Bulletin luxembourgeois des questions sociales
2013 Volume 30

ANNUAL CONFERENCE OF THE EUROPEAN INSTITUTE OF SOCIAL SECURITY ON "SOCIAL SECURITY AND FRAUD"

CEPS INSTEAD
EISS European Institute of Social Security
aloss association luxembourgeoise des organismes de sécurité sociale

aloss
association luxembourgeoise
des organismes de sécurité sociale

BP 1308
L-1013 Luxembourg

ISSN 2071-2486

PREFACE

L'Association luxembourgeoise des organismes de sécurité sociale (aloss), *l'Institut européen de sécurité sociale* (EISS) et *le Centre de recherche public luxembourgeois dans le domaine des sciences sociales* (CEPS/INSTEAD) ont organisé ensemble une conférence qui s'est tenue à Luxembourg le 19 et 20 septembre 2013 sur le sujet "**Sécurité sociale et fraude**".

Ce thème revêt une grande importance dans l'actualité sociale des pays européens, et ceci tant au niveau politique qu'au niveau exécutif, où les institutions de sécurité sociale ont engagé de plus en plus de programmes de lutte contre la fraude.

Au niveau international, le sujet est également d'actualité et de nombreuses initiatives sont lancées: collaboration renforcée au niveau bilatéral avec la conclusion d'accords entre Etats ou institutions, nouvelles dispositions pour l'application du règlement (CE)883/2004 *pour la coordination des systèmes de sécurité sociale* avec création de points de contact et incitation de faire des plans d'action au niveau national.

Par ailleurs, on constate une volonté de parvenir à une collaboration renforcée entre entités administratives pour favoriser l'échange d'information et d'expérience, mais aussi pour parvenir à réaliser un échange concret et quotidien des données disponibles à différents niveaux.

L'objet de la conférence était de lancer le débat des universitaires avec les décideurs et responsables de la sécurité sociale, tout en plaçant les discussions dans un contexte structuré et dans une approche globale.

Le programme des deux jours de la conférence est reproduit ci-après. Suivent ensuite les contributions de la plupart des intervenants dans la conférence.

Le comité d'organisation tient à remercier vivement tous les orateurs de la conférence, mais particulièrement tous ceux qui ont accepté de faire des contributions écrites qui sont publiées dans le présent *Bulletin luxembourgeois des Questions sociales* (BLQS).

CEPS INSTEAD

EISS European Institute of Social Security

aloss association luxembourgeoise des organismes de sécurité sociale

ANNUAL CONFERENCE OF THE EISS
(European Institute of Social Security)

organized by the ALOSS
(Association Luxembourgeoise des Organismes de Sécurité Sociale)
and the CEPS/INSTEAD
(Centre d'Etudes de Populations, de Pauvreté et de Politiques Socio-économiques)

ON

SOCIAL SECURITY & FRAUD

September 19-20, 2013
at
HOTEL NOVOTEL, Kirchberg | Luxembourg

Translation in English & French

Thursday 19th of September 2013

08h30 - 09h00	Registration
09h00 - 09h30	**Welcome and introductory speech** Mr. Mars Di Bartolomeo, Minister of the Social Security in Luxembourg Prof. Dr. Jos Berghman, President of EISS
09h30 - 13h00	**Social security fraud in analysis**
09h30 - 10h15	Types of social security fraud. A legal analysis Prof. Dr. Susanne Reindl-Krauskopf (University of Vienna)
10h15 - 10h45	*Coffee break*
10h45 - 11h30	Fraud and the perceptions of overuse and underuse of social benefits in Europe Prof. Dr. Wim van Oorschot (KU Leuven)
11h30 - 12h15	The economic impact of social security fraud Christian van Stolk (RAND)
12h15 - 13h00	Open discussion
13h00 - 14h00	***Lunch***
14h00 - 17h00	**Combating social security fraud in practice**
14h00 - 14h20	Control mechanisms in the pension sector Riitta Korpiluoma (Finnish Centre for Pensions)
14h20 - 14h40	Fraud combating in public administration and private insurances: common challenges, common solutions? Martin Andresen (Norwegian Labour and Welfare Administration) Harald Bjerke (Finance Norway)
14h40 - 15h00	Coordinating national and European activities in the combat of social security fraud Marc Morsa (Belgian Federal Ministry Social Affairs)
15h00 - 15h30	*Coffee break*
15h30 - 16h15	Reducing fraud and error – a comparison of different approaches from across the world Dr. Chris Gibbon (IBM Global Government Industry)
16h15 - 17h00	Open discussion
17h00 - 18h00	**Young researchers forum**
18h00 - 18h30	**General Assembly EISS**

Friday 20th of September 2013

09h15 - 09h30	**Welcome speech** Dr. Hilmar Schneider, general director, CEPS/INSTEAD
09h30 - 10h30	**Prevention and repression in combating social security fraud**
09h30 - 10h15	Social security fraud and the (re)surrection of the repressive welfare state Prof. Dr. Gijsbert Vonk (University of Groningen)
10h15 - 10h30	Open discussion
10h30 - 10h45	*Coffee break*
10h45 - 12h30	**Social security fraud in a transnational setting**
10h45 - 11h30	Licit social tourism and illicit abuse and fraud in the EU: at the crossroads between fundamental free movement rights and anti-fraud policies Prof. Dr. Yves Jorens (Universityof Gent)
11h30 - 12h00	Use and abuse of social security rights: a vision going beyond the EU Dr. Klaus Kapuy (Austrian Federal Economic Chamber) and Bernhard Zaglmayer (EFTA Surveillance Authority)
12h00 - 12h30	Open discussion
12h30 - 13h15	**Synthesis and concluding remarks**
12h30 - 13h00	Synthesis of the conference Dr. Franz Clément (CEPS/INSTEAD)
13h00 - 13h15	**Closing speech** Fernand Lepage, president, ALOSS
13h15 - 14h15	***Lunch***

TYPES OF SOCIAL SECURITY FRAUD – A LEGAL ANALYSIS

Susanne REINDL-KRAUSKOPF
Martin MEISSNITZER

University of Vienna
Main Association of Austrian Social Security Institutions
Vienna, Austria

I. INTRODUCTION

"Sozialbetrug: eine Milliarde Euro Schaden pro Jahr" [1)]

[Social Security Fraud: 1 billion Euro loss per year]

"£ 5 bn pounds benefiddle" [2)]

Catchy headlines like these draw the attention of the public to so called "social security fraud". But which connotation is linked to social security fraud, also called welfare or benefit fraud? Even though the media as well as politicians seem to have a precise idea of what constitutes social security fraud, this term is highly ambiguous and covers a wide scope of sociological phenomena, ranging from highly elaborated social security fraud schemes over low impact undeclared work to erroneous benefit claims. If we want to discuss the phenomenon, we have to therefore find a common understanding of the variety of social security fraud at the outset.

One essential element in this debate is the distinction between fraud and error. The definition of fraud varies substantially with regard to its constituent

1) *http://diepresse.com/home/wirtschaft/economist/1377483/Sozialbetrug_Eine-Milliarde-Euro-Schaden-pro-Jahr (30.08.2013).*
2) *http://www.thesun.co.uk/sol/homepage/news/politics/4753389/Ministers-war-on-benefit-cheats-after-53bn-false-claims.html (30.08.2013).*

facts throughout Europe. However, fraud always seems to require deliberate wrongdoing or deception causing damage to the financial position of others. Thus, fraud has to be clearly distinguished from mere cases of error. Admittedly, there is only a thin line between fraud and error in the context of social security fraud, since both scenarios usually involve the violation of reporting provisions and result in a loss of funds due to evaded social security contributions or inaccurate benefit payments. Nonetheless, we should only talk of fraud in cases committed with dishonest intent; put in other words: a rule violation as such does not automatically constitute fraud [3]. On the contrary, given the complexity of the welfare system there is a number of perceived fraudulent cases taking place without dishonest intent [4]. This distinction is crucial because it does not only entail the difference between breaking the rules deliberately and doing so inadvertently [5]. But the reduction of inaccurate benefit payments due to error also requires different strategies than the fight against genuine fraud.

Furthermore, social security fraud should be seen in the broader context of the shadow economy as well as the general issue of undeclared work, including the evasion of social security contributions [6]. As early as April 1999 a Council Resolution defined social security fraud as "any act or omission to act, in order to obtain or receive social security benefits or to avoid obligations to pay social security contributions, contrary to the law of a Member State" [7]. Moreover, the resolution highlighted the common ground of combating social security fraud and undeclared work, defining the latter as "any paid activities that are lawful as regards their nature, but not declared in conformity with national law and practice" [8]. In a similar manner, the Administrative Commission for the Coordination of Social Security Systems stresses that "[m]easures to combat fraud […] are closely linked at guaranteeing, that contributions are paid to the right Member State and that benefits are not unduly granted or fraudulently obtained" [9].

3) *Mosher/Hermer 2005: 7; McKeever 1999: 270.*

4) *Mosher/Hermer 2005: 7; cf. the category of "unintentional fraud" in National Audit Office 2006: 29.*

5) *McKeever 2012: 471.*

6) *Prenzler 2012: 83 mentions that fraud involving employment (i.e. under-declaring casual earnings, failure to declare part-time and full-time earnings, failure to declare partner income) took up almost 80% of all welfare benefit frauds in Australia in 2007-08.*

7) *Part A section 2 littera a Resolution of the Council and the representatives of the governments of the Member States, meeting within the council of 22 April 1999 on a Code of Conduct for improved cooperation between authorities of the Member States concerning the combating of transnational social security benefit and contribution fraud and undeclared work, and concerning the transnational hiring-out of workers OJEU 06.05.1999 C 125/1.*

8) *Part A section 2 littera b Resolution (EC) OJEU 06.05.1999 C 125/2.*

9) *Recital 2 decision No H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council on the coordination of social security systems, OJEU 18.03.2010, C 149/5.*

Despite the Council's as well as the Administrative Commission's broad understanding, social security fraud is quite commonly reduced to acts or omissions aiming at inaccurately receiving social security benefits. For example, the British Department for Work and Pensions adopted a definition describing benefit fraud as "those cases where customers deliberately claim money to which they are not entitled" [10]. However, this approach might not be broad enough to adequately tackle social security fraud, because benefit fraud, the evasion of social security contributions and other aspects of undeclared work are usually intertwined, affecting both revenue and expenditures of social security systems. Over recent years and maybe due to the different competences of the involved state authorities, efforts to combat social security fraud on national and international level have developed in relative isolation from the combat of undeclared work neglecting these interdependences. Adopting the Council's broad definition of social security fraud could, and indeed should, therefore serve as a first step to an improved cooperation in the combat against fraud on a national as well as the European level.

II. TYPES OF SOCIAL SECURITY FRAUD

Following the broad understanding of social security fraud, we can distinguish between fraudulent behaviour affecting the revenue of the welfare state on the one hand and the expenditure on the other hand. The following remarks will not deal with mere cases of error.

A) Social security fraud as evasion of social security contributions

When talking about revenue related issues, fraudulent behaviour can be found among all kinds of labour, from self-employment to different forms of dependent employment. However, it seems that the most significant problems arise in connection with dependent employment. In this regard two main strategies are applied by fraudsters in order to evade social security contributions.

1. Concealing employer status

a) In most welfare states the employer is the insurance contribution debtor and thus responsible to immediately register a new employee, deliver the necessary contribution data as well as pay the contributions. Especially in countries with high social security costs, employers can be particularly prone to evading social security contributions by concealing their employer status. Our research has shown that there are mainly two ways of concealing the employer status in Austria. The first one can be described as "**outsourcing**

10) National Audit Office 2008: 6.

employees to letterbox companies": In Austria there is a significant number of limited liability companies that are used as fictitious employers of hundreds of employees [11] without paying any taxes or social security contributions. These companies are founded either by using a so called front man – usually from abroad – or false identities for the registered shareholder and managing director, whereas the real wire-pullers behind those companies typically act behind the scenes. These companies usually do not have any operational activity besides concealing the identity of actual employers.

According to Austrian research, an employer trying to evade social security contributions usually turns to one of the organizers of a letterbox company and asks him to register a number of employees as being employed by the letterbox company. In return for a fee, those employees are subsequently registered with the competent social security institution. Thus, they finally enjoy full protection in all branches of Austrian Social Security. As mentioned before, the due contributions and taxes are not paid. When the authorities take notice after a period of approximately six months to one year that neither contributions nor taxes are being paid, they immediately file for bankruptcy of the company. From that moment onwards the employees are usually deregistered from the social security system and the organizers behind the company start from scratch with another dummy firm. Since the majority of registered employees actually work, they are legally entitled to claim social security benefits, even if the due contributions have not been paid. The fraudulent behaviour thus does not consist in enabling people to receive undue social security benefits, but in hampering the authorities' chances to recover due social security contributions from the real debtor, namely the concealed employer.

b) The second main strategy to conceal someone's employer status we discovered in our research is the so called "**bogus self-employment**": The distinction between dependent work and self-employment can be highly complex and there is no unambiguous distinction between "bona fide self-employed people working on their own account and sham self-employed" [12]. However, there is a number of cases, especially concerning low-skilled workers, where bogus self-employment is used to cover up a relationship of hierarchical subordination and economic dependence [13]. On Austrian

11) In rare cases the number of reported employees exceeded even a level of 1000 employees (Reindl-Krauskopf/Kirchmayr-Schliesselberger/Windisch-Graetz/Meissnitzer, Endbericht zum Forschungsprojekt "Sozialbetrug, auch im Zusammenhang mit Lohn- und Sozialdumping" 2012: 48).

12) Opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion), OJEC 06.06.2013 C 161/03, C 161/14.

13) Böheim/Muehlberger 2006: 1; Reindl-Krauskopf et al 2012: 60 ff.

construction sites, for example, there seems to be a high number of drywall builders, who work as self-employed sub-contractors. Officially, they act as single-person businesses and their business assets are typically limited to a scraper and a bucket. Especially on big construction sites one company might award contracts to dozens of self-employed drywall builders at the same time. However, bogus self-employment is not limited to the construction business [14]: Recently, the Commission has urged the German government to answer questions concerning bogus self-employment in the meat cutting sector, possibly leading to distortion of competition [15]. Besides evading social security contributions and taxes, this phenomenon also gives rise to non-compliance with a wide range of labour-protection regulations, leading to widespread wage dumping.

c) Finally, there are, of course, also cases of **clandestine employment**, where the employment is not registered at all and thus takes place in the shadow, without outsourcing it to letterbox companies or trying to disguise it as self-employment. This type of social security fraud often takes place in addition to a formal reported employment or in connection with illegal employment of foreigners.

2. Misrepresentation of an employment

a) The second strategy to evade social security contributions relies on the misrepresentation of the actual employment. Instead of completely hiding an employment or the employer status, the employer deliberately deceives the authorities as to the nature or the extent of a particular employment. **Bogus low-scale employment** may serve as an example: Austrian Social Security Law provides particular regulations for mini-jobs if the remuneration for an employment does not exceed € 387 per month. In those cases the employer is only obliged to pay contributions for accident insurance. Subsequently, some employers only register and pay contributions for low-scale employment, despite employing the concerned person on a full-time basis [16]. Thus, on the one hand, the employer evades the full burden of social security contributions. On the other hand, he does not incur the risk of clandestine employment which would lead to punishment if it were detected. Besides, the chances that the authorities are able to prove that an employee actually works full time instead of a declared mini-job or low-scale employment usually are very slim compared to the likelihood of detecting clandestine employment.

---

14) Reindl-Krauskopf et al 2012: 68.

15) Cf. ZESAR 08/13, 298; "Lohndumping in Deutschland: Wie Werksarbeiter ausgenommen werden", Die Zeit online 28.08.2013 http://www.zeit.de/politik/2013-08/werkvertrag-lohndumping-unternehmen (30.08.2013).

16) Reindl-Krauskopf et al 2012: 59.

b) Whereas bogus low-scale employment is rather a national phenomenon, **bogus posting of workers** is an example for misrepresentation of an employment with transnational significance. The guiding principle of European social security law is that persons should only be subject to the legislation of one single Member State [17]. This is being achieved by the *lex loci laboris*-rule which provides that the legislation of that Member State applies where an employed or self-employed activity is actually carried out. In the case of temporary posting of workers in another Member State, however, the community regulations allow for an exemption from this principle: If a person is posted to another Member State, the attachment to the social security system of the posting Member State may be maintained. Thus, the employer does not have to pay the social security contributions of the state to which the employee is posted.

For this to take effect, the requirements of Article 12 of Regulation (EC) 883/2004 have to be met: First of all, the employer has to normally carry out substantial business activities in a Member State other than the one he is posting workers to. Postings of mere letterbox companies do not meet the requirements for the exemption from the *lex loci laboris*-rule [18]. Secondly, a direct employment relationship between the employer making the posting and the posted worker has to continue during the whole period of the posting. Thirdly, the posted worker must not be sent to replace another posted worker. And finally, the duration of the posting must not exceed 24 months.

In practice there seem to be numerous cases of postings by companies which have either no direct employment relation with the posted workers or which do not carry out substantial activities in their state of residence and are thus in fact letterbox companies. Furthermore, the detection and prosecution of bogus employment is hampered by the binding effect of the posting attestation. Article 19 par. 2 Regulation (EC) 987/2009 provides that at request the competent institution of the posting state shall issue an attestation that its legislation is applicable. Those so called “A1-attestations” are legally binding for all other Member States as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued [19]. In effect, the Member State to which workers are posted cannot prosecute even obvious evasions of social security contributions if the issuing institution is not willing to withdraw an attestation. Unfortunately, the level of transnational cooperation between the social security institutions is still insufficient and highly

17) Art 11 Regulation (EC) No 883/2004.
18) Art 11 Regulation (EC) No 883/2004.
19) Article 5 par. 2 Regulation (EC) No 987/2009.

time-consuming [20]. As a result, the authorities hardly ever challenge the validity of A1-attestations. Furthermore, there have been frequent reports of counterfeited A1-attestations being presented on the occasion of on-site inspections [21]. So it can be said that the current posting provisions actually offer a number of possibilities to avoid social security contributions. But even in legitimate cases of posting, monitoring the payment of contributions by the authorities of the posting state can be very difficult because those authorities usually cannot control whether the declared employment matches the actual work schedule of posted workers in the other Member State [22].

B) Social security fraud and inaccurate spending of welfare benefits

Besides revenue-related issues, social security fraud also comprises cases of inaccurate expenditures where customers deliberately claim money or benefits in kind to which they are not entitled [23]. The fraudulent patterns in this respect are as diverse as the number of benefits and allocations in different social security systems, thus making it difficult to establish a sound typology of fraudulent phenomena. The nature and risks of fraud vary considerably between particular social security systems as well as from one benefit to the other [24].

What can be established, however, is the fact that every welfare system relies on substantial and on-going reporting requirements about the customers' financial and household circumstances in order to determine the legitimacy of particular benefits or allowances. Benefit fraud usually requires a violation of those reporting requirements resulting in unduly paid benefits. Therefore, benefit fraud affecting social security expenditure might include [25]

- providing false or misleading information or withholding information where there is an obligation to provide it,
- impersonation and identity fraud, especially by using false or forged documents to procure a benefit and
- failing to report material changes in means or circumstances where benefits are already being paid.

Notwithstanding its fragmentary character we try to give a number of examples that seem to be very common throughout most social security systems or have a particular transnational significance:

---

20) Jorens/Lhernould 2011: 25; Reindl-Krauskopf et al 2012: 62 ff and 212, 213.

21) Portugal: 2013 Annual Report on combating fraud and error within the framework of Regulations (EC) No 883/2004 and No 987/2009 pursuant to Decision No H5, A.C. 304/13.

22) Jorens/Lhernould 2011: 32.

23) National Audit Office 2008: 6; Van Stolk/Tesliuc 2010: 3.

24) Coulthard 2008: 25.

25) National Audit Office 2006: 39 (country report Ireland).

1. Non-report of death in relation to pensions

One phenomenon that has recently gained public attention is the non-report of death of a person receiving a pension, so that the pension can be used by spouses or next of kin. While this can arise on national level as well, country reports suggest that between 3% and 5% of deaths are not reported on time to the competent institution when the pensioner used to live abroad, leading to a significant loss [26)].

2. Letterbox companies and maternity benefits

In Austria, there is anecdotal evidence that some women come to Austria to receive maternity benefits. In return for payment, a number of informal agents offer to organize a planned trip to Austria for women to give birth in Austrian hospitals and to receive Austrian maternity benefits. The women are usually registered with an Austrian social security institution as employees of an Austrian letterbox company and take their maternity leave typically within two or three weeks after their initial registration with the competent institution. A couple of weeks after delivery, the women usually return to their home countries [27)].

3. Benefit fraud and undeclared work

Typically, the fight against undeclared work focuses on the employer, trying to evade social security contributions and taxes. Nonetheless, undeclared employment also enables the employee to commit a wide range of fraudulent behaviour. For instance, **claiming unemployment benefits while being employed** in the shadow economy or having additional income from informal activities seems to occur in almost every welfare state [28)]. In Austria, especially bankruptcy allowances were highly affected by fraudulent behaviour of workers being registered as employees of letterbox companies. After companies' bankruptcy, their workers usually claimed that they had not received their salaries over a period of up to three months and were reimbursed by the Austrian fund for bankruptcy allowances. In reality, many of those workers had actually been paid "cash in hand" or had not been employed at all during the relevant period of time [29)].

4. Bogus employment-registrations

In employment based social security systems, we experience that factual insurance coverage can be easily obtained by buying a bogus employment-

---

26) Coulthard 2009: 14.

27) Reindl-Krauskopf et al 2012: 55; Coulthard 2009: 14.

28) National Audit Office 2006: 45 (country report the Netherlands); 57 ("black fraud", country report Sweden).

29) Reindl-Krauskopf et al 2012: 51-54.

registration with a social security institution. In those cases the perpetrators as well as their next of kin enjoy full coverage, without meeting the legal requirements of being employed or at least being the next of kin of an employed person. In Austria, there seems to be a black market of bogus employment-registrations, usually via letterbox companies which officially act as an employer, and offer to register anyone as an employee for market prices ranging from 150? to 500? per person and month. Besides insurance coverage, those bogus registrations also serve as proof of a steady income and can be used to obtain residence permits, bank loans, etc [30)].

5. Identity fraud and impersonation

According to the respective literature, using false identities to obtain benefits seems to be a common type of social security fraud [31)]. This mostly concerns the abuse of personal identification numbers including identity theft [32)]. Furthermore, there have been reports about cases of impersonation in the use of the European Health Insurance Cards (EHIC), where persons without insurance use another person's health insurance card to obtain health care benefits [33)].

6. Billing fraud by intermediaries

Billing fraud is typically committed by hospitals, doctors or other medical practitioners who deliberately bill for services that were not at all or differently furnished in order to obtain inaccurate payments from a social security institution. Although it might be in question whether this phenomenon falls within the scope of the Commission's definition of "social security fraud", especially Austrian and German legal debates usually include billing fraud in the broader discussion of fraudulent behaviour targeting the social security institutions [34)].

III. STRATEGIES IN TACKLING SOCIAL SECURITY FRAUD

In recent years a number of countries have adopted nationwide anti-fraud strategies thus gaining remarkable experience concerning measurement, prevention and detection of social security fraud. Numerous publications have already tried to filter best practices from those experiences and render them accessible for implementation in other countries [35)]. RAND Europe even

---

30) Reindl-Krauskopf et al 2012: 49 ff.

31) Prenzler 2012: 25; cf. case study 9 on p. 30; Van Stolk/Tesliuc 2010: 3; National Audit Office 2006: 66 (country report UK).

32) National Audit Office 2006: 29 (country report Canada), 34 (Country report France), 39 (country report Ireland).

33) Coulthard 2009: 13 ff.

34) Salimi 2012: 28; Grunst 2004: 533; Volk 2000: 3385.

35) Department for Work and Pensions 2010; Houses of the Oireachtas 2011 : 9 f.

prepared a Toolkit on tackling error, fraud and corruption in social protection programs, which was aimed at the diagnostic assessment for combating – inter alia – social security fraud [36].

Given the complexity of the issue, there is obviously no simple solution and the multitude of proposed measures cannot be dealt with in extenso. Taking into account the proposed broad understanding of the issue, three pillars, namely social security law, labour and employment law as well as tax law, constitute the main legal and institutional framework of combating social security fraud [37]. Unfortunately, instruments tackling social security fraud seem to be developed in a mainly isolated approach in each of the three branches themselves. The persisting lack of coherence, of course, is not adjuvant as to a comprehensive strategy against social security fraud.

Taking into account policies and regulations to tackle social security fraud, we can differentiate between three fundamental types of approaches: non-repressive measures to enable compliance, detection and deterrence.

Compliance enabling measures [38] can be either preventative or stimulating. They comprise a wide range of instruments from "integrity information sessions" [39] with customers, direct and indirect tax incentives to declare domestic employment, service voucher systems, the introduction of new types of employment like mini jobs, better eligibility tests in relation to social security claims, etc. Obviously, these measures can not only help to reduce fraud in the narrower sense, but also the risk of error.

Regarding **detection**, one of the key factors of detecting social security fraud is close cooperation between authorities on national as well as international level, including a swift and reliable - preferably electronic - exchange of data. In this respect, there already is a high number of national, bilateral and supranational initiatives trying to guarantee an efficient information exchange, without violating fundamental data protection provisions. On the European scale, the Administrative Commission for the Coordination of Social Security Systems called upon all Member States to nominate a point of contact for fraud and error as well as to cooperate with requests from other Member States aiming at fraud and error [40]. In 2014, a new IT-system for the electronic exchange of social security information (EESSI) should be operational and facilitate data exchanges significantly. In the meantime, many Member States concluded bi- and multilateral agreements concerning the exchange of data, especially of death data to avoid fraud via non-report of

36) Van Stolk/ Tesliuc 2010.

37) Dekker et al 2010: 16.

38) The term is taken from Dekker et al 2010: 19.

39) In Canada and Ireland, Houses of the Oireachtas 2011: 10.

40) Decision No H5 of 18 March 2010 concerning cooperation on combating fraud and error within the framework of Council Regulation (EV) No 883/2004 and Regulation (EC) No 987/ 2009 of the European Parliament and of the Council on the coordination of social security systems, OJEU 18.03.2010, C 149/5.

death [41]. Recently Austria and Germany, for instance, have signed a bilateral treaty concerning the common combat against black labour and illegal temporary employment [42].

However, there are particular phenomena relating to social security fraud, sometimes referred to as black fraud [43], which can only be detected by on-site inspections or on-site audits. In Austria for example, the competence for a vast majority of on-site inspections concerning taxes, social security contributions, unemployment benefits, trade law regulations etc is concentrated in a single authority, the Financial Police [44]. Furthermore, an electronic database of Austrian construction sites was introduced in 2011 [45], providing the authorities with information about the location, amplitude as well as companies active on particular construction sites, in order to more effectively monitor the construction sector.

In some countries, e.g. the UK and Ireland, welfare fraud hotlines or online tools to report fraudsters and black labour have been promoted actively [46]. However, the efficiency of such measures has to be seen critically. On the one hand, the information obtained usually contains a high amount of malicious gossip and, on the other hand, it fosters an atmosphere of hostility in human relations as well as toward the welfare system itself. Therefore, states should refrain from measures that in fact have the potential to create in the public suspicion that every welfare recipient may be a social security fraudster and criminal.

Concerning **deterrence**, many countries seem to favour the deterring effects of a harsh "crack down" on social security fraud by introducing severe punishments, often accompanied by advertising campaigns trying to brand welfare fraud as a serious crime [47]. As we have shown, the debate on social security fraud covers a wide range of "social delinquency" from highly organized evasion schemes linked to classical organized crime to low impact undeclared work as well as erroneous benefit claims. Indiscriminately criminalizing all areas of social security fraud might not only overburden the law enforcement agencies, but also provoke undesired effects. For instance, it has been argued that a harsh crack down on welfare fraud can lead to a situation where the receipt of welfare benefit itself becomes morally suspect and every welfare claim is regarded as potentially fraudulent [48].

---

41) Coulthardt 2009: 8 ff.

42) BGBl III 139/2013.

43) National Audit Office 2006: 57 (country report Sweden).

44) A brief introductory information concerning the various tasks and competences of the Financial Police can be found on the official website of the Ministry of Finance: http://www.bmf.gv.at/betrugsbekaempfung/finanzpolizei/finanzpolizei.html (30.08.2013).

45) See § 31a BUAG (BGBl I 51/2011).

46) https://secure.dwp.gov.uk/benefitfraud/ (30.08.2013).

47) In the UK for example there have been slogans saying "benefit thieves - it's not if we catch you, it's when" (http://campaigns.dwp.gov.uk/campaigns/benefit-thieves/[30.08.2013]).

48) Mosher/Hermer 2005: 120 ff.

IV. CONCLUSION

We are convinced that successful strategies against social security fraud must combine these three approaches. Compliance enabling measures can help to root out cases of error and minor fraud right from the start. Experience proves that a high likelihood of being caught reduces the readiness to break rules because the risk of being punished is too imminent [49]. Therefore, instruments of detection form a second keystone of a comprehensive strategy. And finally, if despite the above mentioned measures social security fraud is nevertheless committed and causes a loss of means, we need instruments of deterrence which should allow the metering out of the punishment that fits the type of fraud. As to minor cases we are primarily talking of civil and administrative sanctions, whereas criminal law should apply to severe cases of fraud. But even when dealing with large-scale evasions of social security contributions and wage taxes, additional legal instruments might be helpful: Austria, for instance, has only recently introduced a system of joint and several liability for social security contributions and wage taxes in subcontracting chains for parties other than the employer [50]. This has proved to be a valuable instrument in tackling fraud [51].

However, the issue of social security fraud will always be a balancing act: On the one hand, guaranteeing compliance is essential to ensure the credibility of every welfare state, especially with respect to the people and businesses whose contributions and taxes support the social security system. On the other hand, strategies to combat social security fraud must not result in inadequate and bureaucratic burdens for the vast majority of contribution and tax payers as well as benefit recipients who comply with existing regulations. Thus, it will never be easy to establish a sound and comprehensive strategy to fight against different phenomena of social security fraud, but it will always be essential in order to avoid the erosion of social security systems, especially in times of economic turmoil.

49) Meier 2007: 266.
50) See § 67a ASVG (BGBl I 91/2008) and § 82a EStG (BGBl I 105/2010).
51) Reindl-Krauskopf et al 2012: 105-110.

V. BIBLIOGRAPHY

Böheim, René / Muehlberger Ulrike: Dependent Forms of Self-employment in the UK: Identifying Workers on the Border between Employment and Self-employment, IZA DP No. 1963 (2006)

Coulthard, Derek: Report of the Ad-Hoc Group on Combating Fraud and Error, Note from the Rapporteur of the Ad Hoc Group on Fraud and Error, 19th September 2008, CA.SS.TM 348/09

Coulthard, Derek: Report of the Administrative Commission Ad Hoc Follow-.up Group on Combating Fraud and Error, Note from the Rapporteur of 16 November 2009, CASSTM 560/09

Dekker, Helga / Oranje, Elske / Renooy, Piet / Rosing, Francien / Williams, Collin: Joining up in the Fight against Undeclared Work in Europe – Final Report (2010)

Department for Work and Pensions: Tackling fraud and error in the benefit and tax credit systems 2010 https://www.gov.uk/government/uploads/system/up-loads/attachment_data/file/214334/tackling-fraud-and-error.pdf (30.08.2013)

Department for Work and Pensions: Targeting Benefit Fraud_ tracking research February 2011, DWP Communications Research Report 6 (2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/188260/comms-res-benefit-fraud-1211.pdf (30.08.2013)

Grunst, Bettina: Zum Abrechnungsbetrug bei fehlender ordnungsgemäßer Zulassung zum Vertragsarzt, NStZ 2004: 533

Houses of the Oireachtas: Tackling Social Welfare Fraud, Spotlight 5 (2011)

Jorens, Yves / Lhernould, Jean Philippe: European Report 2011, tress 2011 http://www.tress-network.org/tress2012/EUROPEAN%20RESOURCES/europeanReport.jsp (30.08.2013)

McKeever, Gráinne: Detecting, Prosecuting and Punishing Benefit Fraud: The Social Security Administration (Fraud) Act 1997, The Modern Law Review 62:3 (1999) pp. 261-270

McKeever, Gráinne: Social Citizenship and Social Security Fraud in the UK and Australia, Social Policy & Administration 46:4 (2012) pp. 465-482

Meier, Bernd Dieter: Kriminologie, 3rd edition, Beck 2007

Mosher, Janet / Hermer, Joe: Welfare Fraud: The Constitution of Social Assistance as Crime, Paper for the Law Commission of Canada (2005) https://apps.osgoode.yorku.ca/osgmedia.nsf/0/271AE1B3D9D286D38525709A00521FBC/$FILE/Welfare%20Fraud%20Report.pdf (30.08.2013)

National Audit Office: International Benchmark of Fraud and Error in Social Security Systems, Report by the comptroller and auditor general, National

Audit Office (2006) http://www.nao.org.uk/report/international-benchmark-of-fraud-and-error-in-social-security-systems/ (30.08.2013)

National Audit Office: Department for Work and Pensions - Progress in tackling benefit fraud, Report by the comptroller and auditor general, National Audit Office (2008) http://www.nao.org.uk/wp-content/uploads/2008/01/0708102.pdf (30.08.2013)

Prenzler, Tim: Welfare fraud in Australia: dimensions and issues, Trends & issues in crime and criminal justice 421 (June 2011)

Prenzler, Tim: Responding to welfare fraud: The Australian experience, Research and Public Policy Series 119, Australian Institute of Criminology (2012)

Reindl-Krauskopf, Susanne / Kirchmayr-Schliesselberger, Sabine / Windisch-Graetz, Michaela / Meissnitzer, Martin: Endbericht zum Forschungsprojekt “Sozialbetrug, auch im Zusammenhang mit Lohn- und Sozialdumping“ (2012) http://www.bmask.gv.at/site/Arbeit/News/Endbericht_zum_Forschungsprojekt_Sozialbetrug_liegt_vor (30.08.2013)

Salimi, Farsam: Anmerkung zu OGH 11 Os 68/11a, RdM 2012/27: 28

Van Stolk, Christian/ Tesliuc, Emil D.: Toolkit on tackling, error, fraud and corruption in social protection programs, Working paper prepared for the World Bank, Rand Europe (2010) http://siteresources.worldbank.org/SOCIALPROTECTION/Re-sources/SP-Discussion-papers/Safety-Nets-DP/1002.pdf (30.08.2013)

ZESAR 08/13, 298

Volk, Klaus: Zum Schaden beim Abrechnungsbetrug - das Verhältnis von Strafrecht und Sozialversicherungsrecht, NJW 2000: 3385

PERCEPTIONS OF MISTARGETING OF SOCIAL SECURITY BENEFITS IN EUROPEAN COUNTRIES

Femke ROOSMA

Department of Sociology, Tilburg University, NL

Wim VAN OORSCHOT

Centre for Sociological Research (CESO) KU Leuven, BE

John GELISSEN

Department of Statistics, Tilburg University, NL

ABSTRACT

Although in general there is limited attention for critical attitudes towards the welfare state in the field of welfare attitude research, existing studies found that people are especially negative about mis-targeting of welfare benefits. Studies have shown that many people perceive overuse (misuse or fraud) of social benefits, and there is evidence that people also perceive underuse (non-take up) of welfare benefits. Perceptions of overuse have been called "the Achilles' heel of welfare state legitimacy". In this article we contribute to the literature by analysing European cross-national data and by elaborating on their individual and contextual level determinants. We use data from the European Social Survey for 25 European countries. We find that overuse perceptions are generally strong in all European countries. Instead of being two manifestations of the same concept of mis-targeting, both perceptions appear to be rather independent dimensions of popular welfare legitimacy. Whereas overuse perceptions are more determined by people's political affiliation and the selectiveness of the welfare redistribution system, underuse perceptions are more shaped by self-interest and the amount and effectiveness of the redistribution of welfare. Instead of one Achilles heel, welfare state legitimacy rather seems to have two weak spots.

Keywords: welfare attitudes, welfare states, benefit abuse, non-take up, European Social Survey

THE ACHILLES' HEEL OF WELFARE STATE LEGITIMACY

Perceptions of overuse and underuse of social benefits in Europe

1. INTRODUCTION

As early as in the 1970s, when Western welfare states were experiencing their hey-days, critical voices warned about an erosion of welfare legitimacy among broad classes of citizens. They expressed their concerns about the expected declining support for the welfare state as a result of different societal developments, as the growing reluctance of the broad middle classes to pay for increasing welfare costs (Wilensky, 1975), the negative influence of growing post-materialistic values on the willingness to contribute to the welfare state (Inglehart, 1990), the government's incapability for offering policy solutions for the new 'risk society' uncertainties (Beck et al., 1994) and the increasing cultural diversity as a threat to the fellow-feeling based legitimacy of formerly cultural homogeneous comprehensive welfare states (Alesina and Glaeser, 2004). However, contrary to these mostly theoretical expectations, empirical studies on the legitimacy of welfare state have come to more optimistic conclusions. Despite a small dip in general welfare support that occurred in the recessive 1980s (Ringen, 1987), opinion studies concluded that there is no evidence that welfare states, or specific welfare programmes, are generally losing support over time (Taylor-Gooby, 1999; Brooks and Manza, 2007).

A possible explanation for this discrepancy between the theory and empirical findings on welfare state legitimacy regards the question whether the empirical studies give us a valid and encompassing understanding of the character, degree and determinants of public welfare legitimacy. In our view, an important critique on these empirical studies is that they paint a too rosy picture of welfare state legitimacy because they mostly shed light on the 'positive' elements of the welfare state only. That is, most of these studies use surveys in which people are asked whether they would like to see more government spending on various social programs, and/or whether government should take more responsibility for providing social welfare (see for instance (Blekesaune and Quadagno, 2003; Brooks and Manza, 2007; Andress and Heien, 2001; Linos and West, 2003; Papadakis and Bean, 1993; Roller, 1995; Svallfors, 2003; Gelissen, 2000; Meier Jaeger, 2007; Pettersen, 1995) . Dogan (1988: 16) argued that these questions are like asking a child if (s)he "would like to play football with the moon": They tend to lead to positive answers. In focusing on the responsibilities of the welfare state and the amount of social spending, most studies in the field address the condition of *substantive justice* that is an essential element of welfare state legitimacy (Rothstein, 1998). This condition demands that the public supports welfare programs as such and that these programs are seen as just and fair. However, Rothstein (1998) argues that the welfare state should also fulfil the

conditions of *redistributional justice*, a fair distribution of contributions to the welfare state, and *procedural justice*, an effective and efficient implementation of the welfare policies.

The few welfare support studies that include items not only measuring preferences for government spending and responsibility, but also items that measure issues of redistributional and procedural justice, all suggest that a focus on 'positive' items only, may indeed offer a too rosy picture of welfare state legitimacy (Sihvo and Uusitalo, 1995; Roosma et al., 2012; Van Oorschot and Meuleman, 2011). They invariably show that the European public is rather critical on the performance or outcomes of welfare systems (especially in the South and East of Europe), and that they are very critical about procedural justice: the European public tends to perceive rather high degrees of bureaucracy and low efficiency and effectiveness of the welfare system of their country (Roosma et al., 2012). More specifically, studies that examine attitudes towards the procedural justice of the welfare state conclude that people are most critical about the mis-targeting of welfare benefits in terms of overuse (abuse) of benefits, as well as underuse (non-take-up) of benefits (Svallfors, 1991; Ervasti, 1998; Ervasti, 2012; Edlund, 1999; Halvorsen, 2002; Becker, 2005; Goul Andersen, 1999). In other words, it seems that European people strongly support welfare provision by the state, but are critical about the process through which this takes place, especially when it comes to targeting the benefits to the people who deserve them. Not without reason then mis-targeting of welfare benefits has been called "the Achilles' heel of welfare state legitimacy" (Goul Andersen, 1999: 20).

In this paper we contribute to knowledge about the critical aspects of welfare legitimacy by focusing on analysing perceptions of mis-targeting (both overuse and underuse) of social benefits in European welfare states. The few previous empirical studies that paid attention to perceptions of overuse and underuse of benefits have not extensively analysed cross-national differences in perceptions, nor have they elaborated on the individual or contextual level determinants, so that it is not well known which mechanisms make that some people in some countries perceive more mis-targeting than other people in other countries. We formulate two research questions: (1) What are the perceptions of the European public towards overuse and underuse of welfare benefits? (2) Which individual and contextual characteristics explain differences in European perceptions of overuse and underuse of welfare benefits?

2. PERCEPTIONS OF MIS-TARGETING OF WELFARE BENEFITS

Targeting of benefits and services most generally means that social policies are directed to specific categories of citizens under specific conditions. Policies are targeted well if only the people who are considered to be

deserving of benefits and services are eligible for them, if all people who are eligible actually receive the benefit or service, and if others do not (Van Oorschot, 2001). In case the actual distribution of benefits and services deviates from this, we define mis-targeting: there may be overuse or underuse of benefits, or both. Underuse, or 'non-take-up' means that people do not have the (full) benefit or service they are eligible for. This can be unintentional, e.g. due to ignorance of social rights, or intentional, when e.g. a benefit is not claimed for fear of stigmatization. Overuse refers to situations in which people have a benefit or service they are not (fully) eligible for. If overuse is intentional the term welfare fraud or welfare abuse is used, if overuse is unintentional it may be called unintended overuse or misuse.

Previous empirical studies on mis-targeting mostly focused on perceptions of benefit overuse. These studies all find large proportions of populations perceiving overuse of welfare benefits (Halvorsen, 2002; Ervasti, 1998; Ervasti, 2012; Goul Andersen, 1999). In European comparative studies that analyse attitudes towards a broad range of welfare dimensions, perceived overuse is often standing in stark contrast to mostly positive perceptions of social programs and social rights (Roosma et al., 2012; Svallfors, 1991; Van Oorschot and Meuleman, 2011; Sihvo and Uusitalo, 1995). Moreover, in studies in which overuse is analysed as part of other critical welfare attitudes, as the bureaucracy of the welfare state or the idea that welfare makes people lazy , it often comes about as the issue that is most seen as problematic by the public (Ervasti, 1998; Ervasti, 2012; Halvorsen, 2002; Goul Andersen, 1999). However, what has had less attention is that European people also tend to see relatively large degrees of underuse of social benefits (Roosma et al., 2012; Ervasti, 2012). The few studies that combine analyses of overuse and underuse perceptions interestingly find only small inter-correlations (Sihvo and Uusitalo, 1995; Ervasti, 2012; Roosma et al., 2012). Ervasti (2012: 245) concludes that overuse and underuse "measure different types of welfare state criticism". Here we take this conclusion by heart and analyse overuse and underuse perceptions separately.

Individual level explanations of overuse and underuse perceptions

The previous studies that relate attitudes towards overuse and underuse to various individual level covariates find most prominently an effect of political orientation or party preference on perceptions of overuse and to a lesser extent also on underuse, where people with a right wing political preference see higher overuse and lower underuse (Ervasti, 1998; Ervasti, 2012; Van Oorschot and Meuleman, 2011; Halvorsen, 2002; Sihvo and Uusitalo, 1995). Also education seems to be a rather stable explanatory factor of overuse and underuse perceptions, where higher education reduces both overuse and underuse perceptions (Sihvo and Uusitalo, 1995; Halvorsen, 2002; Ervasti, 1998; Ervasti, 2012; Van Oorschot and Meuleman, 2011). Most studies find a positive effect of income on overuse perceptions, although Ervasti (2012)

reports a small negative effect. We cannot draw a general conclusion for the effects for class, occupational or employment status, since the scarce significant effects differ over countries. What these previous studies have in common is that they reveal the empirical relation between some rather ad hoc chosen individual characteristics and perceptions of overuse and underuse, but they do not explicitly test hypotheses nor do they elaborate on the mechanisms underlying these relations. Especially perceptions of underuse are not examined in great detail because they are part of studies that focus on multiple welfare attitudes (Ervasti, 2012; Van Oorschot and Meuleman, 2011; Sihvo and Uusitalo, 1995). Below we propose our expectations regarding the individual level mechanisms that influence overuse and underuse perceptions and formulate three hypotheses.

In the welfare attitude literature two main factors are identified as crucial determinants of welfare state attitudes. These factors relate to the classic theories that predict human action to be either inspired by self-interest (*homo economicus*) or by social norms and ideological desires for the common good (*homo sociologicus*) (Kangas, 1997). As previous research has shown, both factors play a role when individuals shape their attitudes towards various aspects of welfare state redistribution (d'Anjou et al., 1995; Gelissen, 2000; Kangas, 1997; Meier Jaeger, 2006).

The argument regarding self-interest of individuals claims that people in a lower structural position (by which we mean people with a lower income, a lower education, and/or a lower job status) are generally more at risk of becoming dependent of welfare benefits and therefore have more positive attitudes towards welfare redistribution than people in a higher structural position. In the literature we find three different ways in which people's structural position is believed to shape people's perceptions of overuse and underuse of benefits. The identification theory (Maassen and De Goede, 1989) suggests that because people in a lower structural position are more at risk of becoming dependent of welfare benefits, and therefore are better able to identify themselves with welfare recipients. Since it is also in their interest to have a more generous welfare state (in the case that they would need to rely on benefits), it is more likely that they perceive higher underuse of benefits, while they do not see overuse so much as a problem. Instead, since people in a higher structural position do not so easily identify themselves with welfare recipients, people in a higher structural position do not see underuse as very problematic issue, while the fact that they have to contribute more to the welfare redistribution does make them more suspicious of potential overuse.

An alternative relation between people's structural position and perceptions of overuse and underuse is suggested by the competition theory. Maassen and de Goede (1989) argue that people who are at risk of becoming dependent of benefits, feel that they are in competition with welfare recipients. Being in a lower structural position increases the fear that people

who abuse benefits will jeopardize the welfare system and therefore overuse of benefits is seen as a substantial problem. At the same time, underuse is not so much seen as an issue. People in a higher structural position, who do not or less feel this competition over the scarce resources of the welfare state, would consequently see less overuse.

A third view on the relationship between structural position and perceptions of mis-targeting emphasizes the role of *social distance* and is based upon the idea that if people are closer to beneficiaries, they are more aware of or confronted with the actual mis-targeting. If mis-targeting occurs, people in a lower structural position perceive it more. Otherwise, being in a higher structural position increases the distance and at the same time decreases the awareness of any problems with targeting of welfare benefits, which then will lead to lower perceived overuse and underuse. Here social distance rather than self-interest drives overuse and underuse perceptions. These three potential mechanisms between people's structural position and perceptions of overuse and underuse, lead to three different hypotheses. *H1: The lower the structural position of individuals, a) the lower the perceived overuse and the higher the perceived underuse of benefits, b) the higher the perceived overuse and the lower the perceived underuse of benefits, c) the higher the perceived overuse and the higher the perceived underuse of benefits*.

Second, next to theory of the individual acting as *homo economicus*, there are empirically established arguments that human beings build their attitudes also on ideological desires and social norms by acting as a *homo sociologicus* (d'Anjou et al., 1995; Gelissen, 2000; Kangas, 1997; Meier Jaeger, 2006). Regarding the ideological preferences of individuals, empirical studies found that people with left wing sympathies are in favour of a more generous redistribution (Andress and Heien, 2001; Arts and Gelissen, 2001; Hasenfeld and Rafferty, 1989; Meier Jaeger, 2006). In relation to our welfare attitudes of interest - overuse and underuse perceptions - we believe that people who are politically more left wing and hence favour a more generous redistribution will see the current access of to the welfare state as too strict: they believe that it is too difficult for people 'in real need' to get a benefit, while they do not see overuse as a problem. We assume that people with right wing sympathies, instead, see access to the welfare state as too easy and perceive more overuse of benefits, while they see little underuse. *H2: The stronger the ideologically left wing sympathies people have, the lower the perceived overuse and the higher the perceived underuse*.

Third, regarding the aspect of social norms, that the *homo sociologicus* is expected to pursue (Kangas, 1997), we hypothesize a relation between overuse and underuse perceptions and social and institutional trust. Trust in fellow citizens and in government institutions is an important precondition for the social contract; the social contract by which individuals mandate the state to execute policies for the common good. The social contract is therefore the foundation for welfare redistribution by the state. People commit themselves

to the social contract because the social norm is to be cooperative and trustworthy and because they believe that others will keep that norm as well (Kahan, 2005). This commitment to the social contract expresses the confidence that the state is able to redistribute in a fair and effective manner. If people believe that social norms are not being observed, and that beneficiaries cheat or that the state is unable to punish free riders, they will not support the social contract and as a result not believe in the effective outcomes of the redistribution (Fong, 2005). Trust in fellow citizens and in institutions establishes trust in the social contract and its fair and effective redistribution of welfare. Therefore we expect that high trust leads to lower perceptions of overuse and underuse. We note that high perceived overuse and underuse could in turn also lead to the erosion of the social contract and trust in institutions and fellow citizens. It is likely that there is a feedback effect as well, where high trust leads to low perceived mis-targeting and low perceived mis-targeting increases the trust levels in society. Also we note that despite the fact that some studies did not find a clear empirical link between institutional trust and attitudes related to substantive justice like the role of the state (Svallfors, 1999; Svallfors, 2002; Edlund, 2006), other studies do find evidence of a relation between trust in the government and elements of procedural justice, like the implementation of tax policies and attitudes towards financial cheating (Svallfors, 2002; Edlund, 2006; Edlund, 1999). We test the following hypotheses. *H3: The higher the interpersonal and institutional trust, the lower the perceived overuse and the lower the perceived underuse of welfare benefits*.

Country level explanations of overuse and underuse perceptions

There are only few studies that examine country differences in perceptions of overuse and underuse perceptions. Edlund (1999) concludes after comparing Norwegian and American attitudes on financial cheating, that conflicts over welfare abuse shows more cross country variation than attitudes about redistribution. Ervasti (2012) carries out a multilevel analysis of attitudes towards overuse and underuse in 28 countries and finds that people in Southern and Eastern European countries perceive higher underuse of benefits than people in other European countries, while no country level effects on overuse were discussed. It is reasonable to say that cross-national differences in overuse and underuse perceptions are not examined thoroughly. To analyse country differences caused by country characteristics, we need to argue for a clear theoretical relation between the country level characteristic and the individual perception of overuse and underuse (Coleman, 1990).

The most apparent country characteristic influencing perceptions of overuse and underuse would be the actual percentages of overuse and underuse of benefits in a country. If there is substantial fraudulent behaviour of welfare recipients in a country, or a lot of people in need that do not receive their

financial support, individuals would notice that not only at an individual level (depending on their social distance to welfare claimants), but also through country level mass-communication by the government or the media. However, only for a couple of countries there is some data available on actual overuse and underuse of welfare benefits. Van Oorschot (1995) and Hernanz, Malherbet and Pellizzari (2004) show in empirical studies of (non) take-up rates of social benefits that occasional data is available in Denmark, France, Germany and the Netherlands. But only the United Kingdom regularly produces official estimates of benefit fraud and take-up rates (DWP, 2012a; DWP, 2012b). Moreover, these data are based upon many uncertainties: authors of single country studies widely discuss the accuracy of their data (Frick and Groh-Samberg, 2007; Kayser and Frick, 2000; Hernanz et al., 2004). This limited availability of incomparable data makes a comparative analysis impossible. We argue that omitting this possible factor will not lead to any bias in our models, because due to the unavailability of the data people are probably not aware of the actual mis-targeting in their country and it will not influence their perceptions of overuse and underuse. But we believe that other country level characteristics do.

First, two main characteristics of the welfare state that are generally thought to influence people's welfare attitudes are the amount and manner of redistribution (Esping-Andersen, 1990). We argue that these welfare state characteristics also influence perceptions of overuse and underuse. If the amount of social spending in a country is low, people can develop the idea that there is underuse of benefits because they see that those in need do not get enough. High social spending, on the other hand, would decrease perceptions of underuse, because people see fewer people in need. At the same time high social spending in a country may strengthen the perceptions of individuals that public money is wasted on beneficiaries which, following the same line of reasoning, will lead to stronger perceptions of overuse. *H4: The higher social spending in a country, the higher perceived overuse and the lower perceived underuse*.

Second, the argument can be made that in countries with more selective benefit schemes, where beneficiaries have to fulfil more criteria to be eligible for a benefit (for instance concerning means-tests, strict work record and job search requirements), people might be more concerned about underuse of benefits because they see that it is hard to become eligible for a benefit. At the same time they see a lower risk of overuse because the actual access to benefits is very strict. In contrast, in countries with universal benefit schemes, where it is easier to obtain and keep a social benefit, people may see less underuse of benefits and more overuse because it may generally be easier for people who do not necessarily need a benefit to obtain one. However, contrary to these presupposed effects on overuse and underuse perceptions, several studies argue that in countries with more selective policies people are actually more suspicious of overuse of benefits (Coughlin, 1980; Edlund,

1999; Svallfors, 1991; Rothstein, 1998). When the welfare system comes with a series of criteria to select eligible claimants, there are more rules that can be broken, and people may paradoxically perceive more overuse in general. In other words, in countries with selective welfare systems, people may be more focused on potential abuse or misuse of benefits since more rules may leave more room for cheating. Whereas in countries with more accessible benefit schemes, as in universal welfare states, these concerns may be less since when many citizens are included anyway there is less need to be suspicious of potential misuse (Rothstein, 1998). We therefore formulate the following hypothesis: *H5: The more selective (instead of universal) social policies in a country are, the higher the perceived overuse and the lower the perceived underuse*

Third, we assume that if the state system is more effective in implementing and carrying out policies in general, it may be better able to redistribute the benefits to the target groups as well. An effective state will be noticed by the people and then strengthen their confidence that regarding redistributing benefits such as everyone gets what he or she is entitled to and that free riders will be punished. Hence our hypothesis: H6: The more effective the state in a country is, the lower the perceived overuse and the lower the perceived underuse.

Finally, we assume that the general climate of interpersonal and institutional trust will influence individual perceptions of overuse and underuse. When trust levels in a country are generally high, one can speak of a high trust culture. This high trust culture can be seen as an expression of a social norm that trustfulness and fair behaviour is expected from everyone, also from the government. This social norm of trustful and fair behaviour strengthens the foundations of the social contract which increases the effectiveness of the redistribution (Fong, 2005; Rothstein, 1998). In this way the high trust culture influences individual perceptions of overuse and underuse because, even if individuals themselves have low trust levels, they will be aware of the strong social norm of trust in their country that contributes to the effective and fair redistribution. This awareness will lead to lower perceived overuse and underuse of benefits. *H7: The stronger the interpersonal and institutional trust culture in a country, the lower perceptions of overuse and underuse*.

3. DATA AND METHODS

In order to test our hypotheses, we use data of the European Social Survey, round 4, 2008/9. This survey provides an extended module on welfare state attitudes. Out of the 29 countries we selected 25 European countries (N= 47.489): Belgium (BE), Bulgaria (BG), Switzerland (CH), Cyprus (CY), Czech Republic (CZ), Germany (DE), Denmark (DK), Estonia (EE), Spain (ES), Finland (FI), France (FR), United Kingdom (GB), Greece (GR), Croatia (HR), Hungary (HU), Ireland (IE), Latvia (LV), Netherlands (NL), Norway (NO), Poland (PL),

Portugal (PT), Romania (RO), Sweden (SE), Slovenia (SI), Slovakia (SK).[1] The survey has three items that we use as indicators of *overuse* perceptions ('people are not trying to find a job', 'obtaining benefits towards which they are not entitled', 'not working and pretending to be sick'), and two items that measure perceptions of *underuse* ('people get less benefits than they are entitled to', 'there are insufficient benefits for people in need' [2]). Table 1 provides the wording of the survey questions. All items are measured on a 5 point scale with higher scores indicating stronger perceptions of overuse and underuse. For the overuse indicators we found partial scalar measurement equivalence, which indicates that the items measure the same concept for all the selected countries.[3] Because we have only two items for underuse we could not assess its measurement equivalence but we did find a similar measurement construct in all countries by employing Principal Component Analyses. We computed a scale for both overuse and underuse by adding the scores on the indicators and divided it by the number of items.

For our individual level covariates we use a measure of an individual's household *income*, which is measured on a 10 point scale (individuals were able to report their weekly, monthly or annual income). We included variables for transfer classes (the item measures 'what have you been doing for the last seven days'): *paid work* (reference category), *unemployed* (*actively* looking for a job) and *unemployed* (*not actively* looking for a job), *retired*, *permanently sick or disabled*, and *other not in labour* (community work, housework, other). We use dummy variables for education as an additionally measure of structural position: (less then) primary education (reference category), *lower secondary education, higher secondary education* and *tertiary education*. For ideological position we use the *left/right self-placement scale* (10-point scale, higher score indicating more right wing). For *interpersonal trust* we computed a means scale out of three variables (scale 0-10) stating: 'would you say that most people can be trusted, or that you can't be too careful in dealing with people?', 'do you think that most people would try to take advantage of you if they got the chance, or would they try to be fair?' and 'would you say that most of the time people try to be helpful or that they are mostly looking out for themselves?'. These items have over the 25 countries an average scale reliability coefficient (alpha) of .745 (standard deviation is .057). For institutional trust we computed a means scale of five variables (scale 0-10): 'how much you personally trust each of the institutions: the parliament, the

1) *We excluded four countries from our sample (Israel, Russia, Turkey and Ukraine) because we want to focus our analyses on European countries.*

2) *We note that the term "insufficient benefits" can be interpreted as "inadequate benefits" or as "benefits that are lacking". In the former case the item can be seen as measure of mis-targeting, but in the latter case it can be discussed whether this item is measuring support for more benefit schemes in general. The correlation of this item with items measuring support for a stronger role of government, however, is substantially smaller than the correlation with the other underuse item. We argue that this item is therefore suitable to measure underuse perceptions.*

3) *Results of these measurement equivalence analyses are available from the first author.*

legal system, the police, politicians, political parties'. This scale has over the 25 countries an average scale reliability coefficient (alpha) of .865 (standard deviation is .024). Finally we add two control variables: *gender* (reference category: male) and *age* in years in the categories *younger than 30* (reference category), *31-45 years*, *46-65 years* and *older than 65*.

For the contextual level measures, we use for social spending the amount of *expenditure on social protection* as a percentage of GDP from Eurostat, for 2008 (which has a high correlation with expenditures in previous years). For the measurement of universal and selective policies we use regime typologies as proxies because of a lack of comparable institutional data for our 25 countries. We indicate the Anglo Saxon countries (IE and GB) to have the most *selective policies* and the Scandinavian countries (DK, FI, NO, SE) to have the most *universal policies* (Esping-Andersen, 1990). We expect the Conservative (CH, BE, DE, FR, NL), the Post-Communist (BG, CZ, EE, HR, HU, LV, PL, RO, SK, SI) and the Mediterranean (CY, ES, GR, PT) countries to be in between. We take the conservative regime as a reference category. For the general state effectiveness we use the measure of *government effectiveness* from the year 2008 that is provided by the World Bank (Worldwide Governance Indicators). This measure combines different data sources in which the quality of public services, the quality of the civil service (and its independence from political pressures), the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies, is evaluated by enterprises, institutes and experts. For *institutional trust* and *interpersonal trust* we create aggregated variables from the variables we defined for the individual level. In the Appendix we present a correlation matrix for these contextual variables (Table A1). It shows that several covariates correlate strongly which restricts us from including them simultaneously in the models. Moreover, our chosen method does not allow including many covariates at the country level since our effective sample size at the country level is only 25 countries. In order to test our hypotheses we use multilevel regression modelling by which we take account of the clustered structure of the data: individuals being nested in countries.

Missing data

Unfortunately some variables in our analyses have missing data. In general the percentage of missing data is low (between one or four per cent), but for some variables it is considerably higher. Most concerning is that 21 % of the respondents in our sample that did not provide information on income and 14% did not provide a self-placement on the left/right scale. An analysis shows that these missing values are not random but related to other observed variables. In this case, if we use listwise deletion of missing data, we get biased estimates. Therefore we opt for the multiple imputation approach in which missing data are imputed according to a specific

imputation procedure that creates multiple imputed data sets (Allison, 2001). We chose the chained equations procedure, in which all variables with missing data are imputed sequentially by a regression model appropriate for the measurement level of the variable to be imputed (Raghunathan et al., 2001). We include all variables in the imputation model that are also included in our substantive analyses and additionally add auxiliary variables (like subjective income and egalitarianism) that have a relation with the variables with missing data. We take account of the clustered structure of the data by including country dummies in the imputation (Graham, 2009). We generate five imputed data sets on which the final estimates that are reported in this study are based.

4. RESULTS

Descriptive results of overuse and underuse types

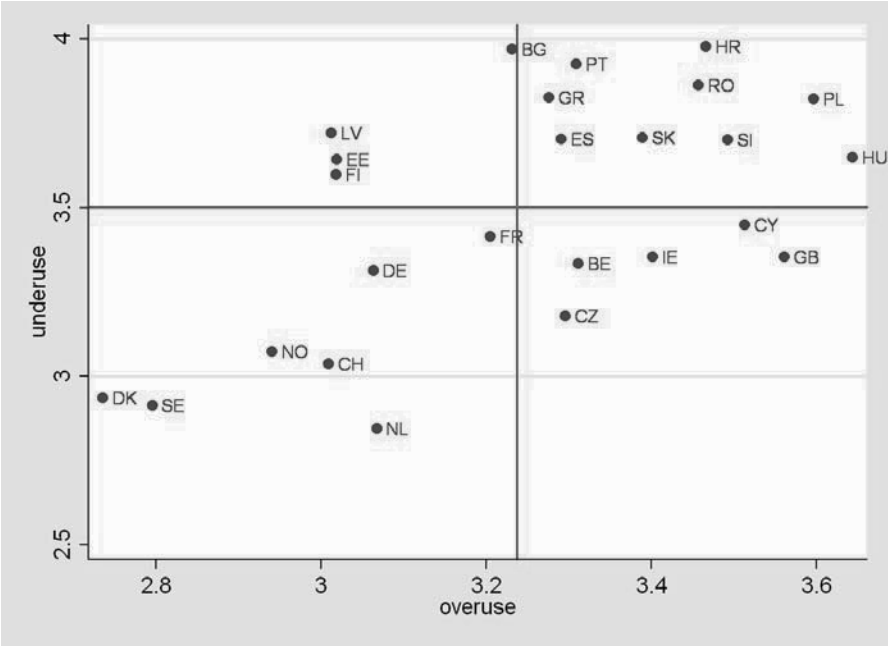
Table 1 shows that 64% of the European public believe that there are many people who intentionally overuse (abuse) welfare benefits. Perceptions related to aspects of overuse that we called misuse of benefits (i.e. people who are not really looking for a job or people getting away with pretending that they are sick) are less negative: the European public seems divided towards that issue, respectively 39% and 38% (strongly) agree with the statement, while 38 and 36% (strongly) disagree . Regarding the underuse of benefits, people have a strong impression that there are insufficient benefits to help the people that are deserving of welfare support, 63% (strongly) agrees with that statement. Also the majority (52%) of the Europeans believe that many people that are entitled to benefits do not 'get' these benefits. These descriptive results are in line with previous research that showed that people perceive both high overuse and underuse of benefits. When we inspect the relation between the overuse and underuse scale we find a substantial correlation on the country level of .54 (Pearson's r), but only a small correlation on the individual level of .22 (Pearson's r). This shows that these attitudes are only weakly related to each other: perceiving high overuse does not necessarily mean perceiving high underuse, or the other way around.

Table 1. Operationalization and descriptive statistics: overuse and underuse (N = 47489)

Scale 1 - 5.	% (strongly) agree	% (strongly) disagree	Mean	St.dev
Overuse (scale)			3.228	.776
Most unemployed do **not** really try to **find** a j**ob**	39	38	3.034	1.104
Many people manage to **obtain benefits** and services to which they are not entitled	64	16	3.620	.957
Employees often **pretend** that they are **sick** in order to stay home	38	36	3.029	1.071
Underuse (scale)			3.498	.823
Many people with very low incomes get l**ess benefits** than they are legally entitled to	52	21	3.394	.973
There are **insufficient benefits** in [country] to help the people who are in real need	63	19	3.603	1.021

When we look at the mean scores for the overuse and underuse scale for the selected countries in Figure 1, we see that in Denmark and Sweden perceptions of both overuse and underuse are well below the European means. And also in Norway, Switzerland the Netherlands and Germany perceptions of overuse and underuse are substantially lower than average. In the upper-right corner (indicating high overuse and high underuse perceptions), we find the Post-communist countries and the Mediterranean countries. Countries that have high perceptions of overuse, but low perceptions of underuse are the Anglo Saxon countries (United Kingdom and Ireland), and Belgium, Czech Republic and Cyprus. Countries in the Baltic region (Latvia, Estonia and Finland) perceive low overuse of benefits, but high underuse. We do not have a specific explanation for this.

Figure 1. Mean scores for overuse and underuse by country



Note: the lines indicate the overall mean

Multilevel models of overuse and underuse perceptions

Table 2 (overuse) and Table 3 (underuse) show the results of the multilevel regression analyses, in which covariates were related to the scales of perceived overuse and underuse. In Model 1-3 we included the individual level covariates (Table 2a and 3a). In Model 4-10 we add to those the contextual factors (Table 2b and 3b). The intercept-only model (M0) reveals that the intraclass correlation coefficient (ICC) for overuse is modest (.096) while for underuse it is nearly two times higher (.171) which means that there is more country level variation in perceptions of underuse than in perceptions of overuse. The variance components in Model 3 (including all individual level covariates) show that the country level variation of overuse as well as of underuse is for about one third explained by the composition of categories of individuals. This composition effect is mostly related to the Eastern and Southern European countries where there are relatively more people with lower trust levels and people in a lower structural position than in other countries. When we look at the individual level effects for structural position we see that people who have a lower income, or people that are unemployed or disabled especially perceive higher underuse while people with paid work perceive more overuse of benefits. There is no significant effect for income on

the perceptions of overuse. These results support hypothesis H1a and the identification theory rather than the competition (H1b) or the social distance theory (H1c): people in a lower structural position can better identify with people who are dependent of welfare benefits and see therefore less overuse and more underuse, while people in paid work do less see underuse as a problem and see higher overuse probably as a result of the fact that they have to contribute more to the welfare state.

However, when we look at the effect for education, we do see support for H1c. Having a higher education increases the chance to perceive well-targeting of benefits (i.e. low overuse and low underuse). We suggest that higher educated people (more than people with high incomes) are in general not surrounded with people that are (at risk of becoming) dependent of benefits. Therefore they might have more abstract or, one might perhaps say, naive ideas about the reality of welfare redistribution and mis-targeting in specific. In other words, here social distance rather than self-interest may explain perceptions of overuse and underuse.

The results for the hypothesized effects of political affiliation confirm hypothesis H2. People who are more right wing perceive more overuse of benefits and less underuse, while people who are more left wing perceive less overuse and more underuse. We note that Model 2, where the ideology indicators are introduced, shows that very little variance of overuse perceptions is explained. For overuse perceptions instead the explained variance doubles; overuse perceptions are strongly determined by right wing ideology, probably because people with right wing ideologies feel that too many people have access to the redistribution system. These effects for ideological affiliation are in line with the results found in previous research (Ervasti, 1998; Ervasti, 2012; Van Oorschot and Meuleman, 2011; Halvorsen, 2002; Sihvo and Uusitalo, 1995). We explain these effects for right wing ideology on overuse perceptions by the observation that perceived overuse plays a significant role in the public debate about the reform or retrenchment of the welfare state. The argument that a too generous welfare state leads to moral hazard and the misuse of welfare benefits is often used by ideological opponents of the welfare state in that debate, while possible underuse of benefits does not play a substantial role for neither the right nor the left wing advocates. As a result perceptions of overuse may be more politicized, while perceptions of underuse relate more to self-interest or social distance.

Considering hypotheses H3, we see substantial expected effects of trust on perceptions of mis-targeting. Model 3 shows that both interpersonal and institutional trust explains a substantial part of the variance, not only at the individual level, but also at the country level as a composition effect. People that are trustful are more optimistic about the redistribution process in general and about well-targeting in particular. Trust in institutions in general also generates trust in targeting of benefits to the deserving people.

Table 2a. Multilevel models - Overuse

	Model 0	Model 1	Model 2	Model 3
Intercept	3.235***	3.446***	3.326***	3.594***
Individual level covariates				
Income		-.003	-.005**	-.001
Job Status (paid work is ref.cat.)				
- In education		-.107***	-.101***	-.068***
- Unemployed (active)		-.196***	-.188***	-.205***
- Unemployed (not active)		-.174***	-.172***	-.176***
- Disabled		-.048**	-.040*	-.066***
- Retired		.006	.006	.007
- Other		-.016*	-.017*	-.012
Education (primary educ is ref.cat.)				
- Lower Sec Education		-.020	-.018	-.016
- Higher Sec. Education		-.071***	-.069***	-.064***
- Tertiary Education		-.261***	-.255***	-.226***
Left / Right self-placement		.037***	.042***	
Interpersonal Trust			-.042***	
Institutional Trust			-.040***	
Age (18-35 is ref.cat.)				
- Age 35-45		-.075***	-.077***	-.077***
- Age 45-65		-.124***	-.120***	-.117***
- Age 65+		-.036*	-.044**	-.021
Female (male is ref.cat.)		.007	-.004	-.001
Variance components				
Group	.058	.055	.055	.039
Residuals	.549	.535	.529	.514
% Group variance explained		5.17	5.17	32.76
% Residual variance explained		2.55	5.64	6.38

Number of observations: 47489
Number of groups: 25
Number of imputed data sets: 5
**p < .05; **p < .01; ***p < .001 (two-tailed tests).*

Table 3a. Multilevel models - Underuse

	Model 0	Model 1	Model 2	Model 3
Intercept	3.489***	3.741***	3.851***	4.124***
Individual level covariates				
Income		-.026***	-.025***	-.021***
Job Status (paid work is ref.cat.)				
- In education		-.071***	-.075***	-.045***
- Unemployed (active)		.080***	0.75***	.062**
- Unemployed (not active)		.044*	.043*	.038
- Disabled		.098***	.093***	.071***
- Retired		-.024*	-.024*	-.022*
- Other		-.012	-.011	-.006
Education (primary educ is ref.cat.)				
- Lower Sec Education		-.047**	-.048***	-.048**
- Higher Sec. Education		-.086***	-.087***	-.086***
- Tertiary Education		-.223***	-.226***	-.205***
Left / Right self-placement		-.023***	-.020***	
Interpersonal Trust			-.020***	
Institutional Trust			-.050***	
Age (18-35 is ref.cat.)				
- Age 35-45		-.029**	-.028**	-.028**
- Age 45-65		-.012	-.015	-.013
- Age 65+		-.042*	-.037*	-.019
Female (male is ref.cat.)		.046***	.045***	.047***
Variance components				
Group	.116	.107	.107	.076
Residuals	.562	.547	.544	.533
% Group variance explained		7.76	7.76	34.48
% Residual variance explained		2.67	3.20	5.16

Number of observations: 47489
Number of groups: 25
Number of imputed data sets: 5
**p < .05; **p < .01; ***p < .001 (two-tailed tests).*

Looking at the country level covariates (in Table 2b for overuse and Table 2b for underuse), we see that a country's social spending level influences underuse perceptions, but has no effect on overuse perceptions. Low social spending in a country is associated with the perception that there is underuse of benefits, most likely because people see that those in need do not get what they deserve. But there is no evidence for the hypothesis that social spending increases the perception of overuse because it would lead to the idea that there is tax money wasted. We can thus only partly confirm hypothesis H4.

The manner in which welfare states redistribute seems to affect perceptions of mis-targeting more substantially. It is especially the Anglo Saxon welfare regime that is associated most importantly with overuse perceptions. This supports our hypothesis H5 that argues that more selective policies increase perceptions of overuse of benefits: when benefits are limited to very specific target groups and being eligible involves a lot of criteria, it increases the suspiciousness of the people towards benefit recipients. This idea is strengthened when we control for trust on the aggregate level (in Model 9 and Model 10): the effect for the Anglo Saxon regime remains strong and significant, while the effects for cultural trust both turn insignificant when controlled for regime type. This could reflect a spurious effect in which the Anglo Saxon regime reduces both the institutional and the interpersonal trust levels and at the same time, with its selective policies, causes strong perceptions of benefit abuse. Interesting is the negative effect of universal benefit schemes (Scandinavian welfare regimes) on underuse perceptions that turns insignificant when interpersonal trust is introduced (Model 9). This suggests that the universal benefit system is fundamentally relying on high trust levels in order to make it possible to include everyone in the redistribution (Rothstein, 1998).

We see that universal or selective welfare state policies do not affect perceptions of underuse significantly. There is an effect for the Post-Communist and Mediterranean regimes, but we assume that that is mostly caused by the lower effectiveness of their government generally. Model 9 shows that this is indeed the case: when we control for government effectiveness the effect for Post-Communist regime turns insignificant, and the effect for Mediterranean reduces substantially. Countries with ineffective bureaucracies increase the perceptions of underuse, but do not affect perceptions of overuse. This indicates that perceived underuse is more affected by (people's idea of) effective redistribution, while overuse perceptions are more related to a climate of trust and the design of the redistribution system (selective or universal access).

The effects for an institutional and interpersonal trust culture are in line with expectations expressed in H7. Remarkably, the effect of interpersonal trust on perceptions of underuse remains strong and significant when we control for the regime types (in Model 10). In high interpersonal trust societies perceptions of underuse are lower, regardless of regime type. A high trust

society seems to be a crucial precondition to execute a generous and effective redistribution. This in turn explains the lower perceptions of underuse. The effect for Scandinavian regime type in Model 10 could be an expression of the high levels of solidarity in these countries, that come in addition to a general culture of high trust, and demands even more (effective) redistribution to welfare beneficiaries.

Table 2b. Multilevel models - Overuse (models adjusted for effects of individual covariates)

	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9	Model 10
Country level covariates							
Social Spending as % GDP	-.003						
Welfare regime (conserve is ref.cat.)							
- Scandinavian		-.182*				-.131	-.234*
- Anglo Saxon		.348**				.359**	.378**
- Post Communist		.078				.026	.164
- Mediterranean		.099				.044	.142
Government Effectiveness			-.063				
Interpersonal Trust (aggr)				-.075*		-.049	
Institutional Trust (aggr)					-.053		.052
Variance components							
Group	.039	.022	.038	.034	.037	.022	.021
Residuals	.514	.514	.514	.514	.514	.514	.514
% Group variance explained	32.75	62.07	34.48	41.38	36..21	62.07	63.79
% Residual variance explained	6.38	6.38	6.38	6.38	6.38	6.38	6.38

Number of observations: 47489
Number of groups: 25
*Number of imputed data sets: 5*p < .05; **p < .01; ***p < .001 (two-tailed tests).*

Table 3b. Multilevel models - Underuse (models adjusted for effects of individual covariates)

	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9	Model 10
Country level covariates							
Social Spending as % GDP	-.029***						
Welfare regime (conserve is ref.cat.)							
- Scandinavian		.051				.138	.316*
- Anglo Saxon		.137				.123	.195
Post Communist		. 425***				.182	.158
- Mediterranean		.441***				.290*	.158
Government Effectiveness		-.307***			-.240*		
Interpersonal Trust (aggr)			-.220***			-.251***	
Institutional Trust (aggr)				-.163***			
Variance components							
Group	.053	.038	.038	.035	.045	.031	.027
Residuals	.533	.533	.533	.533	.533	.533	.533
% Group variance explained	54.31	67.24	67.24	69.82	61.21	73.28	76.72
% Residual variance explained	5.16	5.16	5.16	5.16	5.16	5.16	5.16

Number of observations: 47489
Number of groups: 25
Number of imputed data sets: 5
**p < .05; **p < .01; ***p < .001 (two-tailed tests).*

5. CONCLUSION AND DISCUSSION

The aim of this study was to broaden our understanding of perceptions of overuse and underuse of welfare benefits and its individual and contextual determinants. We contributed to the literature by analyzing cross-national data and formulating hypotheses regarding both individual and contextual level mechanisms that influence perceptions of overuse and underuse. Also, where previous studies focused on perceptions of overuse, we paid an equal amount of attention to the other aspect of mis-targeting: underuse of benefits.

We found that Europeans not only strongly perceive abuse and misuse of benefits, but also perceive substantial underuse of benefits. Especially in the Southern and Eastern European countries underuse perceptions are high compared to the rest of Europe. Regarding overuse perceptions, next to (again) the Southern and Eastern European countries, also the Anglo Saxon countries stand out as countries with high average suspiciousness of benefit abuse.

Furthermore, although overuse and underuse of benefits can be seen as two manifestations of the same problem of mis-targeting of benefits, our analysis shows that overuse and underuse are rather two different dimensions of welfare attitudes; they are shaped by different determinants. Perceptions of overuse depend on people's political affiliation, probably because the threat of overuse is often used as a political argument against (more) government redistribution. Underuse perceptions instead, depend more on people's self-interest: when people are facing the risk of becoming dependent of welfare benefits, they are more concerned with underuse of benefits.

Also contextual factors differ in their influence on overuse and underuse perceptions. Overuse perceptions are shaped by the design of the redistribution system. Due to the fact that selective benefit schemes put more effort in determining whether benefit claimants are really deserving of benefits, there is more focus on possible abuse or misuse of benefits in selective welfare state compared to universal redistribution systems where everyone is included; as a result perceived overuse is higher in welfare states that have stricter eligibility criteria. Underuse perceptions instead, are not based upon the way the redistribution system is designed, but rather on the amount of redistribution and the effectiveness of the redistribution in a country. Thus where overuse perceptions are based upon the more political question on who should be included in the redistribution, underuse perceptions are more related to the actual amount that is redistributed and the actual resources individuals and countries have.

Trust seems to be a general precondition for both perceptions of overuse and underuse. Perceptions of overuse and underuse are also an expression of the strength of the social contract between individuals in a society. If people feel connected to each other and trust the government to arrange their common good, they will see not only lower overuse, but also lower underuse of benefits. Here we also assume a feedback effect: when perceived overuse and underuse is low, trust in other people and the government is strengthened.

Another indication that overuse and underuse are two different dimensions rather than part of one concept of mis-targeting, is that the correlation between our measurements of overuse and underuse is relatively low (.22), as previous research showed as well (Ervasti, 2012; Roosma et al., 2012; Sihvo and Uusitalo, 1995). Moreover, where several effects of covariates are in opposite directions (for work status and political affiliation), some effects are in the same direction instead (for education and for trust). That raises the question how people combine overuse and underuse perceptions. It seems likely that some people see both high overuse and high underuse, where others perceive high overuse and low underuse at the same time, and vice versa. Further research could elaborate on this.

Unfortunately, due to the relatively low number of countries, we were not able to include many covariates on the contextual level. This restricted us in exploring the contextual mechanisms in more detail. In order to be able to fully grasp the mechanism behind these contextual effects, we need to be able to control for more country level factors. Also the unavailability of data about actual overuse and underuse of benefits was a gap in our research design. Then again, due to the fact that this information is not publicly available, we expect only a small contextual level effect on overuse and underuse perceptions.

In conclusion it is fair to say that in all European countries, not only overuse perceptions are a potential threat to welfare state legitimacy, but also underuse perceptions. These two perceptions appear as two different dimensions of welfare state legitimacy determined by different individual and country characteristics. Hence, instead of one Achilles' heel, welfare state legitimacy has rather two weakest spots.

Table A1. Correlations between Contextual Variables (N=22)

	Social Spending	Scandi-navian	Conser-vative	Anglo Saxon	Post Comm.	Medi-terranen	Govern. Effective.	Interpers. Trust	Institut. Trust
Social Spending as % GDP	1.000								
Scandinavian countries	.331	1.000							
Anglo Saxon countries	.547	-.226	1.000						
Conservative countries	.102	-.134	-.165	1.000					
Post Communist countries	-.824	-.328	-.403	-.239	1.000				
Mediterranean countries	.061	-.194	-.238	-.141	-.345	1.000			
Government Effectiveness	.723	.548	.364	.198	-.712	-.165	1.000		
Institutional Trust (aggr)	.631	.656	.309	.037	-.697	-.105	.882	1.000	
Interpersonal Trust (aggr)	.329	.342	.161	.019	-.364	-.055	.460	.522	1.000

Literature

Alesina A and Glaeser E. (2004) *Fighting poverty in the US and Europe: A world of difference*, New York: Oxford University Press.

Allison PD (2001) *Missing data*: SAGE Publications, Incorporated.

Andress HJ and Heien T (2001) Four worlds of welfare state attitudes? A comparison of Germany, Norway and the United States. *European Sociological Review* 17: 337-356.

Arts W and Gelissen J (2001) Welfare states, solidarity and justice principles: does the type really matter? *Acta Sociologica* 44: 283 - 299.

Beck U, Giddens A and Lash S (1994) *Reflexive modernization: politics, tradition and aesthetics in the modern social order*, Cambridge: Polity Press.

Becker J (2005) *De steun voor de verzorgingsstaat in de publieke opinie, 1970-2000*, Den Haag: Sociaal en Cultureel Planbureau.

Blekesaune M and Quadagno J (2003) Public attitudes toward welfare state policies: a comparative analysis of 24 nations. *European Sociological Review* 19: 415-427.

Brooks C and Manza J (2007) *Why welfare states persist*, Chicago: Chicago University Press.

Coleman JS (1990) *Foundations of Social Theory*, Cambridge: Harvard University Press.

Coughlin R (1980) *Ideology, public opinion and welfare policy; attitudes towards taxes and spending in industrial societies*, Berkely: Institute of International Studies, University of California.

d'Anjou L, Steijn A and Van Aarsen D (1995) Social position, ideology, and distributive justice. *Social Justice Research* 8: 351-384.

Dogan M (1988) *Comparing Pluralist Democracies*, Boulder: Westview Press.

DWP. (2012a) Fraud and Error in the Benefit System. *Department for Work and Pensions*. London.

DWP. (2012b) Income Related Benefits: Estimates of Take-up in 2009-10. *Department for Work and Pensions*. London.

Edlund J (1999) Trust in Government and Welfare Regimes: Attitudes to Redistribution and Financial Cheating in the USA and Norway. *European Journal of Political Research* 35: 341-370.

Edlund J (2006) Trust in the capability of the welfare state and general welfare state support: Sweden 1997-2002. *Acta Sociologica* 49: 395-417.

Ervasti H (1998) Civil criticism and the welfare state. *Scandinavian Journal of Social Welfare* 7: 288-299.

Ervasti H (2012) Who hates the welfare state? Criticism of the welfare state in Europe. In: Ervasti H, Goul Andersen, J., Friberg, T., Ringdal, K. (ed) *The*

Future of the Welfare State: Social Policy Attitudes and Social Capital in Europe. Cheltenham: Edward Elgar Publishing.

Esping-Andersen G (1990) *The three worlds of welfare capitalism*, Cambridge: Polity Press.

Fong CM, Bowles, S., Gintis. H (2005) Reciprocity and the Welfare State. In: Gintis H, Bowles, S., Boyed, R., Fehr, E. (ed) *Moral Sentiments and Material Interests: The Foundation of Cooperation in Economic Life*. Massachusetts: The MIT Press.

Frick JR and Groh-Samberg O (2007) To Claim or Not to Claim: Estimating Non-Take-Up of Social Assistance in Germany and the Role of Measurement Error. *SOEPpapers on Multidisciplinary Panel Data Research at DiW Berlin*, No. 53/2007. Berlin: DIW Berlin.

Gelissen J (2000) Popular support for institutionalized solidarity: a comparison between European welfare states. *International Journal of Social Welfare 9*: 285 - 300.

Goul Andersen J (1999) Changing labour markets, new social divisions and welfare state support. In: Svallfors S and Taylor-Gooby P (eds) *The end of the welfare state? responses to state retrenchment*. London: Routledge, 13-33.

Graham JW (2009) Missing data analysis: Making it work in the real world. *Annual Review of Psychology*: 549-576.

Halvorsen K (2002) Solidarity and the legitimacy of the welfare state: Attitudes to abuse of welfare benefits in Scandinavian countries. Florence: COST13 Working Group II meeting.

Hasenfeld Y and Rafferty JA (1989) The determinants of public attitudes toward the welfare state. *Social Forces* 67: 1027-1048.

Hernanz V, Malherbet F and Pellizzari M (2004) Take-up of Welfare Benefits in OECD Countries: A Review of the Evidence. *OECD Social, Employment and Migration Working Papers, No. 17.* OECD.

Hox JJ (2010) *Multilevel Anlysis, Techniques and Applications*, New York: Routledge.

Inglehart R (1990) *Culture shift in advanced society*, Princeton: Princeton University Press.

Kahan DM (2005) The Logic of Reciprocity: Trust, Collective Action and Law. In: Gintis H, Bowles, S., Boyed, R., Fehr, E. (ed) *Moral Sentiments and Material Interests: The Foundation of Cooperation in Economic Life*. Massachusetts: The MIT Press.

Kangas O (1997) Self-interest and the common good: the impact of norms, selfishness and context in social policy opinions. *Journal of Socio-Economics* 26: 475-494.

Kayser H and Frick JR (2000) Take it or leave it: (non-) take-up behavior of social assistance in Germany. *DIW-Diskussionspapiere*, No. 210.

Linos K and West M (2003) Self-interest, social beliefs, and attitudes to redistribution: Re-addressing the issue of cross-national variation. *European Sociological Review* 19: 393-409.

Maassen G and De Goede M (1989) Public Opinion about Unemployed People in the Period 1975-1985; The Case of the Netherlands.

Meier Jaeger M (2006) What Makes People Support Public Responsibility for Welfare Provision: Self-interest or Political Ideology? A Longitudinal Approach. *Acta Sociologica* 49: 321-338.

Meier Jaeger M (2007) Are the 'deserving needy' really deserving everywhere? Cross-cultural heterogeneity and popular support for the old and sick in eight Western countries. In: Mau S and Veghte B (eds) *Social justice, legitimacy and the welfare state*. Aldershot: Ashgate, 73-96.

Papadakis E and Bean C (1993) Popular support for the welfare state: a comparison between institutional regimes. *Journal of Public Policy* 13: 227-254.

Pettersen PA (1995) The welfare state: the security dimension. In: Borre O and Scarbrough E (eds). Oxford: Oxford University Press.

Raghunathan TE, Lepkowski JM and Van Hoewyk J (2001) A multivariate technique for multiply imputing missing values using a sequence of regression models. *Survey methodology* 27: 85-96.

Ringen S (1987) Legitimacy. In: Ringen S (ed) *The possibility of politics: a study in the political economy of the welfare state.* Oxford: Clarendon Press.

Roller E (1995) The welfare state: the equality dimension. In: Borre O and Scarbrough E (eds) *The Scope of Government*. New York/Oxford: Oxford University Press.

Roosma F, Gelissen J and Van Oorschot W (2012) The multidimensionality of welfare state attitudes: A European cross-national study. *Social Indicators Research*.

Rothstein B (1998) *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State*, Cambridge: Cambridge University Press.

Sihvo T and Uusitalo H (1995) Attitudes towards the welfare state have several dimensions. *International Journal of Social Welfare* 4: 215-223.

Svallfors S (1991) The politics of welfare policy in Sweden: structural determinants and attitudinal cleavages. *British Journal of Sociology* 42: 609-634.

Svallfors S (1999) Political trust and attitudes towards redistribution. *European Societies* 1: 241-268.

Svallfors S (2002) Political Trust and Support for the Welfare State: Unpacking a Supposed Relationship. In: Rothstein B and Steinmo S (eds) *Restructuring the Welfare State: Political Institutions and Policy Change.* New York: Palgrave.

Svallfors S (2003) Welfare regimes and welfare opinions. *Social Indicators Research* 64: 495-520.

Taylor-Gooby P (1999) "Hollowing out" versus the new interventionism: public attitudes and welfare futures. In: Svallfors S and Taylor-Gooby P (eds) *The end of the welfare state? responses to state retrenchment*. London: Routledge, 1-12.

Van Oorschot W (1995) *Realizing Rights: A multi-level approach to non-take-up of means-tested benefits*, Aldershot: Avebury.

Van Oorschot W (2001) Troublesome Targeting: On the Mulilevel Causes of Nontake-up. In: Ben-Arieh A, Gal, J. (ed) *Into the Promised Land: Issues Facing the Welfare State.* Westport, Connecticut: Preager Publishers.

Van Oorschot W and Meuleman B (2011) Welfarism and the multidimensionality of welfare state legitimacy: evidence from The Netherlands, 2006. *International Journal of Social Welfare* 21: 79-93.

Wilensky H (1975) *The welfare state and equality: structural and ideological roots of public expenditure,* Berkeley: University of California Press.

'THE ECONOMIC COST OF SOCIAL SECURITY FRAUD': A QUESTION OF MEASUREMENT AND DEFINITION

Christian VAN STOLK

Director Employment and Social Policy at RAND Europe

Helen ELMERSTIG

RAND Europe

Abstract

The economic cost of fraud and error to the social security system can be considerable. For certain benefit types in OECD countries, between 5-10 per cent of social security expenditure can be wrongly allocated to claimants. Benefit expenditure is also considerable, often between 20 and 30 per cent of overall government spending for many OECD countries. Given the current fiscal climate, fraud is at the forefront of policy agendas in many countries. However, establishing the exact level of fraud is not easy. Fraud and error are often confused in definitions. Few countries measure fraud systematically. Governments that do measure, such as the United Kingdom, find that error on behalf of the benefit system can be a more substantial problem than fraud. This finding, which should inform policy-making, questions many governments' obsession with social security fraud. The complexity of the benefit system appears to drive both fraud and error. As such, a government serious about reducing the economic cost of fraud and error really needs to simplify the complexity of the benefit system for both users and administrators.

1. INTRODUCTION

Social security fraud has received increased policy attention in Western Europe over the last few years. News stories frequently describe individuals who fraudulently claim large amounts of money by deliberately submitting false benefit claims. The focus on individual claimants as 'benefit thieves' is increasingly being adopted by politicians and departments.[1)] As both media and policy attention to social security fraud grows there is an increased interest in examining its scope and the losses incurred to society.

The current economic climate further contributes to bringing matters of fraud to the forefront of the current affairs and policy agenda. Under increasing pressure to demonstrate 'value for money' governments look to identify areas of their budgets where savings can be made - decreasing the amount of fraud appears to be one obvious option. As citizens experience the hardships of day-to-day life in the recession, with sections of the population at risk of poverty likely to grow in size, there is also speculation that rates of fraudulent benefit claims might increase.

Despite this increased interest in social security fraud the data available is limited and inconsistent making comparisons both between countries and types of benefits challenging. This policy brief aims to give an overview of what is known about the economic impact of social security fraud and to draw attention to the challenges in calculating these. It compares what is known about the economic impact of fraud in four European countries and reflects on what can be understood from this. We will also look at what is known about fraud more globally, mostly drawing on the experience of Anglo-Saxon countries.

We first reflect on the difficulties in establishing the economic cost of fraud. We then discuss what is known about the direct and indirect economic costs of fraud. In addition, we reflect on the relationship between recession and social security fraud taking the UK as an example. Finally, we make some general conclusions and draw out some lessons for policy makers.

1) *Department for Work and Pensions, (). Benefit Thieves - it's not if we catch you. It's when. Available at http://campaigns.dwp.gov.uk/campaigns/benefit-thieves/ [Last accessed 25 July 2013].*

2. ESTIMATE OF ECONOMIC COST OF FRAUD DEPENDS ON HOW FRAUD IS DEFINED

The ability to estimate the economic cost of fraud is dependent on how fraud is defined. At a basic level error, fraud and corruption in social security programmes indicate the extent to which the programme is compliant with its own rules. This makes it distinct from targeting. Targeting in a social security programme measures how well a programme is directed at a specific population. Typically, targeting reflects on the fairness of a programme, for instance how well it is directed at those most deserving of assistance. Thus someone looking at programme with an error, fraud and corruption perspective is mainly interested in fairness from a compliance point of view. As such, a programme can technically lack 'fairness' from a targeting perspective but still be compliant with its own rules.[2)]

In defining the issues of error, fraud and corruption in a programme, it is important to note that the boundaries between fraud, error, and corruption are set differently in different national and cultural contexts. Variations can also be seen not just between different countries, but also between different benefit types within the same country. The Netherlands, for example, does not have one overarching definition of fraud but instead allows for different agencies to use different definitions. In comparison, Canada defines fraud in two ways (intentional and unintentional), while Ireland defines fraud in four different ways (see section 4.4). [3)] As definitions of fraud vary, so do perceptions of responsibility for fraud and error. Anglo-Saxon countries tend to emphasise the responsibility of the individual claimant while the Swedish example suggests that achieving correct benefit claims is more a shared responsibility between the claimant and the state/service-provider.[4)] These definitions are not fixed and may change over time. Recently, Sweden has started to emphasise the individual's responsibility in 'getting it right' more and so is potentially opening up more cases being reclassified as fraud.

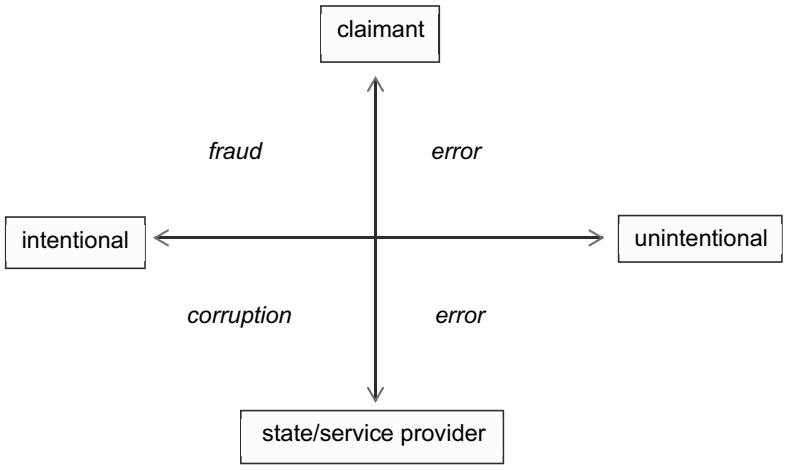
These differences are often nuanced but still can lead to significant differences in calculations. Outside of the policy context intentional fraud is often not isolated from mistakes occurring through claimant or service-provider/state error. This can result in the costs of fraud being presented as deceptively large. The diagram below divides irregular overpayments in the social security budget into four different categories, only one of which constitutes claimant fraud:

---

2) van Stolk C. & Tesliuc E. (2010). Toolkit on tackling error, fraud and corruption in social protection programs. World Bank.

3) National Audit Office (2006). International benchmark of fraud and error in social security systems. (HC 1387 Session 2005-2006) - Report together with RAND Europe London: TSO.

4) Ibid.



Source: RAND Europe

This diagram demonstrates an understanding of fraud as occurring when individual claimants deliberately provide false information (or withhold relevant information) with the intention of receiving payments. Claimants may also unintentionally withhold or provide false information. The state/service-provider can equally make unintentional or intentional errors, the latter generally known as corruption.

Understanding the cost of fraud is thus dependent on understanding the definition of fraud which informs it. A wider definition of fraud, where responsibility for it is more likely to be placed on the claimant than on the state, will generate higher levels of fraud. Equally, for countries where the definition of fraud is narrow and the responsibility for avoiding it is shared by the claimant and the state the volume of fraud compared to error will appear lower.

3. ...AND HOW FRAUD IS MEASURED

To arrive at economic costs, it is also necessary to understand how fraud and error is measured in different contexts. As different countries have different definitions of fraud and error, they also have different practices for how its impact is measured. The type of measurement can affect the size of the economic cost reported. [5)] There are five primary approaches.[6)]

5) *For a similar point in a related area see Levi, M., & Burrows, J. (2008). Measuring the Impact of Fraud in the UK A Conceptual and Empirical Journey. British Journal of Criminology, 48(3), 293-318.*

6) *Then distinction between categories is based on National Audit Office (2006). International benchmark of fraud and error in social security systems. (HC 1387 Session 2005-2006) - Report together with RAND Europe London: TSO.*

- **A general sample-based approach that estimates the overall levels of fraud and error in the system.** This approach samples a set number of case files across benefits, checks for accuracy and, on the basis of sampling estimates the total volume of fraud and error in the system. The UK developed this approach and it is broadly perceived to be the gold standard for assessing fraud and error.[7)] The approach is also being developed in Australia and in Ireland. There still remain differences in this approach. Ireland, for example, measures in a less systematic way (across fewer benefit types and with a smaller sample as a proportion) compared to the UK. This method typically gives a relatively accurate account of the stock of fraud and error in the system.
- **A sample-based approach to measure fraud and error in specific programs.** This does not provide overall measurements of fraud and error, but instead measures the level of error and fraud in specific programs which may be chosen because they are considered particularly high risk. The method is the same as in the first measurement type outlined above. The United States mostly uses this approach. They may even rotate the measurement on an annual basis between different types of programs.
- **Using administrative data to estimate the level of fraud and error in the system.** Certain countries use administrative data such as prosecutions and number of fraudulent cases detected to make estimations of fraud and error within the system. As estimates rely on general reported information this normally underestimates the level of fraud and error in the social security system. Sweden has used prosecutions as a proxy in the past. Other countries such as the Netherlands and Australia try to estimate the accuracy of payments and benefit decisions in the system. Basically, they review cases and determine the total volume of fraud and error on the basis of what they detect. The difference with sampling is that there is no estimation of the total stock of fraud and error across the system.
- **Using perceptions on fraud and error to estimate the amount of fraud and error.** Several countries ask the general population about what they find acceptable behaviour. On the basis of such surveys, they estimate the likely amount of fraud and error in society. The Netherlands and Sweden have used such approaches. These approaches tend to overestimate the level of fraudulent behaviour in society as individuals tend to overstate the extent of fraudulent behaviour and a result the volume of fraud in the social security system.

---

7) The World Bank (2011). Measuring Error & Fraud. [online] Available at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTSAFETYNETSANDTRANSFERS/0,,contentMDK:21508473~menuPK:4279356~pagePK:210058~piPK:210062~theSitePK:282761~isCURL:Y,00.html/ [Last accessed 25 July 2013].

- **Establishing the cost-benefit of anti-fraud initiatives.** Many countries, instead of estimating the volume and value of fraud and error, focus on other criteria. One such criterion is the cost-benefit ratio. Some countries, like Ireland and the Netherlands, focus on the savings and prosecutions achieved through the identification of fraudulent claims. Other countries like Australia establish specific cost-benefit ratios for each anti-fraud initiative it introduces. If the intervention does not prove cost-effective (i.e. it recovers more overpayments than its cost) it may be reviewed or aborted.

Differences between what is measured makes comparisons between the economic impact of social security fraud on different countries difficult and potentially misleading.

The diverse methodologies used to measure error and fraud produce a further challenge to comparing the available data. Each methodology holds particular strengths and weaknesses which have an impact on the results generated. There is a growing sense that using direct methods, such as independent sampling of cases, is preferable to perception data and secondary use of administrative data, as indirect methods have a tendency to generate inconsistent results.[8)]

4. IMPACT OF SOCIAL SECURITY FRAUD: TRENDS AND CHARACTERISTICS

The table below gives an overview of figures available on social security fraud in some European countries: Sweden, the United Kingdom, the Netherlands and Ireland. The use of different measurements and methodologies make comparisons between the countries uncertain, but the figures can nonetheless allow for some reflection.

	Welfare expenditure	Welfare expenditure as % of GDP	Fraud & Error	Fraud
Sweden	£24.5bn	29%	6-7%	3%
UK	£166.8bn	22%	2.1%	0.7%
Netherlands	£42bn	21%	n/a	10-20%
Ireland	£18bn	13.5%	0.5 - 2.1%	0.5 - 1.2%

Source RAND Europe compilation 2006-2008, reviewed in 2013

8) *National Audit Office (2008). Comparing how some tax authorities tackle the hidden economy. - Report together with RAND Europe London: National Audit Office.*

The figures confirm quite significant variance in the levels of fraud and error. This reflects mostly on how fraud and error are measured in these four countries. For instance, the Netherlands has used perceptions data which tend to overstate the overall level of fraud and error. Ireland and the United Kingdom, because of their sample-based approach, probably have the most robust data in Europe.

We present some of the case studies below:

4.1 Sweden

Two ministries share responsibility for most of the social security system in Sweden. The Ministry of Health and Social Affairs (Socialdepartementet) holds the main responsibility, while the Ministry of Industry, Employment and Communications (Naringslivsdepartementet) is responsible for benefits relating to the labour market. Programme administration is delegated to central agencies. Fraud is described as a 'deliberate attempt to unlawfully obtain benefits'. It is sub-divided into two categories: fraud which can be detected during regular revisions and fraud which can only be detected through extraordinary control activities, such as participation in the hidden economy.[9)]

In 2005, Sweden spent 29% of GDP on social welfare, which can be compared with the OECD average of 21% [10)]. This made the total value of Sweden's social expenditure £24.5bn in 2005 and 2006. A 2007 study published by the Swedish government suggests that between 6-7% of the total social security budget consists of erroneous payments, totalling £1.8 - 2bn. Approximately half of this (3% of total expenditure, or £1bn) is estimated to be due to fraudulent claims. Around 30% of overpayments are estimated to be due to false information being unintentionally provided and 20% due to state/service provider error.[11)] The same study also measured the percentage of erroneous payments for different types of benefits:

9) *National Audit Office (2006). International benchmark of fraud and error in social security systems. (HC 1387 Session 2005-2006) - Report together with RAND Europe London: TSO.*

10) *OECD Factbook (2010). Economic, Environmental and Social Statistics. [online] Available at http://www.oecd-ilibrary.org/sites/factbook-2010-en/10/02/01/10-02-01-g1.html?contentType=&itemId=/content/chapter/factbook-2010-75-en&containerItemId=/content/serial/18147364&accessItemIds=&mimeType=text/html/ [Last accessed 25 July 2013].*

11) *FUT-delegationen, (2007). Vad kostar felen? [online]. Stockholm, Sweden: Statens Offentliga Utredningar. Available at http://www.regeringen.se/sb/d/108/a/91747. [Last accessed 25 July 2013]*

Social security benefits with the highest proportion of erroneous (including fraudulent) payments:

Type of benefit	Erroneous payments in %
Income support	18.2%,
Temporary maternity/paternity payment	13.7%
Disability assistance	10.9%
Maternity/paternity payment	9.7%
Support for asylum seekers	8.5%

Source: Compilation of Swedish data based on studies referenced

The study is based on three other studies using different methodologies. The use of expert elicitation in one of those studies has been heavily criticised as severely overestimating the volume of fraudulent claims [12]. The study acknowledges that the uncertainty interval is large at between 3-10% (£0.8 - 2.6bn).

4.2 UK

The UK social security benefits are administered by the Department for Work and Pension through agencies and local authorities. Fraud and error is divided into three categories: official error, customer error and deliberate fraud.[13] The total benefit expenditure in 2012/13 is estimated to be £166.8bn [14]. In 2005, social expenditure amounted to 22% of the total GDP.

The Department for Work and Pensions present overpayments and underpayments across the benefits system in the UK on an annual basis. Individual estimates for Income Support, Jobseeker's Allowance, Pension Credit and Housing Benefit are also presented. Preliminary figures for 2012/ 2013 show the value of overpayment due to fraud and error across all benefits as £3.5bn, 2.1% of the total expenditure. The estimate for overpayment due to deliberate fraud is 0.7% (£1.2bn) of the total expenditure. The total underpayment is estimated at £1.4bn (0.9% of the total expenditure). 0.6% or 0.9bn is due to claimant error, while 0.3% or 0.5bn is due to official error. The volume and value of underpayments is increasing.

The Department for Work and Pensions also presents figures on overpayments in specific benefit types. The individual benefit that is most often overpaid is the Pension Credit at 5.5% of its total expenditure,

12) *Larsson, P. & Johansson, B. (2011). DN Debatt: Ryktet om bidragsfusk hotar trygghetssytemen. Dagens Nyheter [online] 6 June. Available at http://www.dn.se/debatt/ryktet-om-bidragsfusk-hotar-trygghetssystemen/ [Last accessed 25 July 2013].*

13) *National Audit Office (2006). International benchmark of fraud and error in social security systems. (HC 1387 Session 2005-2006) - Report together with RAND Europe London: TSO.*

14) *Department for Work and Pensions (2013). Fraud and Error in the Benefit System: Preliminary 2012/13 Estimates. Newcastle: Department for Work and Pensions.*

amounting to £7.6bn. The highest value of overpayments is in Housing Benefit expenditure, where £23.8bn is overpaid (5.3% of the total expenditure). The figures are drawn from sampling or reviewing of existing benefit claims.[15)]

Like most countries, the UK has a range of initiatives to prevent and detect social security fraud, but it is one of the few countries which produce systematic data evaluating those. UK anti-fraud initiatives include advertising campaigns to educate the public about benefit fraud and telephone and internet 'hotlines' where suspected fraud can be reported. The majority of anti-fraud spending is not cost-neutral, with the Department of Work and Pensions spending £1.50 for every £1 of overpayment identified. On average 25% of overpayments are recovered, but there is no reliable data considering the preventative effect of anti-fraud investment.[16)] Despite internationally being considered leading in tackling fraud and error, the accounts of the Department for Work and Pensions has had to be qualified for the last 18 years due to the perceived large sums unaccounted for due to fraud and error.[17)]

4.3 The Netherlands

The Ministry of Social Affairs and Employment (Ministerie van Sociale Zaken en Werkgelegenheid) has the responsibility for the social security system, and delegates this to implementation agencies which work with the claimants. The Dutch government does not have one overarching definition of fraud. Instead, different agencies use different definitions. The Implementation Institute for Employment Insurance (Uitvoeringsinstituut Werknemersverzekeringen) administers unemployment and disability benefits, and defines four categories of fraud: identity fraud, income fraud, estate fraud and living situation fraud. The total social expenditure was £42bn in 2004 [18)], amounting to 21% of GDP in 2005.[19)]

The Netherlands currently measures fraud and error in two ways for specific benefit types. Firstly, rates of detection and prosecutions are measured. This is based on where fraud is suspected, meaning that the figures do not describe the level of fraud across the system. Secondly, a survey method is used to determine what percentage of benefit claimants are fraudulently

15) *Ibid.*

16) *National Audit Office (2008). Progress in Tackling Benefit Fraud. Report together with RAND Europe. London: National Audit Office.*

17) *National Audit Office, 2006. International benchmark of fraud and error in social security systems. (HC 1387 Session 2005-2006) - Report together with RAND Europe London: TSO.*

18) *National Audit Office (2006). International benchmark of fraud and error in social security systems. (HC 1387 Session 2005-2006) - Report together with RAND Europe London: TSO.*

19) *OECD Factbook (2010). Economic, Environmental and Social Statistics. [online] Available at http://www.oecd-ilibrary.org/sites/factbook-2010-en/10/02/01/10-02-01-g1.html?contentType=&itemId=/content/chapter/factbook-2010-75-en&containerItemId=/content/serial/18147364&accessItemIds=&mimeType=text/html*

receiving unemployment and disability benefits. Between 10 and 20% of claims were found to be fraudulent according to surveys in 2000, 2002 and 2004.[20)]

2009 saw the introduction of a new system to verify benefit and pension claims for claimants living outside the Netherlands. It is considered that the details of claimants are particularly difficult to ratify, making their claims particularly susceptible to fraud.[21)]

4.4 Ireland

The social security benefit system is in Ireland administered by The Department of Social and Family Affairs and its five executive agencies. The total social expenditure in 2010 was approximately £18bn, or 13.5% of GDP. This is a notable increase from 2005 when the equivalent percentage was 7.7%.

In 2011, we saw the launch of the three-year Department of Social Protection Fraud Initiative. The initiative declared a zero tolerance approach to social welfare fraud with the motivation that it undermines public confidence in the system. The aim of the initiative is to achieve specified volumes of savings and case reviews. As part of the initiative, Fraud and Error Surveys, with the net rate of fraud and error, were published in three schemes in 2012: One Parent Family Payment, Disability Allowance and Jobseeker's Benefit. A Fraud and Error Survey on Child Benefits was published in 2013. There is no overall data available.

Type of benefit	Net cost of fraud and error/benefit expenditure	Net cost of suspected fraud/benefit expenditure
Disability Allowance	2.1%	1.2%
One Parent Family Payment	2.7%	2.3%
Jobseekers Benefit	1.6%	0.1%
Child Benefit	0.5%	0.5%

Source: Department of Social and Family Affairs

The Fraud and Error Surveys are carried out using a small sample, which may have an impact on the quality of the results. For example, the Jobseeker's Benefit Survey included 790 representative samples, of which 52 were identified as 'suspected' (but not confirmed) fraud. The Jobseeker's Benefit

20) National Audit Office (2006). International benchmark of fraud and error in social security systems. (HC 1387 Session 2005-2006) - Report together with RAND Europe London: TSO.

21) ISSA (2008). Netherlands. [online] Available at http://www.issa.int/Observatory/Country-Profiles/Regions/Europe/Netherlands/Good-Practices/ [Last accessed 26 July 2013].

Survey further found that a large proportion of claimants were engaged in casual or part time labour, which may make administration of benefits particularly challenging for the claimants.[22] This raises questions about the lack of precise boundaries between fraud and claimant error.

5. ECONOMIC COST OF BENEFIT FRAUD AND ERROR VARY PER BENEFIT TYPE

Our international evidence suggests that social security benefits which are means-tested have higher levels of fraud and error than those which are not. In a survey of 5 OECD countries the average level of fraud and error in means tested benefits was between 5-10% of overall benefit expenditure, followed by unemployment benefits and disability programs at 1-2%. The lowest rates of fraud and error (0.1-1%) appear in old age pension benefits and child benefits. These are benefit streams where misrepresenting qualification would be difficult for claimants.[23]

There are two main reasons for this higher risk in means-tested benefits: [24]

- Complex eligibility requirements; and
- Changing eligibility over time due to changes in personal circumstances

We reflect further on this in the section on drivers of fraud and error below.

6. INDIRECT ECONOMIC IMPACT OF SOCIAL SECURITY FRAUD

While attempts are being made at measuring social security fraud there are affiliated areas of both costs and savings which could also be considered. These include indirect losses (withholding of potential tax revenue) and fraud displacement costs. Here, a general comment is that the evidence is quite limited and generally anecdotal.

It can be argued that those who misrepresent their circumstances to receive benefits falsely then have a disincentive to work because of the income generated through the fraud. This in turn would lead to lost tax revenue. For instance, a benefit claimant receives incapacity benefits, when they are in fact capable of engaging in employment, leads to a productivity loss and potential tax revenue withheld from the state. Estimating the value of such losses is challenging as there is no comprehensive data and establishing the counterfactual is difficult. We cannot know with certainty whether this benefit claimant would have been in gainful employment without the falsely claimed benefit.

---

22) Department of Social Protection Fraud Initiative 2011-2013, 2012. Progress Report. [online]. Available at http://www.welfare.ie/en/downloads/DSP_Fraud_Initiative_Progress_Report_to_end_Dec_%202012.pdf/ [Last accessed 26 July 2013].

23) van Stolk C. & Tesliuc E. (2010). Toolkit on tackling error, fraud and corruption in social protection programs. World Bank.

24) Ibid.

However, the UK national fraud strategy contains some insights on fraudulent behaviour. This document claims that one type of fraudulent behaviour is often associated with other types of fraudulent behaviour and crime.[25] As such there could be wider economic costs associated with fraudulent behaviour. It also argues that a person committing benefit fraud is also more likely to be part of the hidden economy.[26] Provokingly, the report also argues that anti-fraud initiatives in one sector lead to displacement effects in other sectors. As such, a significant impact on benefit fraud could disadvantage other sectors.[27] These effects have not been quantified. Finally, there is an argument whether fraud or crime in general compromise economic growth.[28] In short, the question is: does fraud compromise economic growth in certain countries?

The cost of combatting fraud is also not negligible. In 2008, the UK government spent £1 for every £1.50 it identified in overpayments. Of this £1.50, it only managed to recover £0.375. The reason for this discrepancy is twofold. Often administrators will not or cannot pursue a person. Secondly, overpayments are often taken out of future benefit payments to the claimants (as many benefit claimants are disadvantaged and would struggle to pay back a full amount) and as such the recovery of overpayments is low and happens over time. Though these calculations could not capture the deterrent effect of its activities, it shows that reducing fraud even further may be an expensive proposition. As such, governments such as the United Kingdom and Australia have started focusing on establishing the cost-benefit of anti-fraud interventions to ensure the returns outweigh the investment made. For instance, the Australian government expects a multimedia campaign encouraging citizens to notify service providers on changing circumstances to lead to savings of £115.5m over four years. The campaign would in turn cost £22m to administer. There is a growing evidence of the cost-effectiveness of initiatives, mainly from Anglo-Saxon countries.[29]

Finally, there may be a cost associated with the 'non-take ups' of benefits. This includes individuals who (deliberately or not) do not claim the benefits they are entitled to. This could be due to an unwillingness to take up benefits, a lack of knowledge of entitlements or due to a system error.[30] In the United Kingdom, underpayments are estimated to be potentially higher than

25) *The displacement and substitution effects are mentioned in Levi, M., Burrows, J., Fleming, M. H., & Hopkins, M. (2007). The nature, extent and economic impact of fraud in the UK. London: ACPO.*

26) *See e.g. Evason, E., & Woods, R. (1995). Poverty, deregulation of the labour market and benefit fraud. Social Policy & Administration, 29(1), 40-54.*

27) *National Fraud Strategic Authority (2011). Fighting Fraud Together. London: TSO.*

28) *For a study on Italy see, Detotto, C., & Otranto, E. (2010). Does crime affect economic growth?. Kyklos, 63(3), 330-345.*

29) *National Audit Office (2008). Progress in Tackling Benefit Fraud. Report with RAND Europe. London: National Audit Office.*

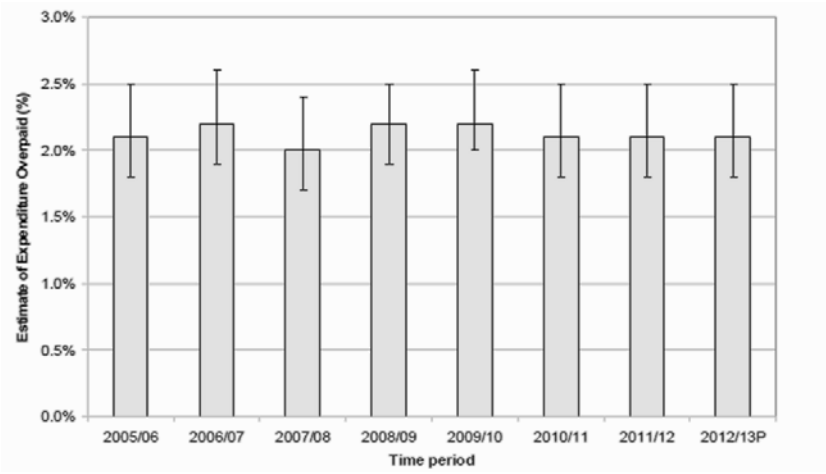
30) *Van Oorschot has written about non take-up of benefits, see Van Oorschot, W. (1991). Non-take-up of social security benefits in Europe. Journal of European Social Policy, 1(1), 15-30.*

overpayments. The UK's Department for Work and Pensions estimates that the total underpayment due to error across all benefits will be £1.4bn in 2013, about 0.9% of the total expenditure. The few measurements that we collected and presented in the table above suggest that error can be a more substantial issue than fraud itself.

While underpayments may appear to save costs for the state, they also potentially mask economic losses. As eligible claimants have less expendable income, their VAT contributions are in turn smaller. It is also possible that those who do not receive the social security benefits for which they are eligible put a strain on the welfare state in other ways, for instance by requiring other forms of costly support such as housing or medical care.

7. THE ECONOMIC RECESSION AND FRAUD

We also want to reflect on the relationship between the economic climate and fraud and error. There is however only anecdotal evidence of any connection between the economic climate and benefit fraud or related areas such as crime. In this instance, we take the example of the UK given the availability of reliable measurements over time. The UK may very well be an outlier given the strong emphasis on fraud and error mitigation over time. When looking at the numbers as presented below, the overwhelming impression has been that the economic climate since 2008 has not impacted on benefit fraud significantly. In fact, benefit fraud has remained largely stable since 2008.[31] We can broadly make the same argument for error and underpayments.[32]



Source: Department for Work and Pensions

31) *Department for Work and Pensions (2013). Fraud and Error in the Benefit System: Preliminary 2012/13 Estimates. Newcastle: Department for Work and Pensions.*

32) *Department for Work and Pensions (2013). Fraud and Error in the Benefit System: Preliminary 2012/13 Estimates. Newcastle: Department for Work and Pensions.*

This trend has also been noted in other sectors in the UK such as reported crimes.[33] This raises the paradox whether the economic crisis has actually been good for crime reduction. Can we make the same argument for benefit fraud in the UK?

In contrast, it appears that attitudes in society have hardened against benefit fraud. As such, there appears to be less tolerance for benefit fraud and the issue has become more prominent on political party agendas.[34] Some studies allude to an association between levels of fraud in society and the political salience of the topic.[35] Political attention can translate into more effective measures, regulation, and creating societal awareness around the topic.

This also raises a final question. The UK example appears to suggest that fraud and error have remained stable over a period of time. Does this suggest that there is a point beyond which it becomes difficult and perhaps very expensive to reduce fraud and error further? This is an interesting observation for politicians and administrators alike (see earlier points about the cost of an effective strategy).

8. DRIVERS OF FRAUD AND ERROR IN SOCIAL SECURITY SYSTEMS

Studies allude to a relationship between benefit expenditure (or more precisely social security contributions) and fraud and error in the social security system. Higher contributions lead to higher incidences in illicit activities. Some studies argue that countries with a high level of taxation also tend to have higher levels of participation in the hidden economy, contributing to tax losses for the state.[36] [37] The same studies seem to indicate that the quality of institutions and over-regulation also appear to matter in explaining the size of the hidden economy with countries with better

33) *For a recent commentary on the decline in UK crime rates see for instance, Dr Siddhartha Bandyopadhyay, Senior lecturer in Economics, Department of Economics, University of Birmingham, available at http://www.birmingham.ac.uk/schools/business/departments/economics/news/2013/april/the-paradox-of-falling-crime-rates-in-a-recession.aspx (accessed, September 2013).*

34) *Sefton, T. (2009). Moving in the right direction? Public attitudes to poverty, inequality and redistribution. Towards a more equal society, 223-244.*

35) *For an example on Finland see, Alvesalo, A., & Tombs, S. (2001). Can economic crime control be sustained? The case of Finland. Innovation: The European Journal of Social Science Research, 14(1), 35-53. For further examples on white collar crime see, Podgor, E. S. (2010). White-Collar Crime and the Recession: Was the Chicken or Egg First. U. Chi. Legal F., 205.*

36) *See e.g. Schneider, F. (2002). The size and development of the shadow economies of 22 transition and 21 OECD countries; Schneider, F. (2002, July). Size and measurement of the informal economy in 110 countries. In Workshop on Australian National tax centre; Friedman, E., Johnson, S., Kaufmann, D., & Zoido-Lobaton, P. (2000). Dodging the grabbing hand: the determinants of unofficial activity in 69 countries. Journal of public economics, 76(3), 459-493.*

37) *National Audit Office (2008). Comparing how some tax authorities tackle the hidden economy. Report together with RAND Europe. London: National Audit Office.*

quality institutional arrangements recording less illicit activities or a smaller hidden economy.

Other studies talk mainly about motivation.[38] They may talk about the erosion of the notion of citizenship and solidarity in society. They may also discuss the acceptability of fraudulent behaviour in society.

However, our findings suggest a more structural conclusion. We found that complexity of the benefit system as exemplified by the number of benefits and complex eligibility requirements appears to be associated with high levels of fraud.[39] If the process of claiming benefits, making changes to existing claims and administering benefit claims are complicated, more fraudulent claims appear. This is also borne out in an analysis of the main reasons why fraud and error occur in international social security systems.[40] The main causes for fraud and error appear to be:

- Customer dishonesty: This includes undeclared income and failing to report changes in material circumstances;
- Exploiting the system: This includes multiple program claims and misrepresentation of material circumstances and identity fraud; and
- Complexity of the social protection system: This includes cross-jurisdictional claims and complexity of rules and regulations.
- Staff: This includes excessive staff caseloads, inadequate support and training of case managers and team coaches, breakdown or override of internal control;
- System: This includes the failure of payment system, failure of IT systems, problematic information management, and inadequate monitoring or reporting procedures; and
- Complexity: Complexity of benefits and rules confuse administrators and benefit claimants.

Complexity of rules and processes also has an impact on state/service provider error, contributing to both overpayment and underpayment.[41] In this way, the same process that costs the state money also makes the state money as it unfairly disadvantages claimants due to maladministration.

More complex requirements give greater opportunities to those wanting to commit benefit fraud and also cause a greater number of errors on the side of claimants and benefit staff. In addition, complex requirements can be hard

38) *We do not provide an exhaustive list of references here, but see e.g. Sefton, T. (2009). Moving in the right direction? Public attitudes to poverty, inequality and redistribution. Towards a more equal society, 223-244*

39) *van Stolk C. & Tesliuc E. (2010). Toolkit on tackling error, fraud and corruption in social protection programs. World Bank.*

40) *Ibid.*

41) *Levi, M., Burrows, J., Fleming, M. H., & Hopkins, M. (2007). The nature, extent and economic impact of fraud in the UK. London: ACPO.*

to verify. Finally, benefit systems are often not designed with the claimant in mind and can create perverse incentives through the ease of compliance with procedures for the claimant to comply. The complexity of the benefit system perhaps does not fully explain why someone may want to commit fraud (as is the case in motivations studies). However, it explains the 'opportunity' for someone to do so.

9. CONCLUSION

Establishing the economic cost of benefit fraud across social security administrations is constrained by how fraud is defined in different national and cultural contexts and whether fraud is measured in a systematic way. Our review of the available evidence across a number of European countries concludes that:

- fraud and error can represent a substantial loss to the taxpayer in OECD countries, with fraud and error in several OECD countries accounting for, on average, between 2-5% of social security budgets;
- error can be a more significant problem (and is becoming a more significant issue) than fraud in several social security systems;
- certain means-tested benefits or those with complex eligibility requirements are more prone to fraud;
- underpayments can be considerable and are often neglected when determining economic costs; and
- the economic crisis since 2008 may have impacted fraud differently or less significantly than perhaps expected.

Looking at this analysis, what are the lessons for policy makers? We identify four main lessons:

- Policy makers need to look at the system as a whole and focus on fraud as well as error and underpayment;
- Measurement of fraud and error is important not only in determining the overall size of the problem but also in promoting an understanding of the effectiveness of the initiatives put in place to combat the problem;
- Simplification of the benefit system and processes used to administer the benefit system is likely to have the biggest impact on benefit fraud and error; and
- There may be an acceptable level of fraud and error beyond which it is difficult and not cost-effective to reduce fraud and error further (though it is likely difficult for politicians to accept this).

CONTROL MECHANISMS IN THE FINNISH EARNINGS-RELATED PENSION SCHEME

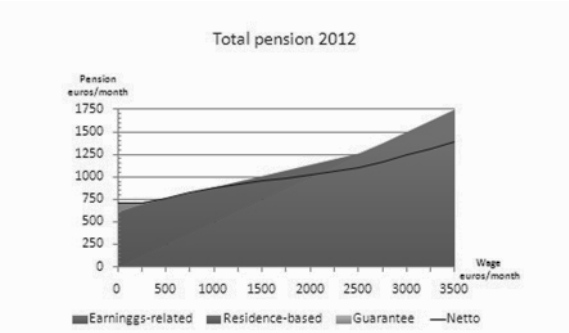
Riitta KORPILUOMA

Finnish Centre for Pensions

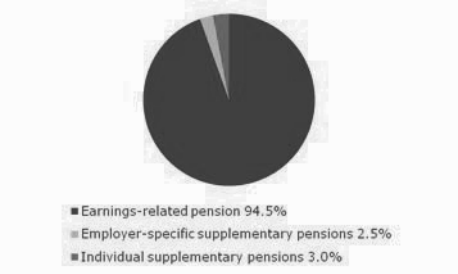
Contents

1. INTRODUCTION

In Finland, the earnings-related pension scheme covers those who work or have worked as employees or self-employed persons. The residence-based national pension (including guarantee pension) ensures minimum security for those who have not yet entered the labour market or whose working career remains short.



In the earnings-related pension scheme, there is no upper limit to covered income and no pension ceiling, i.e. all income accrues a pension. This is why occupational and personal private pensions play a minor role.



2. CHARACTERISTICS OF THE FINNISH EARNINGS-RELATED PENSION SCHEME

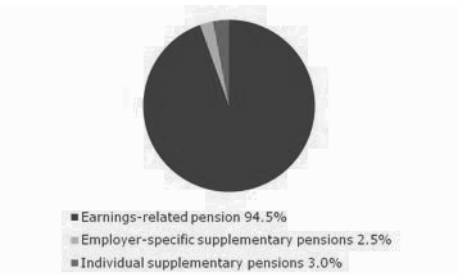
Coverage

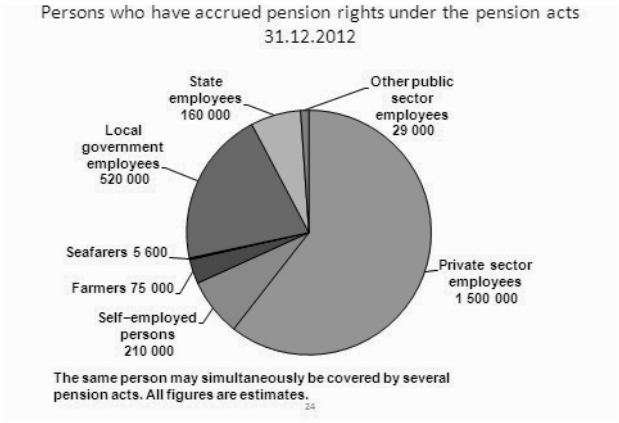
The statutory earnings-related pension scheme covers all workers in all industries in Finland. The scheme consists of several laws for private sector workers, seafarers, public-sector workers, farmers and other self-employed persons. The principles and benefits are practically the same for all workers, civil servants and the self-employed.

The earnings-related pension scheme is managed by pension insurance companies, industry-wide and company pension funds, as well as special pension providers for public sector em-ployees, seafarers and farmers.

The private-sector employer is liable to take out insurance for his/her employees. The employer chooses the pension provider. A self-employed person is liable to insure himself in a pension company of his own choosing.

The public-sector employers (the local government, state and Evangelical-Lutheran church) are liable to arrange pensions for their employees in a special pension institution (Keva) which also supervises this obligation.





Benefits

The benefits are:

- old-age pension (age 63-68)
- part-time pension (age 61-67)
- full and partial disability pension (age 18-62)
- survivors' pension and
- vocational rehabilitation (age 18-62)

3. THE FINNISH CENTRE FOR PENSIONS (FCP)

The Finnish Centre for Pensions is a statutory joint body for the earnings-related pension scheme, but not part of government administration. It produces services for all parties to the pension scheme (both private and public-sector pension providers).

The administrative bodies of the FCP are

- Board of Representatives, chairman and deputy chairman of the Board of Directors appointed by the Ministry of Social Affairs and Health
- Board of Directors includes representatives from labour market organisations, the State and earnings-related pension insurance companies.

The operating expenses of the FCP are financed with earnings-related pension contributions. The FCP provides services common to the decentralised earnings-related pension scheme:

- Assessments and projections
- Research and statistics

- Registers
- Supervision
- Legal, actuarial and customer information services
- Training and communication relating to pension provision
- International services.

Further information (in FI, SW, EN)

- www.etk.fi for experts in the field
- www.tyoelake.fi for citizens.

4. CONTROL MECHANISMS IN THE FINNISH EARNINGS-RELATED PENSION SCHEME

It is a statutory responsibility of the Finnish Centre for Pensions to supervise the private sector employers' and the self-employed persons' insurance obligation. The private-sector employer is liable to take out insurance for his/her employees and report their earnings to the pension insurance company (monthly or annually). The employer chooses the pension provider. A self-employed person is liable to insure himself in a pension company of his own choosing.

If an employer or a self-employed person neglects the insurance obligation, the FCP can take out pension insurance at the employer's or self-employed persons' expense.

Public-sector employers are liable to arrange pensions for their employees in a special pension institution (Keva) which also supervises this obligation.

The goals of the FCP's supervision are

- to ensure pension security for employees and the self-employed
- to give assistance to pension insurance providers (information for levying the insurance contributions)
- to ensure fair competition between companies and
- to participate in the prevention of grey economy.

A preventive method of supervision is a an information letter send by the Finnish Centre for Pensions for all starting companies, entrepreneurs and self-employed persons about the employer´s or the self-employed persons´ obligation to take out the pension insurance.

The FCP supervises the compliance of the insurance obligation by comparing the Tax Administration income registers´ data with the Pension Scheme's common pensionable income register´s data (the mass supervision). The real-time mass supervision of labour-intensive industries began in 2008. The retroactive mass supervision of all Finnish employers started in 2010.

The labour-intensive sectors are targeted three or four times a year (almost real-time supervision of construction, transport and catering business). The advanced tax information on wages paid is compared to the employer´s monthly reports of his employees´ pensionable income in the pension provider´s register.

Retroactive mass supervision takes place once a year and covers practically all employers in Finland. Here the final tax information on wages paid is compared to the employer´s final yearly report of his employees´ pensionable income in the pension provider´s register. This same method is used to supervise the self-employed persons´ insurance obligation.

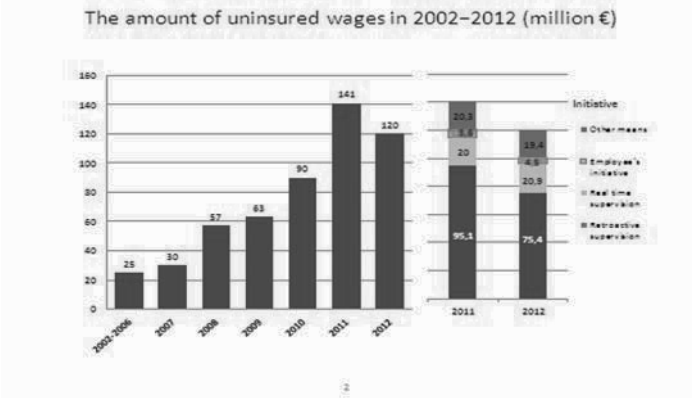
If the information on income differs and there is no adequate (legal) explanation for the difference, the FCP will check the employer´s or the self-employed person´s business, as a last resort by visiting the workplace.

Supervision may also be based on an insured person's inquiries about his/her pension insurance. The insured employees receive an extract of the pension register and a forecast of their future pension every third year. They are advised to control the information and contact their pension provider if they find neglect or deficiencies. The employees may also check their pension insurance information (pension accrual, pensionable income and forecast of future pension, both private and public sector) on the Internet any time they want.

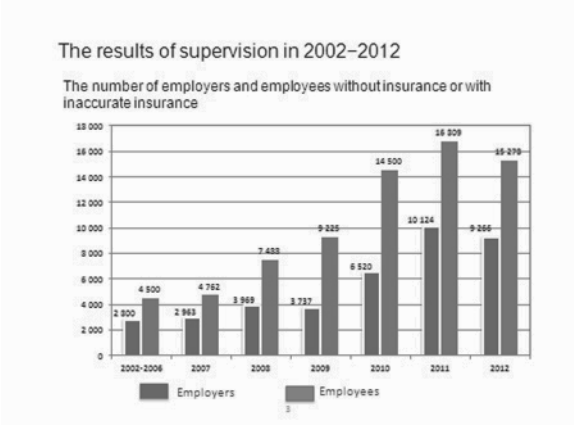
The pension insurance companies may ask the FCP to check a certain employer's business and the accuracy of his income reports. The FCP also gets incentives through the cooperation between different authorities (e.g. Tax Authorities, Regional State Administrative Agencies, Police, etc.).

If the employer or the self-employed person has neglected his insurance obligation or there are some deficiencies, the FCP first advises the employer or the self-employed person to correct the neglect. As a last resort, the FCP can take out pension insurance at the employer's or the self-employed person´s expense, if the employer or the self-employed person is not willing to comply.

The results of the two new mass supervision methods have been quite impressive. While in 2002-2006 the sum of uninsured pensionable income found by the FCP´s supervision was on average 25 million euros a year, it was 141 million euros in 2011 when retroactive mass supervision of practically all Finnish employers was made for the first time. In 2012 the amount of the uninsured income was a bit smaller, 120 million euros, probably due to the fact that most of the operating employers had corrected their neglect and deficiencies. Of the 120 million euros, 75.4 million were found by the retroactive mass supervision, almost 21 million by the real-time mass supervision and 19.4 million by other means. Only 4.5 million was found based on the employee´s own initiative.



Based on the FCP´s supervision and measures, in 2012 almost 15,300 employees got the pension accrual they were entitled to and which otherwise would have been lost. Unfortunately there are no statistics on the amount of the pension accrual in question. In 2012 approximately 9,300 employers had neglected their insurance obligation or had deficiencies in their income reports.



5. CONCLUSIONS AND CHALLENGES

Employers heed the insurance obligation quite well in Finland. Employers operating totally without insurance are quite rare. Cases of neglect account for about 0.1-0.2 per cent of all insurable income. The inaccurate payments are mostly made by employers who are still operating, and they tend to pay the contributions at the latest when advised to do so. It seems that it is reasonably difficult to properly do business in Finland totally without pension insurance.

However, the grey economy seems to bloom also in Finland. The most challenging branch is the construction business. By the supervision methods used by the FCP, those who don´t comply with any statutory obligations are hard to find. They may be targeted only by cooperation with different authorities.

Migrant workers and self-employed persons are also a growing problem when it comes to insurance neglect. There is a lack of information on where their social security should be arranged. The rules on applicable legislation are also quite complicated and thus difficult to comply with. And there are of course always those who make it their business not to follow the obligations.

During this year the Finnish Centre for Pensions is clarifying whether it is possible to establish a register of posted workers and open it to public. The aim would be that anybody could check the authenticity of the certificate of a posted employee working in Finland.

COMBATTING FRAUD IN PUBLIC ADMINISTRATION AND PRIVATE INSURANCE. COMMON CHALLENGES - COMMON SOLUTION?

Martin ANDRESEN

Norwegian Labour and Welfare Administration

INTRODUCTION: A NATIONAL OR COMPARATIVE POINT OF VIEW?

This presentation has a national point of view, not a comparative one. The main reason is that there are few comparative studies in this field. Those that exist are mainly benchmarking studies, including the UK and a select number of other countries (i.e. Commonwealth countries).

In a 2007 report, a World Bank report concluded that "Making like for like comparisons between countries is challenging, due to

- Institutional differences
- Varying benefit types and funding
- Lack of availability of comparable data

My impression is that the conclusion from 2007 is still valid. There has however been a marked increase in cooperation in combating fraud at the European level since the adoption of regulation 883/2004 in 2010. Hopefully, this cooperation will also generate better data for comparative studies in the future.

This means that our ambition for this presentation is to shed some light on the subject, and to share some Norwegian experience on public and private cooperation - a cooperation that has improved after changes in the legislation were introduced in 2009. My colleague Harald Bjerke will focus more on the way cooperation works in practice in his part of the presentation.

Three questions

In my presentation, I will shortly address three questions:

- Why combat fraud in the first place?
- What are the possibilities of - and limitations on - public / private cooperation in this field?

Finally, I will briefly address a question on organized crime:

- Is organized (benefit) crime mainly a challenge for the public sector?

1. *WHY* COMBAT FRAUD?

This may seem like an odd question, but it is always important to ask the question "why".

The EISS has a 45 year long tradition of bringing together scholars from different academic disciplines - legal experts, social scientists and economists, along with administrators.

What would a representative for each of these discipline answer to the question? My guess is something like this:

The legal expert will point out that benefit fraud is a form of economic crime. The social scientist will probably say something like "fraud is a threat to solidarity, and hence to the legitimacy of social security", while the most ("hard-core") economist might say that "Benefit fraud is nothing but *alternative distribution of society's surplus* (!)"

The latter statement may sound like a traditional "economist's joke", but it is not - it is an argument that I have actually heard from economists. It is, however, not as crazy as it sounds. Instead, it reminds us of an important aspect of the current debate on fraud: There has always been fraud committed against both social and private insurance, but the focus on fraud has grown stronger during the last 15-20 years. One important reason is possibly that the extent of fraud has grown, making the threat to solidarity more menacing than before. (It should also be mentioned that there is a similar solidarity in private insurance as well: Most people insure their homes against fire, even though only a few people actually experience fire in their homes. Those that are lucky thus act in "solidarity" with those who are unlucky.)

2. PUBLIC AND PRIVATE COOPERATION - POSSIBILITIES AND LIMITATIONS

When discussing public and private cooperation in combatting fraud, there are several important aspects that should be addressed:

- The benefits (differences between public and private sector benefits)
- The legal framework (legislation on confidentiality and protection of data)

- Is there an inherent conflict of interests between the sectors?

The benefits

In most countries (at least in Europe), social insurance offers a wider range of benefits than private insurance normally does.

Norwegian data shows that 1,199 persons were reported to the police (for police investigation) by NAV in 2012 for having fraudulently claimed NOK 211 million (app. € 26,5 million).

- 722 people were reported for having fraudulently claimed unemployment benefit totalling NOK 93 million.
- 142 people were reported for having fraudulently claimed sickness benefits in cash, totalling NOK 30 million.
- 49 people were reported for having fraudulently claimed disability benefit totalling NOK 24 million

Private insurance in Norway offers neither unemployment benefits nor sickness benefits in cash. The private sector mainly provides supplementary pensions (both disability and old age), occupational injury benefits and (to a lesser degree) health services. The public sector has a broader scope, and hence more "opportunities" for fraud.

The legal framework

The legal framework that regulates public and private cooperation in this field is of course important.

The starting point is simple: Legislation on confidentiality and information security / protection of data prevents all sharing of information from public to private sector. There are, however, three important exceptions from this starting point:

- Informed consent (normally given when a person takes out insurance) overrules confidentiality legislation. Consent in this form can only be given by an individual, not by e.g. an employer or a trade union.
- Criminal investigations, conducted by the police
- Specific legal exceptions

There are several such legal exceptions, but one of them is of special interest to public / private cooperation. In 2009, in an amendment to the National Insurance Act made it possible for private insurers and the National insurance Administration to exchange information in cases where the institution (either a public or a private one) suspects fraud. This amendment has enhanced the possibility of cooperation between public and private providers of social insurance. My colleague will present the way this cooperation works in practice.

Conflict of interests?

The last question is if there are possible conflicts of interests between public and private sector - also when fraud is considered?

My short reply is "Yes". One obvious conflict is the possibility for "cream skimming" in private insurance (e.g. disability benefits) if all information possessed by the National insurance were made available for private disability insurers. Another conflict is a bit more subtle: What happens when the anti-fraud unit with the National Insurance ask for information from private sector (e.g. complete medical records from a person's GP)? They do have the authority to do so, but the medical profession do not like it. They fear that it violates doctor / patient confidentiality, and hence (in some cases) may block effective treatment.

3. ORGANIZED CRIME?

Most of you recognize this man [picture in PP presentation]. Al Capone in many ways personifies the term "organised crime". He is, however, interesting for another reason: He was never convicted of the 100+ murders he was (supposedly) responsible for - but on the other hand, he finally received an 11 years prison sentence for to tax fraud.

Our experience is that benefit frauds has become more "interesting" to the police, because a conviction normally results in a prison sentence. This means it is sometimes easier to have mobsters put away if they are (also) convicted for benefit fraud.

Organized benefit fraud seems to be an increasing problem, though we have few data on the subject 20 or 30 years ago in order to analyse the long term trends. Organised fraud has various forms and shapes, including "pro forma" businesses, false medical certificates and fake identities. Much of this organised fraud stretches across national borders, like other forms of organised crime, making cooperation on a European level important.

Norwegian data suggests that organised crime targets public sector benefits, especially unemployment benefits, single parents allowance and sickness benefits. The private sector (at least in Norway) deals mainly with pensions and occupational injuries. These benefits are long-term, and the case management involves medical experts to a higher degree than for many short-term benefits. Hence, theses benefits are harder to "reach" for organised crime. The potential is there, however. Several medical doctors in Norway have been condemned to prison sentences for selling false medical statements, thus helping fraudsters get disability benefits.

COMBATING FRAUD IN PUBLIC ADMINISTRATION AND PRIVATE INSURANCE

Harald BJERKE

Manager
Financial Crime Unit, Finance Norway

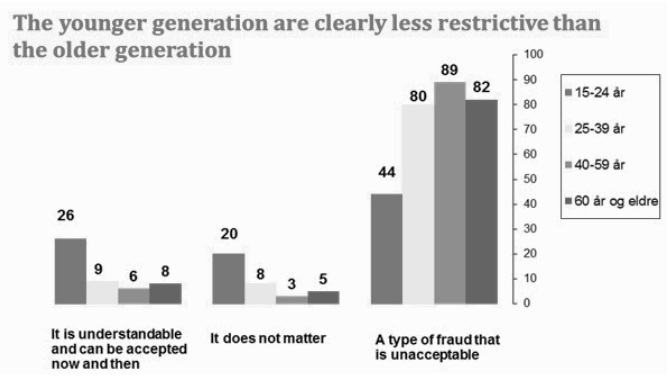
Tendency to defraud - moral views

During 2012 Norwegians attempted to defraud insurance companies of 72 million Euros.

In April 2013, 4202 individuals throughout Norway were questioned about their moral views of insurance fraud. Target group: Norway's adult population, aged 15 or above.

The following questions were put:

- How do you feel about "adding on a bit" when an insurance claim is sent to the insurance company after an insured event?
- Do you think it could be understandable in certain instances, it's acceptable now and then, doesn't matter, or is it a type of fraud that is unacceptable?



Whereas for the whole population - all age groups, 78 per cent consider it fraud to add a little extra when submitting an insurance claim, only 44 per cent of the population in the group aged 15-24 think the same. Most young people do not see it as fraud when one enters incorrect assertions to trick the insurance company to achieve an unjust settlement.

At the same time 26 per cent of the youngest think insurance fraud is OK. One in five young people see it as completely insignificant whether or not they commit fraud.

It is also in the youngest age group that the fewest believe there will be any reaction whatsoever if the fraud is discovered.

It is among the youngest age group we find the widest perception that it is the insurance company and the state that lose money on insurance fraud - there is little understanding that other insurance customers have to pay higher premiums.

Why is collaboration important?

Systems based on trust are often subject to exploitation and fraud.

NAV (Norwegian Labour and Welfare Service) and the insurance industry are defrauded of millions every year! We see that fraud cases involving personal injury, insurance fraud and benefits fraud, are closely linked.

Statutory collaboration

It is both wrong and unnecessary that individuals who have defrauded one body should be able to go on and defraud another. Since fraud against NAV and the insurance industry are closely linked, we obtained statutory collaboration in 2009. It then became permissible through legislation for the insurance industry and NAV to alert each other in cases related to suspicion of fraud.

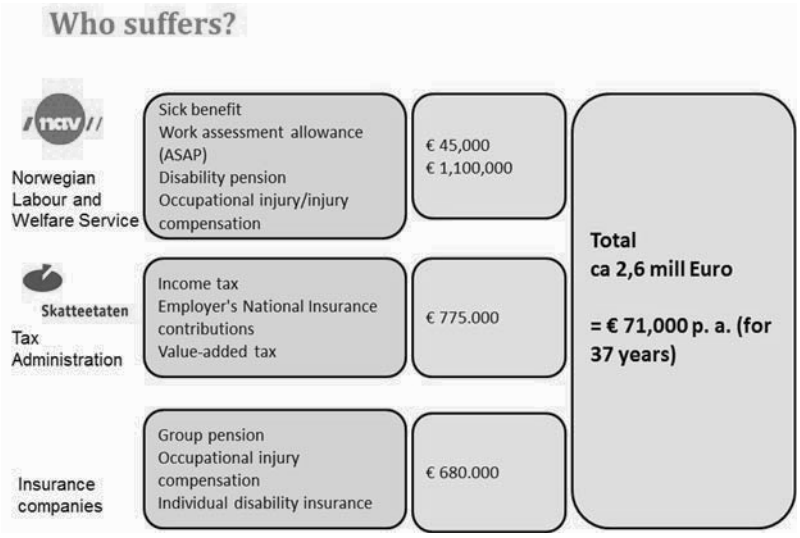
In addition, joint seminars and working groups are arranged with representatives both from NAV and the insurance industry. The aim of the information exchange is to catch those who defraud the system and in this way undermine the confidence that exists in our welfare system. The result of this cooperation with NAV has confirmed something the insurance industries have long feared: many who are caught for insurance fraud also have a record of fraud elsewhere.

Who suffers?

The columns and numbers below are taken from a real case, where a person claimed injury compensation, sick benefit and disability pension after an accident. In reality he defrauded the insurance company because the

accident had not given any permanent damage. The numbers shows the totals fraud can generate over time.

The numbers is an estimate.



- The "injured" person was 30 years old, and had an estimated salary is about 45.000 Euro.
- He gets sick benefits for 1 year.
- He was granted 100 % Occupational injury compensation from his insurance company in 2009.
- He got disability pension from both insurance and NAV.
- He also gets Work assessment allowance (ASAP) and disability pension from NAV.
- After 5 years with disability pension he is regarded as permanently disabled until retirement at an age of 67.
- In addition to the pensions, he also receives a larger one-time payment in the form of occupation injury compensation claims.

- In reality the suspect started working again after 6 months.
- With illicit work, he earns about the same as before, but he is cheating the community for taxes.
- From the day his"injury" occurs until retirement, this one person costs society almost 2,6 mill euro - 71.000 Euros per year.

The insurance company got suspicious when this man founded a new company (2011)

The insurance company also tipped off NAV in this case.

This is the costs of one person only. Imagine what large sums fraud in total generates!

Fraud against NAV, the insurance industry and tax administration costs society enormous sums each year!

Fraud against the public administration and private insurance is a social problem that requires cooperation.

COORDINATING NATIONAL AND EUROPEAN ACTIVITIES IN THE COMBAT OF SOCIAL SECURITY FRAUD [1)]

Marc MORSA

Service public fédéral Sécurité sociale
Direction générale appui stratégique
Service relations multilatérales

Table des matières

---

1) L'auteur de cette contribution s'exprime en sa qualité de représentant du gouvernement belge mais la contribution peut comporter certaines opinions personnelles qui n'engagent aucunement la Belgique.

LIMINAIRE

La coopération et la coordination entre acteurs dans la lutte contre la fraude sociale constitue un enjeu central. Il s'agit de deux actions interdépendantes. Ainsi, alors que la coopération vise l'action par laquelle les institutions des Etats membres de l'UE mues par un intérêt commun (celui de la correcte application des règlements européens de coordination ; de la correcte perception des cotisations sociales, etc.) collaborent à une action commune (la lutte contre la fraude sociale), la coordination renvoie à la nécessité d'harmoniser les activités diverses liées à cette collaboration dans un souci d'efficacité. Pour cette raison, nous utiliserons " accolés ", dans le cadre de notre contribution, les termes " coopération et collaboration ".

I. LA COORDINATION DES ACTIVITÉS EN BELGIQUE POUR COMBATTRE LA FRAUDE À LA SÉCURITÉ SOCIALE : LA COOPÉRATION ET LA COORDINATION RENFORCÉES !

1. Le travail non déclaré est un phénomène complexe !

1. - Le travail non déclaré est un phénomène complexe qui prospère en raison de différents facteurs tels que la pression fiscale et les coûts élevés de la main-d'œuvre, une bureaucratie envahissante, un manque de confiance dans le gouvernement, l'absence de contrôle, la pénurie d'emplois réguliers sur le marché du travail et des niveaux élevés d'exclusion sociale et de pauvreté. Il convient d'examiner et de traiter ces facteurs dans le cadre plus large de la stratégie Europe 2020 et en tenant compte de la nécessité de réformes structurelles afin de rendre les marchés du travail plus inclusif [2)].

" La fraude sociale peut se comprendre comme un abus en matière de droit du travail, de droit à la sécurité sociale et de l'aide sociale afin de se soustraire aux règles administratives et aux charges y liées. L'éventail des exemples est très large et dépasse de loin les affaires de fraude aux allocations. Il s'agit également du " travail au noir ", de la dissimulation de revenus qui non seulement permet d'éviter une partie de l'impôt mais permet également de profiter d'avantages sociaux liés aux niveaux des revenus déclarés (bourses d'études, tarifs divers déterminés au prorata du revenu…). L'exemple du travail au noir ou de la dissimulation d'une part des revenus montre combien la limite entre la fraude fiscale et la fraude sociale est ténue et pourquoi certains la considère comme inexistante. En effet, les fraudes opérées touchent aussi bien les contributions fiscales et parafiscales. Que ce soit la fraude fiscale ou la fraude sociale l'effet principal est identique, à savoir la réduction de l'assiette fiscale et ce faisant des recettes de l'État et des

2) *Commission européenne, 4 juillet 2013, C(2013) 4145 final, document de consultation des partenaires sociaux, conformément à l'article 154 TFUE, sur le renforcement de la coopération entre États membres de l'Union européenne pour la prévention et la discussion du travail non déclaré*

ressources dont il dispose pour mener des politiques de redistribution et produire des biens et services à l'usage de la collectivité. Les phénomènes de fraude évoqués ci-dessus ont des conséquences néfastes autant pour les entreprises, et les individus que pour les pouvoirs publics " [3)].

2. - À la suite de la crise économique et sociale, la préoccupation relative au niveau élevé du travail non déclaré figure parmi les priorités de la politique de l'UE visant à améliorer la création d'emplois, la qualité de l'emploi et l'assainissement budgétaire. Le travail non déclaré a de lourdes conséquences budgétaires du fait qu'il entraîne une perte de recettes fiscales et de cotisations sociales. Il nuit à l'emploi, à la productivité et aux conditions de travail, à l'acquisition de compétences et à l'apprentissage tout au long de la vie. Il ne permet guère la constitution de droits à pension et n'offre guère accès aux soins de santé [4)].

2. Le travail non déclaré est un phénomène difficilement mesurable mais le processus décisionnel, tant politique qu'administratif, ne produit des effets que lorsqu'il est basé sur une qualification et une quantification correctes du phénomène

3. - Il est un fait acquis que le processus décisionnel, tant politique qu'administratif, ne produit des effets que lorsqu'il est basé sur une qualification et une quantification correctes du phénomène du travail non déclaré. Ce dernier doit être appréhendé dans sa définition la plus large, afin d'arriver à une compréhension adéquate de tous ses aspects.

4. - Le professeur J. Pacolet (KUL) a consacré ces dernières années de nombreuses études, sous l'angle essentiellement économique, au phénomène de l'économie souterraine, du travail illégal et de la fraude sociale [5)]. Selon cet auteur, la fraude est " *une notion non mesurable et un phénomène coriace* " [6)], " *un phénomène aux facettes multiples* " [7)].

---

3) M. MONVILLE, " Fraude : Fiscale vs sociale ", Lettre mensuelle socio-économique, n° 152, octobre 2009, Conseil Central de l'Économie, pp. 11-12

4) Commission européenne, 4 juillet 2013, C(2013) 4145 final, ibidem.

5) J. PACOLET et A. MARCHAL, Strijd tegen sociale en fiscale fraude, HIVA, K.U.Leuven, 2001, 261 p.

6) J. PACOLET, S. PERELMAN, P. PESTIEAU et K. BAEYENS, avec collab. O. FAYE et B. SOUMAGNE, Un indicateur de l'étendue et de l'évolution du travail au noir en Belgique, Étude commandée par le Service public fédéral Programmation politique scientifique et le Service public fédéral Emploi, Travail et Concertation sociale, 15 juin 2007 ; voy. V.C., " Qu'est-ce que frauder ? ",Le Journal du médecin, n° 2039, 20 novembre 2009, p. 8.

7) J. PACOLET, S. PERELMAN, P. PESTIEAU et K. BAEYENS, avec collab. O. FAYE et B. SOUMAGNE, Un indicateur de l'étendue et de l'évolution du travail au noir en Belgique, op. cit., p. 7.

5. - Dans ses lignes directrices en matière d'emploi, la Commission européenne a accordé une place considérable à la lutte contre le travail au noir [8]. À l'origine, une identification et une quantification de ce travail étaient aussi demandées. L'édition spéciale 2007 de l'Eurobaromètre, consacré au travail non déclaré dans l'Union européenne, présente les résultats d'une enquête dans toute l'UE en se concentrant sur l'opinion publique concernant la question. En dépit de son caractère pilote et relativement petite échelle, l'enquête a révélé l'existence dans tous les pays d'un grand marché pour le travail non déclaré dans des secteurs spécifiques et en outre souligné que l'évitement des impôts et des charges administratives sont les principaux facteurs qui donnent lieu à une hausse du phénomène combiné à une faible prise de conscience des sanctions en cas de détection. L'étude fait également référence à la prévalence du phénomène parmi les travailleurs indépendants et les chômeurs et à l'importance croissante des paiements de la main dans certains secteurs comme l'industrie de la construction.

6. - À l'heure actuelle, il existe des estimations assez divergentes pour ce qui est du travail non déclaré en Belgique, lesquelles oscillent entre 3 ou 4 % à 20 % du PNB. Suivant J. Pacolet, la cause de ces estimations aussi divergentes tient peut-être à des différences de définition ou aux différentes méthodes utilisées pour obtenir ces résultats [9].

Peu importe la méthode utilisée, l'exhaustivité est impossible [10]. La fraude est un sujet important mais délicat [11]. En Belgique, le manque à gagner - et donc à dépenser - s'élèverait à plus de 30 milliards d'euros et l'économie souterraine représenterait 21,5 % du PIB. Cette proportion n'aurait pas diminué malgré les diverses mesures prises visant directement ou indirectement à réduire cette proportion. Pensons à l'amnistie fiscale, au développement des chèques services ou encore aux dispositions prises en matière de lutte contre la fraude fiscale. De son côté, la Banque nationale de Belgique a évalué l'ensemble de la fraude fiscale et de la fraude sociale à 6,6 milliards d'euros [12].

---

8) C. DENEVE, " Sociale fraude in België, situering, vormenen omvang ", in M. DESPONTIN et M. JEGERS, De sociale zekerheid verzekerd ? Toespraken, commentaren en geselecteerde papers van het 22e wetenschappelijk economisch congres, VUBpress, 1995.

9) J. PACOLET, S. PERELMAN, P. PESTIEAU et K. BAEYENS, avec collab. O. FAYE et B. SOUMAGNE, Un indicateur de l'étendue et de l'évolution du travail au noir en Belgique, op. cit., p. 5.

10) J. PACOLET, S. PERELMAN, P. PESTIEAU et K. BAEYENS, avec collab. O. FAYE et B. SOUMAGNE, Un indicateur de l'étendue et de l'évolution du travail au noir en Belgique, op. cit., p. 10.

11) M. MONVILLE, " Fraude : Fiscale vs sociale ", Lettre mensuelle socio-économique, n° 152, octobre 2009, Conseil Central de l'Économie", op. cit., pp. 11-12.

12) Jan VRANKEN, de l'Université d'Anvers en 2004, in JDW, " Maar 65 OCMW's bij Kruispuntbank ", Gazet van Antwerpen, 7 décembre 2004, précise que le montant de la fraude sociale atteindrait 4,4 milliards d'euros par an.

Une étude réalisée en mai 2010 par le département d'Économie Appliquée de l'Université libre de Bruxelles estime que la fraude fiscale à elle seule oscille entre 5 et 6 % du PIB [13)].

7. - Le 19 avril 2012, les résultats d'une nouvelle enquête sur les activités frauduleuses des Belges, sur leurs opinions et leurs motivations [14)] ont été présentés aux autorités politiques ainsi qu'aux différents stakeholders [15)]. Ce qui ressort des études, outre les tentatives en vue de mesurer l'ampleur de la fraude sociale et fiscale, ce sont davantage les déterminants de la fraude et de la lutte contre la fraude que l'on peut identifier par un triangle de forces qui peuvent en même temps servir de point de départ dans la lutte contre la fraude : il s'agit de la moralité fiscale (d'une personne, d'un pays), de la pression fiscale (ou de l'avantage de se soustraire à cette pression) et du contrôle (risque d'être pris et amende). Pour les causes, est mentionnée presque exclusivement la pression fiscale, donc l'avantage de frauder. Pour le jugement de la politique, on accorde toutefois aussi de l'attention facteur de contrôle. La politique même peut ainsi en déduire qu'il ne faut pas tout attendre de la seule diminution de la pression fiscale, mais que la population s'attend aussi à ce qu'il y ait un système de contrôle adéquat.

8. - A cet égard, tous les angles d'approche utilisés peuvent cependant contribuer à éclairer le phénomène. Pour approcher et mettre en évidence sa complexité, il est préférable de recourir à une triangulation à partir de ces divers angles. Il convient également de tenter de concilier les différentes méthodes de mesure, étant donné qu'aucune d'entre elles n'apporte de solution probante [16)]. Ici s'applique également le principe selon lequel plus il y a de perspectives, plus l'appréhension du phénomène est complète. Ce

---

13) H. DIALLO, G. KARAKAYA, D. MEULDERS et R. PLASMAN, Estimation de la fraude fiscale en Belgique, étude réalisée à la demande de la FGTB, Département d'Économie Appliquée de l'Université Libre de Bruxelles, www.dulbea.org, 14 mai 2010. Dans ce rapport, écrivent les auteurs précités, " nous fournissons également nos propres estimations de la fraude fiscale en Belgique en utilisant deux méthodes d'estimations différentes. La première méthode qualifiée de microéconomique consiste à comparer le revenu déclaré dans l'enquête sur le budget des ménages avec le revenu déclaré aux autorités fiscales. Sur la base de cette approche, nous avons obtenus une perte en recettes fiscales d'environ 20 milliards d'euros, soit 6 % du PIB, en 2006. Ce chiffre comprend aussi bien la fraude découlant d'activités licites que celle pouvant résulter d'activités illicites. La seconde méthode utilisée est basée sur l'écart entre le taux théorique et le taux effectif de la TVA. Cette méthode macroéconomique ne capture que la fraude provenant d'activités licites et aboutit à une perte en recettes fiscales de l'ordre de 16 milliards d'euros, soit 5 % du PIB, en 2008. En conclusion, nos évaluations soutiennent l'existence d'une perte en recettes due à la fraude fiscale tournant autour de 15-20 milliards d'euros (soit entre 5 et 6 % du PIB) en Belgique. Les chiffres ainsi obtenus sont relativement proches des estimations réalisées par d'autres auteurs et soulignent l'importance du problème en Belgique ".

14) L'enquête porte l'acronyme " Sublec " = Study on Black Economy.

15) L'étude a été commanditée et financée par le SPF (Ex-ministère des affaires sociales) Sécurité sociale et le SPP Politique scientifique BELSPO. Cette étude est le fruit d'une collaboration entre la KU Leuven (HIVA), l'ULg (CREPP) et l'ULB (METICES). HIVA, Onderzoeksinstituut voor Arbeid en Samenleving ; CREPP, Center of Research in Public Economics and Population Economics ; METICES, Migrations, Espaces, Travail, Institutions, Citoyenneté, Epistémologie, Santé.

16) M. MORSA, " les inspections sociales en mouvement ", Larcier, préface de C. V.DE BOCARMÉ, collection droit social

processus de conciliation des méthodes doit être confié de préférence à un institut de statistiques apte à garantir la qualité et la continuité du produit. Ceci implique l'existence d'un système permettant l'inclusion des données des divers partenaires (in crime) dans le calcul. La mise en place d'un système de comptes satellites pourrait y répondre parfaitement.

9. - Les efforts consentis par l'ICN en matière d'estimation exhaustive de l'économie souterraine doivent être complétés par les résultats obtenus par les services de contrôle et d'inspection des lois sociales et fiscales à partir des données récoltées sur le terrain.

La Belgique dispose de tous les atouts requis pour s'attaquer à la réalisation d'une estimation de l'économie souterraine dans toutes ses manifestations et pour réagir ainsi adéquatement aux menaces que celle-ci comporte pour notre état-providence.

3. La prise en compte du phénomène de la fraude sociale en Belgique

3. a) La prise en compte politique du phénomène de la fraude sociale

10. - En Belgique, la prise en compte du phénomène de la fraude sociale dans le discours politique remonte au début des années quatre-vingt dans un contexte d'assainissement des finances publiques [17], associée parfois à des motivations différentes comme celle de préserver notre système de sécurité sociale [18]: Au fil du temps, les représentations " politiques " conférées à ce phénomène se sont diversifiées : d'abord, l'attention (toutes tendances politiques confondues) s'est focalisée sur l'usage impropre des allocations

---

17) M. MORSA, "les inspections sociales en mouvement", Larcier, 2011, préface de C. Visart de BOCARME, postface de Ph. GOSSERIES, p.25.

18) Voy. C. VISART de BOCARMÉ, " Pour une politique intégrée de lutte contre la fraude ", mercuriale de rentrée de la cour du travail de Liège, J.T.T., 2008, p. 457 ; P. GOSSERIES, " Postface ", in Ch.-E. CLESSE et G.-F. RANERI, La doctrine juridictionnelle du droit pénal social, coll. Droit social, Larcier, 2010, pp. 1096-1097, qui écrit magnifiquement que " le droit pénal social, au cœur du droit social, poursuit l'objectif de rendre effectif en sanctionnant ses violations et donc ses infractions dans les conditions déterminées par la loi. Le droit social comprend le droit du travail, le droit de la sécurité sociale et celui de l'aide sociale qui sont des droits fondamentaux garantis par l'article 23 de la Constitution, ce qui situe l'importance du droit pénal social. C'est à la condition de l'effectivité de ces droits sociaux que ceux-ci réa- lisent l'objectif énoncé par la Constitution, en son article 23, à savoir le droit de chacun de mener une vie conforme à la dignité humaine [par la libération du besoin social de chacun]. […] Les lois du travail, du droit de la sécurité sociale, du droit à la protection sociale et à l'aide sociale qui ont pour objectif de respecter la dignité humaine de chacun, comme la Constitution le garantit, en son article 23, sont fondamentales pour l'ordre démocratique de sorte que les violer constitue une atteinte à cet ordre et dès lors sont à contrôler, à poursuivre et à sanctionner dans le respect du droit ". Voy. X. HAUBRY, Le contrôle de l'inspection du travail et ses suites, coll. " Pour comprendre ", L'Harmattan, 2010, p. 7, qui écrit que " la force du droit, et notamment du droit du travail, évite également que ceux qui ne sont pas économiquement les plus forts mais qui sont les plus nombreux, envisagent de s'auto-attribuer le droit de la force " ; J. PACOLET, " Un indicateur de l'étendue et de l'évolution du travail au noir en Belgique ", Rev. b. séc. soc., 4e trimestre 2008 ; J. ALBRECHT, " Sociale fraude en sociaal kapitaal ", Itinera Institute Nota, 2008/37, p. 3.

sociales en y intégrant des comportements connexes liés à la fraude sociale (le travail au noir, etc.) pour englober progressivement d'autres phénomènes hétérogènes tels que le recours à la pseudo-indépen- dance, la lutte contre les négriers dans le secteur de la construction ainsi que la fraude aux cotisations de sécurité sociale dès l'année 1996.

Au tournant du XIXe siècle, le politique évoque " la notion de "grande fraude sociale" qui renvoie davantage à des pratiques liées à la criminalité financière et économique d'acteurs sociaux qui sont soit totalement dans l'illégalité (filière d'importation de travailleurs clandestins), soit aux frontières entre l'illégalité et la légalité (entreprises développant des techniques en vue de contourner les lois sociales) " [19].

11. - Ce n'est qu'en 1993 que le politique fait référence explicitement aux services d'inspection sociale en tant que dispositif à mettre en œuvre pour lutter contre la fraude sociale (renforcement des inspections sociales pour contrer l'usage impropre dans le cadre de l'assurance chômage) [20]. C'est à cette même époque qu'à défaut d'avoir pu imposer la fusion des services d'inspection sociale , le gouvernement opta pour une coordination structurée et institutionnalisée entre les divers services d'inspection sociale afin de lutter de façon plus efficace contre les infractions en matière de législation sociale 5 : tel est l'objet du protocole de collaboration entre les différents services de contrôle conclu le 31 juillet 1993 par les différents ministres concernés. À côté, un train de mesures spécifiques ont été prises pour lutter contre le travail au noir comme, par exemple, la diminution des charges sociales dans les secteurs perméables à la fraude sociale (p. ex., le recours au calcul des cotisations sociales sur la base de forfaits dans le secteur Horeca, la mise en place du système des titres-services [21], etc.).

12. - Au tournant du XXIe siècle, la note d'orientation générale relative à la lutte contre le travail illégal de la ministre de l'Emploi du 26 octobre 1999 mettant en œuvre la déclaration gouvernementale préconisant le développement d'un État social actif au travers de sept mesures dont une est précisément la lutte contre le travail au noir ou illégal [22] tracera ce faisant le cadre de travail et de réflexion pour les années futures, dont celui de la réforme du droit pénal social.

---

19) C. NAGELS et S. SMEETS, " La fraude sociale est-elle une priorité politique (criminelle) ? ", in La fraude sociale : une priorité politique criminelle, Actes du colloque organisé par l'École de sciences criminologiques Léon Cornil en hommage à Pierre Vandervorst, Bruylant, 2009., p. 19,

20) Séance plénière de la Chambre du 31 mars 1993, communication du gouvernement, Ann. parl., 1992-1993, p. 1831 (http://www3.dekamer.be/digidoc/ANHA/K0097/K00972396/K00972396.PDF).

21) L'Écho, 3 février 2009, p. 10; C. VISART de BOCARMÉ, " Pour une politique intégrée de la lutte contre la fraude ", op. cit., p. 457.

22) P. VANDERVORST, " Vingt ans après… 1981-1985/2001-2005 (avant-dire) ", Rev. b. séc. soc., 1er trimestre 2007, point 3. Les signes annonciateurs du moment, p. 11.

13. - À partir de l'année 2003, la fraude sociale devient enfin une priorité spécifique de politique criminelle alors que précédemment la fraude sociale était considérée comme moyen d'action ou comme conséquence dans le cadre de la criminalité organisée [23]. Mais si le terme " fraude sociale " est mentionné explicitement dans la déclaration du gouvernement Verhofstadt en 2003 comme " phénomène criminel indépendant d'autres criminalités " [24], la fraude sociale n'est cependant envisagée que de manière très limitée dans l'accord du gouvernement [25]. Il reste qu'à partir de l'année 2003, la notion de fraude sociale va, par extension, s'étendre à d'autres phénomènes criminels : la traite des êtres humains et la lutte contre le travail illégal.

14. - En 2007, le ministre de la Justice et le collège des procureurs généraux, dans une circulaire commune, vont tracer les grands axes de la politique de poursuite des auditorats du travail [26]. L'entrée en vigueur du Code pénal social au 1er juillet 2011 nécessitait une refonte complète de la circulaire précitée. Aussi, afin de canaliser les hypothèses dans lesquelles l'inspecteur social devrait dresser procès-verbal, une circulaire du 22 octobre 2012 relative à la politique criminelle en matière de droit pénal social [27] [28] trace les grands axes de la politique de poursuite des auditorats du travail par laquelle il est stipulé que les dossiers, qui mettent en exergue des fraudes organisées, des infractions graves de droit pénal social qui mettent en péril le fondement même de la sécurité sociale des travailleurs salariés et préjudicient gravement le financement de ce système, feront l'objet de poursuites par l'auditeur du travail.

---

23) C. NAGELS et S. SMEETS, " La fraude sociale est-elle une priorité politique (criminelle) ? ", op. cit., p. 31.

24) Déclaration de politique générale du gouvernement Verhofstadt du 12 octobre 2004 ; voy. égal. les grandes lignes de la lutte contre la fraude sociale présentées dans la note " Respect de la solidarité " lors du conseil des ministres des 16 et 17 janvier 2004 à Gembloux.

25) C. NAGELS et S. SMEETS, " La fraude sociale est-elle une priorité politique (criminelle) ? ", op. cit., p. 40.

26) Circulaire n° COL 3/2007.

27) Circulaire n° 12/2012 du Collège des Procureurs généraux près les Cours d'appel du 22 octobre 2012.

28) Voy. P. PONSAERS, "onderzoek naar vervolging", in " sociaal strafrecht - van controle tot veoordeling ", Yves Jorens ed. Die Keure, 2011, p.39-41 qui relate les résultats de son enquête auprès de plusieurs services d'inspection de laquelle il ressort qu'il existe des critères opérationnels déterminant les cas dans lesquels ces services d'inspection vont dresser procès-verbal de constatation d'infraction (matière concernée ; le secteur visé comme la traite des êtres humains ; la non-souscription d'une assurance contre les accidents du travail, etc.) . Parfois ces critères sont relatés des guides de bonnes pratiques propre à tel service ou bien encore discuté lors de réunions avec les inspecteurs. En tout cas, il existe une certaine garantie d'uniformité de traitement.

3. b) Le renforcement des moyens d'action législatifs, humains, informatiques…

3.b.1)Les moyens d'action législatifs, humains, informatiques

15. - Cette prise en compte de la fraude sociale et la volonté de l'éradiquer vont s'accompagner d'un renforcement des moyens d'action existants :

- la mise en place d'une structure permanente de coordination des différentes actions menées par les services d'inspection sociale contre le travail au noir et la fraude sociale (Conseil pour la lutte contre le travail illégal et la fraude sociale [29)], transformée en Service d'Information et de Recherche Sociale (en abrégé le " SIRS ") en 2006 [30)] ;
- l'accent placé sur l'échange accru d'informations entre les parquets, les auditorats et les services d'inspection sociale [31)] ;
- ola création tant attendue de chambres correctionnelles spécialisées en droit pénal social au sein des tribunaux de première instance et des cours d'appel [32)] ;
- la modification de l'article 138bis, § 2, du Code judiciaire donnant à l'auditeur du travail le droit d'agir d'office devant le tribunal du travail afin de faire constater une infraction aux lois et règlements relevant de la compétence des juridictions du travail et qui touche à l'ensemble ou à une partie des travailleurs d'une entreprise [33)] ;
- l'accroissement considérable des pouvoirs des services d'inspection (pouvoir de recherche et d'examen) [34)], déjà qualifiés par la doctrine de " fort étendus et souvent peu définis " [35)] compensés - faut-il le souligner - par l'octroi de garanties formelles et d'une voie de recours à l'encontre des mesures de contrainte imposées par l'inspection sociale (insertion des art. 4quinquies et 4sexies, L. 16 novembre 1972 concernant l'inspection du travail [36)]) ;

---

29) L. 3 mai 2003 instituant le Conseil fédéral de lutte contre le travail illégal et la fraude sociale, le Comité fédéral de coordination et les Cellules d'arrondissement (M.B., 10 juin 2003).

30) L.-progr. 27 décembre 2006, titre XII. Institution du Service de Recherche et d'information sociale en matière de lutte contre la fraude sociale et le travail illégal, les cellules d'arrondissement et la commission de partenariat et abrogation la loi du 3 mai 2003 instituant le Conseil fédéral de lutte contre le travail illégal et la fraude sociale, le Comité fédéral de coordination et les Cellules d'arrondissement.

31) Directive n° COL 13/2005 relative à l'échange d'informations entre les parquets et les auditorats et les services d'inspection sociale.

32) L. 3 décembre 2006 modifiant diverses dispositions légales en matière de droit pénal social.

33) Cet article a été introduit par la loi du 3 décembre 2006 modifiant diverses dispositions légales en matière de droit pénal social.

34) L. 20 juillet 2006 modifiant certaines dispositions de la loi du 16 novembre 1972 sur l'inspection du travail.

35) H.-D. BOSLY, Les sanctions en droit pénal social belge, Story-Scientia, 1979, p. 78 (réf. citée par F. KÉFER, " Un jour, peut-être un Code pénal social… ", in Droit pénal social : actualités et prospectives, op. cit., pp. 13-32.

36) Ces dispositions ont été introduites par la loi du 20 juillet 2006 portant des dispositions diverses.

- l'introduction du e-PV [37) 38)]. Avec l'application e-PV (procès-verbal électronique), les autorités belges entendent améliorer la lutte contre la fraude par à un traitement plus rapide des procès-verbaux et à un meilleur échange d'informations [39) 40)]. L'introduction des PV électroniques doit conduire, en outre, à des PV de meilleure qualité et donc aussi à plus de poursuites et plus d'amendes administratives, parce que moins de PV seront classés sans suite pour cause d'insuffisante qualité [41)] et, ce à moindre coût [42)].

---

37) Toutefois, afin de garantir notamment le respect de la vie privée lors de l'échange d'e-Pv aussi bien entre services d'inspection sociale qu'entre les inspections et la justice, une loi spécifique est rendue nécessaire. De même, le projet e-PV soulevait des objections d'ordre juridique de la part du monde judiciaire concernant la gestion de la banque de données e-PV et la constitution d'un organe de contrôle de cette base de données : tel est l'objet particulièrement du chapitre 5 intitulé " rréglementation de certains aspects de l'échange électronique d'information entre les acteurs de la lutte contre le travail illégal et la fraude sociale " inséré dans le Code pénal social par la loi-programme du 29 mars 2012 ; Loi-programme du, titre VII " lutte contre la fraude ", section 8 " La réglementation de certains aspects de l'échange électronique d'information entre les acteurs de la lutte contre le travail illégal et la fraude sociale ". - Art. 85-99, M.B. 6 avril 2012, entré en vigueur le 16 avril 2012

38) Pour plus de détails, voy. M. MORSA, " infractions et sanctions en droit social ", préface de H-D BOSLY, Larcier, Collection droit social, juin 2013.

39) Communiqué de presse de Carl DEVLIES, " Un pv électronique pour tous les services d'inspection sociale ", 5 janvier 2011.

40) Le projet e-PV, réalisé dans le cadre du plan d'action pour la lutte contre la fraude pour la période 2008-2009, vise à l'instauration d'un procès-verbal électronique. Le projet poursuit les objectifs suivants :

- *élaborer un modèle uniforme de procès-verbal, sécurisé et électronique ;*
- *créer une banque de données centrale reprenant toutes les données figurant dans les e-PV, lesquels pourront être intégrés dans la banque de données par les inspecteurs eux-mêmes permettre l'envoi des e-PV par voie électronique ;*
- *permettre aux institutions de sécurité sociale d'exploiter les données recueillies dans le cadre de la lutte contre la fraude sociale améliorer la lisibilité des procès-verbaux, dans l'intérêt du justiciable ;*
- *améliorer la qualité des procès-verbaux ;*
- *mieux garantir la charge de la preuve.*

41) Communiqué de presse de Carl DEVLIES, ibidem, dans lequel le secrétaire d'Etat précise qu' " Actuellement, pour diverses raisons, 29 pourcents des pv sont encore classés sans suite, 25 pourcents donnent lieu à des poursuites pénales et 40 pourcents à une amende administrative. 4 millions d'euros d'amendes administratives sont infligés par an, dont 3 millions sont effectivement perçus ".

42) Communiqué de presse de Carl DEVLIES, ibidem, dans lequel le secrétaire d'Etat précise indique que " Quand le projet aura été réalisé complètement, le produit sera de 5,4 millions par an. "Le prix de revient de l'epv s'élève jusqu'à présent à 1,5 millions d'euros. Assurément pas un mauvais investissement"".

16. - Durant la législature actuelle, le gouvernement belge n'a pas ménagé ses efforts en vue d'adopter de nouveaux dispositifs législatifs [43)] (ajoutés à une liste déjà bien longue) en vue de lutter tant contre la fraude sociale que la fraude fiscale.

17. - Sans être exhaustifs, relevons l'arrêté royal visant à lier l'octroi des prestations sociales au paiement de la première cotisation sociale dans le régime des travailleurs indépendants [44)], l'institution d'une concertation permanente entre la Cellule de Traitement des Informations Financières (CTIF) et le Parquet de Bruxelles afin de mieux lutter contre le blanchiment d'argent. Citons également un mécanisme légal permettant d'assurer la publicité des revenus des propriétaires d'entreprises fantômes (trusts...) situées dans des paradis fiscaux, la loi-programme (I) du 29 mars 2012 qui étend la responsabilité solidaire pour les dettes sociales et fiscales [45)] et qui

---

43) Tout en ne contestant pas la légitimité de la lutte contre la fraude sociale, la fédération des entreprises belges demande instamment au gouvernement de ne plus résoudre des problèmes spécifiques par le biais de nouvelles règles générales qui vont systématiquement de pair avec une complexité croissance, de nouvelles obligations et une insécurité juridique. Évitez que nos entreprises doivent faire les frais des erreurs commises par d'autres. Ainsi, les limites géographiques de nos instances de contrôle (elles ne peuvent agir hors de Belgique) les amènent à s'attaquer à l'entreprise belge qui s'est embarquée avec une entreprise de mauvaise foi. De plus, il y a un grand besoin de plus de logique et de cohérence entre les différentes mesures. En effet, les entreprises n'ont plus une vision globale et elles opèrent dès lors constamment dans une zone grise où elles risquent de commettre des infractions. - See more at: http://vbo-feb.be/en/Business-issues/government-and-policy/Fraud/Les-entreprises-preoccupees-par-la-lutte-contre-la-fraude-sociale/#sthash.VxObJCgn.dpuf

44) Cette mesure vise à éviter que des personnes qui n'ont pas de résidence principale chez nous s'affilient à une caisse d'assurances sociales pour travailleurs indépendants, dans le seul but de bénéficier de tels droits, alors qu'elles n'exercent pas ou ne comptent pas exercer d'activité professionnelle en Belgique.

45) La deuxième section du Titre 7 - "Lutte contre la fraude" de la loi-programme (I) du 29 mars 2012 (le "Loi-programme") étend la responsabilité solidaire pour les dettes sociales en modifiant l'article 30bis de la loi du 27 juin 1969 et en insérant un nouvel article 30ter dans cette même loi. Le gouvernement a en effet constaté que les entrepreneurs et les sous-traitants se rendent encore trop souvent coupables de fraudes sociales sans que l'on puisse les sanctionner, parce qu'ils changent de nom trop rapidement ou qu'ils disparaissent dans la nature. Pareilles pratiques aboutissent à des distorsions de concurrence et à une perturbation du marché (du travail). Dans le secteur de la construction immobilière, il existe depuis quelque temps un mécanisme de responsabilité solidaire. Ce mécanisme consiste en ce que le donneur d'ordre ou l'entrepreneur qui fait appel à un sous-traitant soit solidairement responsable du paiement des dettes sociales de son cocontractant, sauf s'il a respecté son obligation de retenue. L'obligation de retenue est l'obligation pour le donneur d'ordre ou pour l'entrepreneur de retenir et de verser 35% du montant dont il est redevable à l'ONSS lorsqu'il constate dans une base de données disponible en ce sens que le sous-traitant a des dettes sociales. La Loi-programme octroie au Roi le pouvoir d'étendre le champ d'application de ce mécanisme à d'autres secteurs à risques, après avis des commissions paritaires compétentes. En outre, la Loi-programme introduit un mécanisme de responsabilités en cascade tant pour les nouveaux secteurs que pour le secteur de la construction immobilière. Cette responsabilité en cascade implique que la responsabilité solidaire s'exerce à l'égard des entrepreneurs intervenant à un stade précédent, lorsque l'entrepreneur solidairement responsable s'est abstenu (partiellement) d'acquitter les sommes qui lui sont réclamées sur base de la responsabilité solidaire. Dans la mise en œuvre de la responsabilité, l'ordre chronologique est respecté. Il s'ensuit que l'entrepreneur qui a fait appel au sous-traitant en infraction, sera sollicité avant que l'on ne remonte la chaîne. Par ailleurs, la responsabilité solidaire pour les dettes fiscales est également étendue aux nouveaux secteurs et une responsabilité en cascade est également mise en place pour ces dettes.

introduit une responsabilité solidaire pour les dettes salariales [46)], l'accroissement du cadre du personnel des inspecteurs sociaux, l'accroissement des moyens à mettre au service du fisc, dont déjà 276 chasseurs de fraude de plus ; le relèvement des montants des amendes fiscales jusqu'à plusieurs millions, en prenant en considération que la fraude organisée dissimule souvent des organisations criminelles de grande ampleur, brassant illégalement des sommes face auxquelles les amendes prévues ne paraissaient plus du tout proportionnées ; le renforcement des pouvoirs des enquêteurs en matière fiscale, comme le droit de perquisition en concertation avec le Parquet, etc.

3.b.2) Le code pénal social [47)]

18. - La mise sur pied d'une commission de réforme du droit pénal social [48)]. Cette commission procéda par étapes et débuta ses travaux dès le 11 janvier 2001. Dans la première phase de ses travaux, la Commission a élaboré un avant-projet de loi modifiant certaines dispositions de droit pénal social d'ordre procédural, dont l'ampleur était limitée. Une partie substantielle de ce travail est devenue la loi du 3 décembre 2006 modifiant diverses dispositions légales en matière de droit pénal social et la loi du 3 décembre 2006 contenant diverses dispositions en matière de droit pénal social qui visent à créer une chambre correctionnelle spécialisée pour connaître des infractions de droit pénal social au sein du tribunal de première

---

46) La quatrième section du Titre 7 - "Lutte contre la fraude" de la Loi-programme introduit un mécanisme de responsabilité solidaire salariale. Ce mécanisme est tout à fait neuf et s'inscrit dans la loi du 12 avril 1965 concernant la protection de la rémunération des travailleurs. Les donneurs d'ordre, les entrepreneurs et les sous-traitants sont dorénavant solidairement tenus du paiement de la rémunération des travailleurs lorsque leurs entrepreneurs ou les sous-traitants succédants à ceux-ci manquent gravement à leur obligation de payer dans les délais, à leurs travailleurs, la rémunération à laquelle ceux-ci ont droit. Les secteurs auxquels ce mécanisme s'appliquera devront encore être déterminés par arrêté royal. L'inspection sociale joue un rôle-clé dans ce nouveau mécanisme de responsabilité solidaire: les inspecteurs doivent informer par écrit les donneurs d'ordre, les entrepreneurs et les sous-traitants de ce que leurs entrepreneurs ou les sous-traitants qui leur succèdent manquent gravement à leur obligation de payer dans les délais la rémunération due à leurs travailleurs. Est en principe censée être une infraction grave à l'obligation de paiement de la rémunération, le paiement d'une rémunération inférieure au barème salarial le plus bas applicable dans le secteur concerné. L'inspection sociale détermine la période pendant laquelle la responsabilité solidaire est d'application. Cette période prend cours après l'expiration d'un délai de 14 jours ouvrables après la notification de l'inspection. Cela implique que le responsable solidaire a le temps de se libérer de la chaîne afin d'échapper à la responsabilité. A cet égard, la rédaction de certaines clauses dans les différents contrats d'entreprise sera de la plus grande importance. Le responsable solidaire est sommé de payer la rémunération soit à la demande de l'inspection soit directement à la demande d'un des travailleurs concernés. La rémunération due est définie comme "la rémunération devenue exigible dès le début de la période de responsabilité solidaire, à l'exception des indemnités auxquelles le travailleur a droit à la suite de la rupture du contrat de travail". Le responsable solidaire qui paie la rémunération d'un travailleur d'un de ses entrepreneurs ou des sous-traitants qui leur succèdent, paie les cotisations de sécurité sociale y afférentes. Le Roi déterminera les modalités selon lesquelles ces cotisations devront être calculées, déclarées et payées.

47) Pour un commentaire exhaustif du Code pénal social, voy. M. MORSA, " infractions et sanctions en droit social ", préface de H-D BOSLY, coll. droit social, Larcier, 2013.

48) Commission instituée par l'arrêté royal du 19 juillet 2001, M.B., 28 juillet 2001.

instance et de la cour d'appel (modifiant les articles 76, alinéa 6, et 99 bis du Code judiciaire) ainsi qu'une action en faveur de l'auditorat du travail (par l'insertion dans le Code judiciaire de l'article, 138bis, § 2) [49]. Au cours de la deuxième phase des ses travaux, la Commission s'est assignée une tâche de plus grande ampleur, en se lançant dans la rédaction d'un avant-projet qui prendra la forme d'un Code pénal social censé répondre aux causes d'inefficacité relevées ci-dessus.

La commission a achevé ses travaux en septembre 2005 par la remise d'un second rapport portant codification du droit pénal social aux trois ministres compétents [50]. Ce rapport a été coulé en un avant-projet de loi introduisant le code pénal social (celui-ci s'écarte, cependant, sur un certain nombre de points, des recommandations de la Commission, parfois de manière substantielle) et en un avant-projet de loi comportant des dispositions de droit pénal social. L'adoption du projet de Code pénal social a connu un parcours parlementaire chaotique notamment ensuite des problèmes politiques et institutionnels du moment. Ainsi, l'avant-projet de loi déposé le 30 mars 2007 à la Chambre des représentants n'ayant pu être adopté avant la dissolution des chambres [51] était rendu caduc [52]. Le projet de loi contenant un futur et attendu Code de droit pénal social [53] a été redéposé le 11 décembre 2008 à la Chambre des représentants [54], adopté en séance plénière par cette dernière le 4 décembre 2009 et transmis ensuite au Sénat [55] pour être adopté dans les deux chambres le 6 mai 2010.

19. - La loi du 6 juin 2010 contenant le Code pénal social a été publiée au *Moniteur belge* du 1er juillet 2010 et est entrée en vigueur le 1er juillet 2011 [56]. Une seconde loi du 2 juin 2010 comportant des dispositions de droit pénal social complète la loi du 6 juin 2010 [57]. Cette dernière comprend, d'une part, les recours contre les mesures de contrainte prises par les

---

49) M.B., 18 décembre 2006, pp. 72540 et 72538; voy. Ph. GOSSERIES, "quelques réflexions à propos de l'auditorat du travail. Bilan et plaidoyer", J.T.T., 10 septembre 2012, pp.292-296.

50) Lequel a fait l'objet d'une publication, voy. SPF Justice, Commission de réforme du droit pénal social. Rapport des travaux 2001-2005, Anthémis, 2006, 454 p.

51) Doc. parl., Ch. repr., sess. ord. 2006-2007, n° 51-3059

52) Ch.-E. CLESSE, Les inspections sociales : devoirs et pouvoirs, Anthémis, 2009, p. 212 ; http://www.lachambre.be.

53) F. KÉFER, " Un Code pénal social : pour quoi faire ? ", Rev. b. séc. soc., 1er trimestre 2007, pp. 27-31 ; F. KÉFER, " Un jour, peut-être un Code pénal social… ", op. cit., p. 14 ; F. KÉFER, " L'architecture générale et les grands axes du Code pénal social ", in La fraude sociale : une priorité de politique criminelle, op. cit., pp. 97-117.

54) Projet de loi introduisant le Code pénal social, Doc. parl., Ch. repr., sess. ord. 2008-2009, n° 52-1666/001.

55) Projet de loi introduisant le Code pénal social, texte adopté en séance plénière et transmis au Sénat, Doc. parl., Ch. repr., sess. ord. 2008-2009, n° 52-1666/013.

56) En effet, conformément à l'article 111 de la loi du 6 juin 2010 précitée, à défaut d'intervention du Roi, le Code pénal social est entré en vigueur le 1er juillet 2011.

57) Il s'agit de trois dispositions devant passer par un processus bicaméral intégral en raison de leur atteinte aux compétences des cours et tribunaux; voy., M. MORSA, "les inspections sociales en mouvement", Larcier, Collection droit social, préface de C. Visart DE BOCARMÉ et postface de Ph. Gosseries, 2011, note infrapaginale n°648.

inspecteurs sociaux en exécution des articles 31, 35, 37, 38 et 43 à 49 du Code pénal social et, d'autre part, les voies de recours à l'encontre des décisions prises par le fonctionnaire compétent imposant une amende administrative. Cette dernière loi devrait être intégrée au Code pénal social [58)] et est entrée en vigueur au 1er juillet 2011 en application de l'article 14 de l'arrêté royal du 1er juillet 2011 [59)].

4. Le plan d'action de lutte contre la fraude 2012-2013 du Collège contre la fraude fiscale et sociale

20. - Le gouvernement belge veut s'attaquer résolument à la fraude organisée ou de grande envergure et renforcer la lutte contre la fraude fiscale et sociale mais également contre la fraude aux allocations et aux aides sociales.

21. - Chaque ministre est " responsable " pour la lutte contre la fraude dans son champ de compétence (fiscal ; emploi, sécurité sociale) et le secrétaire d'Etat à la lutte contre la fraude sociale et fiscale est chargé de la **coordination et du monitoring** de la mise en œuvre du plan.

22. - Le plan 2012-2013 comporte une série de dispositions avec trois objectifs généraux. C'est ainsi que le plan vise à mettre en place une **politique préventive** pour que les fraudeurs potentiels puissent passer moins rapidement à des pratiques illicites. Il prévoit également une lutte plus efficace via notamment un **croisement accru des informations** contenues dans diverses banques de données.

Enfin, avec ce plan, le gouvernement entend éviter que les fraudeurs profitent du produit de leurs pratiques criminelles et abusent des procédures juridiques pour arriver à la prescription.

23. - Le plan vise à lutter contre toutes les fraudes et ce dans un but d'équité.

24. - Le plan entend renforcer et accélérer la coopération européenne en matière de lutte contre la fraude aux allocations. Ainsi, lors d'une enquête sur le cumul d'allocations, le plan d'action insiste sur le fait qu' " *il n'importe pas seulement de focaliser sur le cumul de différents types d'allocations, mais bien davantage sur les allocations d'un même type octroyées dans des pays différents. A coup sûr dans le contexte européen, où la libre circulation des personnes est de mise, cela s'avère indispensable. Le fait de bénéficier d'une allocation de chômage dans notre propre pays, alors que l'on exerce une activité dans un de nos pays voisins est un cas qui est de plus en plus fréquemment constaté par les services d'inspection sociale*[60)] ". Le plan

---

58) En vertu de l'habilitation donnée au Roi par l'article 5 de la loi du 2 juin 2010.

59) Arrêté royal du 1er juillet 2011 (M.B. 6 juillet 2011) portant exécution des articles 16, 13°, 17, 20, 63, 70 et 88 du Code pénal social et fixant la date d'entrée en vigueur de la loi du 2 juin 2010 comportant des dispositions de droit pénal social.

60) Plan d'action de lutte contre la fraude 2012-2013 du Collège contre la fraude fiscale et sociale, pp.107 et s.

d'action relève également le problème posé concernant l'état du patrimoine dans le pays d'origine ou dans un autre pays (biens immobiliers, ressources, …) du bénéficiaire de l'aide sociale au sens large, des personnes vivant avec le bénéficiaire ou les éventuels débiteurs d'aliments. Dans le cadre de l'enquête sociale, les CPAS se trouvent dans l'incapacité de savoir si le bénéficiaire, les personnes vivant avec lui ou les éventuels débiteurs d'aliments disposent par exemple de biens immobiliers dans son pays d'origine [61)].

25. - En vue d'endiguer la fraude transfrontalière le plan d'action du gouvernement reconnaît explicitement que celle-ci ne peut être combattue efficacement que par un échange de données au niveau international. Cela vaut à coup sûr pour la lutte contre la fraude sociale et fiscale grave et/ou organisée, qui requiert une coopération européenne, voire internationale [62)].

A titre d'instruments en vue d'atteindre cet objectif, le plan d'action cite la nécessité de conclure des accords bilatéraux. De même, le Comité général de gestion du statut social des indépendant estime que d'autres accords de ce type doivent être conclus pour optimiser la communication des Etats membres sur les revenus. En effet, les instruments de droit dérivé européen en matière de sécurité sociale [les règlements n°883/2004 du Parlement Européen et du Conseil du 29 avril 2004 portant sur la coordination des systèmes de sécurité sociale [63)] et n°987/2009 du Parlement Européen et du Conseil du 16 septembre 2009 fixant les modalités d'application du règlement (CE) n° 883/2004 portant sur la coordination des systèmes de sécurité sociale [64)]] et de droit du travail [e.a. le directive n°96/71/CE du parlement européen et du conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services] s'avèrent souvent insuffisantes pour faire coopérer concrètement et directement les organismes publics concernés des différents Etats membres. Les règlements UE se limitent en effet à la coopération sur le plan de l'échange de données relatives à des dossiers individuels et ne prévoient ni le transfert des fichiers en vue de pouvoir les coupler, ni des échanges dans le cadre des contrôles effectuées sur le territoire d'un des Etats membres. C'est pourquoi la Belgique a conclu avec la France (2008) et avec les Pays-Bas (2010) un accord-cadre en matière de sécurité sociale. Cet accord vise à lutter contre la fraude, les erreurs et les abus et à garantir l'effectivité des droits sociaux. Cet accord-cadre permet aux organismes concernés des deux Etats de renforcer leur coopération administrative en vue de mieux lutter contre la fraude transfrontalière. Ainsi, ils pourront échanger des données et permettre à leurs agents de participer à des contrôles effectués sur le

61) Plan d'action de lutte contre la fraude 2012-2013, ibidem.
62) Plan d'action de lutte contre la fraude 2012-2013, ibidem.
63) JOUE n° L 166 du 30 avril 2004, entré en vigueur le 1er mai 2010.
64) JOUE n° L 284 du 30 octobre 2009) entré en vigueur le 1er mai 2010.

territoire de l'autre partie. la question des sociétés de management, les domiciles fictifs et les sociétés frauduleuses, la fraude dans le secteur de l'immobilier et de la construction et la fraude aux carrousels dans le secteur du gaz et de l'électricité, sera suivi plus avant

5. La coordination institutionnalisée [65)]

5.a) A défaut de fusion : la coopération institutionnalisée entre services d'inspection sociale

26. - Le cadre institutionnel de coordination défini au titre 1er du Code pénal social s'inscrit dans la politique de lutte contre le travail illégal et la fraude sociale. Que recouvre cette notion de fraude sociale et le travail illégal et quelles sont les instances chargées d'en déterminer la politique ? Selon l'article 1er, § 1er, du Code pénal social, celui-ci définit la fraude sociale et le travail illégal comme " *toute violation d'une législation sociale qui relève de la compétence des autorités fédérales* " [66) 67)]. De manière plus précise, cette notion couvre à la fois la fraude aux prestations et la fraude aux cotisations sociales, à l'exclusion de la fraude commise par des indépendants qui n'est pas visée à moins que l'indépendant n'agisse en qualité d'employeur [68)]. En effet, tant la fraude aux cotisations que celle aux allocations minent le système de solidarité qui sous-tend notre pays et met en péril l'économie saine et concurrente que notre pays défend [69)]. Quant à la politique en la matière, celle-ci est dorénavant définie par le Conseil des ministres qui charge les ministres compétents de son exécution. Cette dernière est ensuite communiquée au Service d'information et de recherche sociale (S.I.R.S.) par les ministres qui ont les Affaires sociales, les Indépendants, l'Emploi et la Justice dans leurs attributions dans les quinze jours qui suivent les notifications du Conseil des ministres (art. 1er, § 2, al. 3, CPS). Fruit des techniques modernes de management, un plan stratégique est élaboré

---

65) L'idée d'une agence de coordination de la lutte contre la fraude fiscale et sociale a été lancée durant les négociations gouvernementales de 2007.

66) Voy. l'article 309 de la loi-programme du 27 décembre 2006. F. KÉFER in Questions de droit social (J. CLESSE et F. KÉFER coord., CUP, vol. 94, Anthémis, 2007, p. 222, § 51, analysant le nouveau dispositif écrit, déclare : " concept pour le moins large puisque, tel qu'il est défini, il pourrait recouvrir la non-institution d'un conseil d'entreprise comme le non-respect des mesures édictées par la loi du 4 août 1996 relative au bien-être des travailleurs et ses arrêtés d'exécution " ; voy. J.-Cl. HEIRMAN, " Les pouvoirs des inspecteurs sociaux ", op. cit., p. 86

67) Cette définition est identique à celle qui était en vigueur sous l'empire de la précédente structure de coordination prévue par la loi du 5 mai 2003 (COLUTRIL) qui elle-même avait dû être remaniée pour tenir compte des remarques formulées par la section de législation du Conseil d'Etat. Cette haute juridiction administrative était d'avis qu'il était primordial d'éviter d'éventuels empiétements sur les compétences dévolues aux entités fédérées (Communautés et Régions) - voy. Rapport fait au nom de la commission des Affaires sociales par M. Bernard Baille, Doc.parl., Ch. repr., sess. ord. 2002-2003, n° 50-2233/002 du 14 février 2003, p. 4.

68) Projet de loi, Doc. parl., Ch. repr., sess. ord. 2006-2007, n° 51-2773/001, pp. 190-191.

69) Projet de loi, Doc. parl., Ch. repr., sess. ord. 2006-2007, n° 51-2773/001, ibidem.

chaque année et communiqué pour le 30 avril au Conseil des ministres. Il porte notamment sur l'approche de la fraude aux cotisations, de la fraude aux allocations sociales et du travail illégal. Après approbation par le Conseil des ministres, un plan opérationnel est établi pour le 15 septembre qui comprend, d'une part, un volet relatif à la fraude aux cotisations sociales et, d'autre part, un autre relatif à la fraude aux allocations sociales. Les deux volets fixent les actions à entreprendre, les projets informatiques à développer, les moyens à mettre en œuvre, les objectifs à réaliser qui sont déterminés sur la base d'indicateurs mesurables et des produits budgétaires qui seront réalisés dans le cadre des missions du Bureau fédéral d'orientation [70] (art. 2, CPS). Une évaluation mensuelle des différents éléments du plan d'action devra être mise en place via un système de rapportage élaboré par le Bureau de direction. Le directeur doit aviser le ministre compétent si trois évaluations mensuelles successives font apparaître que les objectifs fixés ne seront pas atteints. Cette communication structurée permet au gouvernement de tirer les conclusions du bilan des actions menées l'année précédente, et à ses éventuelles propositions d'amélioration et de donner à l'occasion de la confection du budget les nouvelles orientations pour l'année à venir [71].

27. - A côté des acteurs politiques (le Conseil des Ministres; les ministres "spécialement compétents", "les plus concernés" [72] pour la fraude et le travail illégal), le service d'information et de recherche sociale (S.I.R.S.) sert en quelque sorte d'interface entre ceux-ci et les acteurs de terrain. Quant aux acteurs de terrains chargés d'exécuter la politique traduite en plans opérationnels figurent les Cellules d'arrondissement [73], l'auditeur du travail [74] ainsi que les inspecteurs sociaux. En effet, l'auditeur du travail agit

---

70) Projet de loi introduisant le Code pénal social, Exposé des motifs, Doc. parl., Ch. repr.,sess. ord. 2008-2009, n° 52-1666/001, p. 95.

71) Ibid. Voyez Ph. GOSSERIES, "quelques réflexions à propos de l'auditorat du travail. Bilan et plaidoyer", J.T.T., 2012, pp.295 et 296; voyez le plan stratégique, les cellules d'arrondissement, le SIRS, le plan opérationnel, le secrétaire d'Etat à la lutte contre la fraude sociale.

72) Rapport fait au nom de la commission des Affaires sociales par M. Bernard Baille, Doc. parl., Ch. repr., sess. ord. 2002-2003, n° 50-2233/002, p. 4.99. Ibid., p. 5.

73) Ces cellules d'arrondissement sont présidées par l'auditeur du travail - afin de créer le lien entre, d'une part, le plan d'action et les lignes directrices développées et, d'autre part, avec les acteurs du terrain - qui sont composées d'un représentant des services des quatre inspections (.C'est-à-dire l'administration du Contrôle des lois sociales, du Service public fédéral Emploi, Travail et Concertation sociale ; l'administration de l'Inspection sociale du Service public fédéral Sécurité sociale ; le service d'inspection de l'Office national de Sécurité sociale ; le service d'inspection de l'Office national de l'emploi.),d'un représentant du Service public fédéral Finances, d'un magistrat du parquet du procureur du Roi, d'un membre de la police fédérale, d'un membre appartenant à l'un des Services publics fédéraux Emploi, Travail et Concertation sociale, du Service public fédéral Sécurité sociale, des institutions publiques de sécurité sociale ou du Service public de programmation Intégration sociale, Lutte contre la Pauvreté et Économie sociale (membre du Bureau fédéral d'orientation) et du secrétaire de la cellule. Est associé à la cellule d'arrondissement, à sa demande, le représentant du service d'inspection régionale compétent en matière occupation de travailleurs étrangers

74) Ph. GOSSERIES, ""Quelques réflexion à propos de l'auditorat du travail "bilan et plaidoyer", J.T.T., n°1133, 10 septembre 2012, spécialement point V "compétences pénales de l'auditeur du travail".

en dehors de la compétence d'attribution des juridictions du travail, dans le cadre de l'application du droit social pénal [75]. L'action publique de l'auditeur du travail du chef d'une infraction aux lois et règlements dans l'une des matières de la compétence des juridictions du travail est exercée devant les juridictions répressives (155 C. Judiciaire). "Cette réforme fondamentale de 1967 est motivée par la considération que grâce à la formation approfondie en droit social, les magistrats de l'auditorat du travail [et de l'auditorat général] seront en effet plus qualifiés pour apprécier l'importance et la gravité des délits commis à l'occasion de l'application des règlementations sociales ; nul mieux qu'eux ne pourra en effet préciser la portée et apprécier les opportunités sur le plan de l'action publique" [76]. L'auditeur dirige les enquêtes, le plus souvent avec l'appui des inspections sociales, et, si nécessaire, il poursuit les auteurs d'infractions devant le tribunal correctionnel. Son intervention s'inscrit naturellement dans le cadre des actions menées par les différents acteurs chargés de la lutte contre la fraude sociale et le travail illégal [77]. On peut partant affirmer que la compétence répressive de l'auditeur du travail est exercée en liaison avec les inspections sociales [78].

75) Ph. GOSSERIES, op cit., pp.294 et ss.

76) Doc parl, Sénat, 1963-1964, 600, 87, cité par Ph GOSSERIES, "l'expérience des amendes administratives et les aspects fondamentaux du droit social pénal ", in à l'enseigne du droit social belge, coord. P. VANDERVORST, revue de l'ULB, 1978, n°1-3, 304

77) M. DE RUE, " Le Code pénal social : Analyse des lois des 2 et 6 juin 2010", Les Dossiers du Journal des tribunaux, n°86, 2012, p.21.

78) Ph. GOSSERIES, op cit., p.294.

5.b) La forme actuelle : la coopération institutionnalisée : le Service d'Information et de Recherche sociales (S.I.R.S.) [79)]

5.b.1) Le Service d'information et de recherche sociales (S.I.R.S.)

28. - Les inspections sociales, dans leur forme actuelle, constituent un vaste ensemble hétéroclite. L'histoire, ensuite, a été échelonnée de diverses tentatives toutes avortées de fusion des services d'inspection notamment pour des raisons budgétaires [80)], mais aussi pour des raisons purement politiques [81)]. Depuis 1993 (date du protocole de collaboration du 30 juillet 1993 relatif à la collaboration entre les divers services d'inspection sociale pour coordonner les contrôles en cas d'infraction à la législation sociale et du travail [82) 83)]), l'idée de fusion des services d'inspection semble avoir été abandonnée et a cédé la place au concept de coopération institutionnalisée entre services [84)] : en 2003 d'abord, par l'institution du COLUTRIL sur la base de la loi du 5 mai 2003 [85)] ; en 2006, ensuite, par le SIRS qui y a succédé en

---

79) Pour une analyse exhaustive sur cette partie, le lecteur pourra se rapporter à notre ouvrage, "les inspections sociales en mouvement" parue dans la collection droit social, Larcier, 2011, 784 pages. KÉFER, F. et DEBAUCHE, M., " la codification du droit pénal social ", revue de la Faculté de droit de Liège, 2011/2, p.194 indiquent que " la dénomination d'origine était " Service de recherche et d'information sociale " ; les termes ont été inversés dans le Code pénal social ; M.MORSA, " les inspections sociales en mouvement ", o.c., collection droit social, Larcier, 2011, 784 pages.

80) M. MORSA, "les inspections sociales en mouvement", op cit., pp.83 et s. ; Ch-E CLESSE, " Les inspections sociales : devoirs et pouvoirs ", Anthémis, p.27.

81) J-C HEIRMAN, " le rôle de médiation des inspecteurs sociaux en droit pénal social ", Orientations 2012/4, p.19. Contra P. VANDERVORST " Débat avec les stakeholders vers une structure permanente en vue de l'observation et de l'analyse de l'économie souterraine et du travail au noir : souhait ou nécessité ", Rev. b. séc. soc., 2010/1, p. 119 ; dans le même sens, voy. J.-C. BODSON, " Inspection du travail et P.M.E. : écueils et perspectives ", Droit du travail : effectivité, efficacité ?, La Charte, 1996, p. 24.

82) La mise sur pied de ce protocole fait suite à la décision du Conseil des ministres du 5 février 1993 dans le cadre des mesures poursuivant l'amélioration qualitative du fonctionnement des services publics à l'occasion de la radioscopie des besoins en personnel de la fonction publique administrative nationale, afin d'instaurer un groupe de travail " Inspection sociale " qui, pour le 1er mai 1993, devait faire des propositions en vue d'assurer des contrôles plus efficaces et une meilleure coordination, ce qui n'exclut pas la fusion de certains services. L'absence de polyvalence des inspecteurs due à l'étendue et à la complexité de la législation sociale nécessitait une coordination structurée et institutionnalisée entre les divers services d'inspection sociale afin de lutter de façon plus efficace contre les infractions en matière de législation sociale. Ainsi, le protocole de collaboration du 30 juillet 1993 règle la coordination du contrôle des infractions à la législation sociale et du travail entre les services d'inspection compétents et les administrations concernées notamment dans les dossiers de pourvoyeurs de main-d'œuvre, de travail au noir, d'illégaux, de détachements, de travail à temps partiel, dans les secteurs de la construction, de l'horticulture, de l'Horeca, de la confection, de la préparation de la viande, du transport.

83) Néanmoins, le bilan tiré par bon nombre d'acteurs s'est avéré finalement négatif pour plusieurs raisons dont les principales étaient, d'une part, l'absence d'une structure permanente et, d'autre part, le manque de " direction " au niveau du comité directeur (chargé de l'exécution du protocole et de tous autres accords de collaboration notamment avec les Régions) et au niveau des cellules d'arrondissement (chargées du contrôle sur le terrain).

84) M. MORSA, "les inspections sociales en mouvement", op cit., p.86 et s.

85) L. 3 mai 2003 instituant le Conseil fédéral de lutte contre le travail illégal et la fraude sociale, le Comité fédéral de coordination et les Cellules d'arrondissement (M.B., 10 juin 2003). Voy. F. BLOMME, De sociale inspectiediensten, op. cit., p. 40

vertu de loi-programme du 27 décembre 2006 que l'on peut caractériser par l'idée de renforcement de la coordination et la création d'un centre d'expertise en matière d'informations et d'options politiques concernant la lutte contre la fraude sociale et le travail illégal. Il reste que le paysage des services d'inspection s'est encore complexifié par le nombre croissant, ces dernières années, d'accords de coopération conclus entre services d'inspection et autres parties prenantes impliquées peu ou prou dans la lutte contre la fraude [86) 87)]

29. - Le titre I, chapitre 2 (art. 3-14) [88)] du Code pénal social (C.P.S.) intègre la nouvelle architecture de la coopération mise en place par la loi-programme du 27 décembre 2006 : le Service d'Information et de Recherche sociale [89)]. Le SIRS fait suite à une première tentative (infructueuse) de coordination institutionnalisée [90) 91)], le Conseil fédéral de lutte contre la fraude sociale [92)] qui a avait été mis en place par la loi du 5 mai 2003.

Très rapidement, une réorganisation s'était imposée afin de mieux coordonner les actions en matière de lutte contre la fraude tant aux cotisations qu'aux allocations [93)] et en vue de faire face aux ingénieries sociales grandissantes en matière de fraude sociale [94)]. Cette réorganisation présente trois axes:

- la venue de nouveaux partenaires en vue d'une meilleure collaboration au sein des différentes structures ;
- la mise en place d'un véritable organe stratégique chargé de rédiger un plan stratégique et opérationnel : le Comité de direction du Bureau fédéral d'orientation ;
- une meilleure communication entre les différentes structures afin d'améliorer la transmission des informations.

Le SIRS dépend directement des ministres de l'Emploi, des Affaires sociales et de la Justice. La création de cette instance d'organisation et de concertation en matière de fraude sociale traduit la prise de conscience par

---

86) Voy. M. MORSA, "les inspections sociales en mouvement", o.c., pp.86-100; voy. J-C HEIRMAN et M. GRATIA, o.c.,pp.27 -28, § 59.

87) Civ. Gand, 21 octobre 2009, Courr. fisc., 2009, pp. 767-770 et note W. DEFOOR.

88) La loi du 6 juin 2010 introduisant le code pénal social, M.B., 1er juillet 2010.

89) I. BRISART, " structuren voor samenwerking inzake sociale fraude ", in in " sociaal strafrecht - van controle tot veoordeling ", Yves Jorens ed. Die Keure, 2011, p. 63. Voyez Ph. GOSSERIES, "quelques réflexions à propos de l'auditorat du travail", J.T.T., 2012, p.295.

90) Rapport fait au nom de la commission des Affaires sociales par Mme P. CAHAY-André le 18 décembre 2006, Doc. parl., Ch. repr., sess. ord. 2006-2007, n° 51-2773/025, pp. 28-30.

91) J.-Cl. HEIRMAN (" Les pouvoirs des inspecteurs sociaux ", op. cit., p. 85, § 82) justifie la création du SIRS par le fait que " […] ces nouvelles structures de collaboration n'ont pas donné les résultats escomptés ". voy. également P. VANDERVORST, " Vingt ans après… 1981-1985 / 2001-2005 (avant-dire) ", op. cit., note infrapaginale n° 28.

92) Mieux connu sous l'acronyme de Colutril.

93) Projet de loi, Doc. parl., Ch. repr., sess. ord. 2006-2007, n° 51-2773/001, p. 191

94) Note de politique générale du ministre des Affaires sociales et de la Santé publique, Doc. parl., Ch. repr., sess. ord. 2006-2007, n° 51-2706/021 du 17 novembre 2006.

les autorités politiques et judiciaires [95] de la gravité du problème de la fraude sociale.

30. - Le SIRS n'est pas un organe opérationnel mais plutôt un **organe de coordination**, qui assure une interaction correcte entre, d'une part, la politique du gouvernement, qui est fixée par le Conseil des ministres et, d'autre part, la mise en œuvre de cette politique par les services d'inspection et les cellules d'arrondissement. Dans ce cadre, le Conseil fédéral cesse d'être un organe stratégique [96] et est transformé en une assemblée générale où les partenaires sociaux trouvent leur place [97]. Cet organe est encore en plein développement [98]. Le Comité de direction du Bureau fédéral d'orientation devient l'organe stratégique chargé de rédigé un plan stratégique et opérationnel.

Le SIRS est avant toute chose un organe de coordination, qui soutient les services fédéraux d'inspection sociale et les cellules d'arrondissement dans leur lutte contre le travail illégal et la fraude sociale. Il mène également des actions de prévention et de formation et organise la collaboration entre les différents services d'inspection fédéraux, régionaux ainsi qu'au niveau international. Enfin, il élabore des plans stratégiques, détermine leur mise en œuvre et en évalue la réalisation.

---

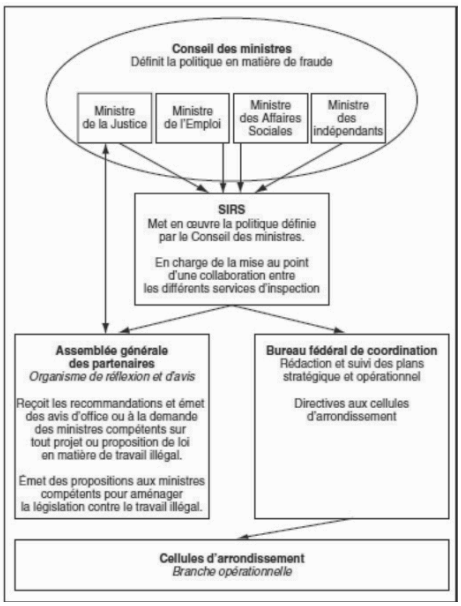
95) Voyez C. Visart DE BOCARMÉ, Procureur général près la Cour d'appel de Liège, "quelques réflexions sur l'évolution de la politique criminelle dans les matières relevant du droit pénal social", in la doctrine juridictionnelle du droit pénal social, Larcier, Coll. droit social, 2010, pp.1013 et s; C. Visart DE BOCARMÉ, "pour une politique intégrée de lutte contre la fraude", op cit., pp.1033 et s., C. Visart DE BOCARMÉ, sa mercuriale du 24 septembre 2010 devant la Cour du travail de Liège in "en guise de préface" in Marc Morsa, "les inspections sociales en mouvement", Bruxelles, Larcier, collec. droit social, 2011, p.8 et s.; voyez aussi l'intervention du collège des procureurs généraux et du conseil des auditeurs du travail, in Ph. GOSSERIES, "quelques réflexions sur l'auditorat du travail. Bilan et plaidoyer ", J.T.T., 2012, p.295 pour l'élaboration du plan stratégique (L. 27 déc.2006).

96) J.-Cl. HEIRMAN, " Les pouvoirs des inspecteurs sociaux ", op. cit., p. 86 in fine.

97) En effet, il est important que tous les acteurs (qui ont un intérêt dans la lutte contre la fraude sociale et le travail illégal en ce compris trois institutions publiques de sécurité sociale qui n'étaient pas représentées auparavant, soit l'Office national des pensions, l'Office national des allocations familiales pour travailleurs salariés et l'Institut national d'assurance maladie-invalidité) - Projet de loi introduisant le Code pénal social, exposé des motifs, Doc. parl., Ch. repr.,sess. ord. 2008-2009, n° 52-1666/001, p. 96 - puissent siéger dans cette plate-forme institutionnelle, " véritable organe de réflexion de lutte contre la fraude sociale " - Rapport fait au nom de la commission des Affaires sociales, Doc. parl., Ch. repr., sess.ord. 2006-2007, n° 51-2773/025, pp. 28-30. Voyez Ph. GOSSERIES, "quelques réflexions (...)", J.T.T., 2012, p.295.

98) Rapport fait au nom de la commission de la Justice, intervention de la représentante du ministre, Doc. parl., Ch. repr., sess. ord. 2008-2009, n° 52-1666/009, p. 36.

31. - Le SIRS est composé de trois piliers [99] :



a) L'Assemblée générale des partenaires

32. - L'Assemblée générale des partenaires regroupe l'ensemble des autorités impliquées dans la lutte contre la fraude sociale (art.4 CPS) : les responsables des services ministériels [100] et des administrations concernés, le secrétaire général du Conseil national du travail [101], le commissaire général de la police fédérale, le procureur général désigné par le Collège des procureurs généraux, ainsi que les partenaires sociaux [102]. Quatre représentants des Régions compétentes en matière d'occupation des

---

99) Pour un commentaire exhaustif, voy. M. MORSA, "les inspections sociales en mouvement", o.c.

100) Il s'agit des présidents des comités de direction des Services publics fédéraux Emploi, Travail et Concertation sociale et Sécurité sociale.

101) F. KÉFER et M. DEBAUCHE, " La réforme du droit pénal social : les premier pas… ", in Questions de droit social, op. cit., p. 226 ; voy. projet de loi, Doc. parl., Ch. repr., sess. ord. 2002- 2003, n° 50-2233/001, où il est précisé que " La présence du premier permet de garantir une collaboration avec le Conseil national du travail et à travers lui, associer les partenaires sociaux aux travaux menés par le Conseil fédéral. […] le gouvernement tient à ce que des liens existent entre instances, ce qui permettra incontestablement de favoriser la communication et de mieux tenir compte, autant que faire se peut, des positions des partenaires sociaux ".

102) Soit six représentants des partenaires sociaux en nombre égal des organisations les plus représentatives des employeurs et des organisations les plus représentatives des travailleurs désignés au sein du Conseil national du Travail. En outre, il faut y ajouter d'un représentant du Conseil supérieur des indépendants et des petites et moyennes entreprises (art. 4, 11°, CPS)) - voy. Projet de loi, exposé des motifs, Doc. parl., Ch. repr., sess. ord. 2007-2008, n° 52-1011/001,pp. 17-18. Cette personne représente bien les travailleurs indépendants et non pas les employeurs.

travailleurs étrangers [103] et, avec voix consultative, des représentants des administrations et des établissements publics impliqués dans la lutte contre le travail illégal et la fraude sociale, ainsi que les organisations professionnelles signataires d'une convention de partenariat dans les conditions déterminées par l'assemblée générale des partenaires peuvent venir compléter la composition de l'assemblée générale des partenaires. Enfin, l'assemblée générale des partenaires peut également faire appel à des experts pour l'examen de questions particulières

Il s'agit d'un organe de réflexion et d'avis, à vocation consultative. dans le cadre de la lutte contre la fraude sociale et le travail illégal et sur le fonctionnement optimal des cellules d'arrondissement [104]

b) Le Bureau fédéral d'orientation

33. - Le Bureau fédéral d'orientation est dirigé par un comité de direction, composé du procureur général compétent, des administrateurs généraux des services d'inspection [à savoir l'inspection sociale; le contrôle des Lois sociales, contrôle de l'O.N.E.M. et contrôle de l'O.N.S.S.] ainsi que des représentants de tous les services concernés. Outre ses fonctions d'analyse, il s'agit d'un organe à vocation exécutive : le Bureau élabore des plans stratégiques et opérationnels et a, notamment, un rôle de soutien aux services d'inspection et aux cellules d'arrondissement. La gestion journalière du service est assurée par le directeur du Bureau fédéral d'orientation [105]. Parmi ses différentes tâches, ce directeur doit porter à la connaissance des autorités judiciaires toutes les informations susceptibles de donner lieu à l'ouverture d'une procédure judiciaire [106]. Selon certains auteurs [107], "cette obligation pose certains problèmes pratiques (...)" et "ne contribue pas à renforcer la collaboration entre services d'inspection". Ces mêmes auteurs annoncent que "la prochaine loi de réforme du Code pénal social devrait

---

103)En vertu de l'article 6, § 1er, IX, (3°) de la loi spéciale du 8 août 1980 de réformes institutionnelles.

104)F. BLOMME, De sociale inspectiediensten, op. cit., p. 42. La volonté que cet organe devienne le lieu de réflexion et de communication entre les partenaires (projet de loi introduisant le Code pénal social, Doc. parl., Ch. repr., sess. ord. 2008-2009, n° 52-1666/001, p. 96). À ce titre, l'assemblée générale des partenaires adresse des propositions aux ministres compétents en vue d'aménager la législation applicable à la lutte contre le travail illégal et la fraude sociale, établit des recommandations et rend des avis, d'office ou à la demande d'un ministre, sur les projets et propositions de lois relatifs à la lutte contre le travail illégal et la fraude sociale. En outre, l'assemblée est consultée par le Bureau fédéral d'orientation sur le plan stratégique et est chargée d'approuver le rapport annuel tel que défini à l'article 316, 16° (art. 7, 16°, de la loi du 6 juin 2010 introduisant le Code pénal social, M.B., 1er juillet 2010), c'est-à-dire le rapport sur le degré de réalisation des actions visées dans le plan opérationnel, les projets informatiques à développer, les moyens à mettre en œuvre, les objectifs et les produits budgétaires, ainsi que sur la situation de la lutte contre le travail illégal et la fraude sociale pour le 30 juin, à l'Assemblée générale.

105)Selon l'article 8 du Code pénal social le directeur du Bureau doit être titulaire d'une fonction de management ; voy.projet de loi introduisant le Code pénal social, exposé des motifs, Doc. parl., Ch.repr., sess. ord. 2008-2009, n° 52-1666/001, p. 98.

106)Code pénal social, article 9.

107)J-C HEIRMAN et M. GRATIA, o.c., p.25, note infrapaginale n°1.

remédier à cette situation et donner la possibilité au directeur du bureau de transmettre toute information utile aux services d'inspection sociale" [108)]

c) Les cellules d'arrondissement

34. - La cellule d'arrondissement est une structure qui s'inscrit sous l'égide du SIRS, dont elle constitue la branche opérationnelle. Il existe une cellule au sein de chaque arrondissement judiciaire, mais certains arrondissements judiciaires ont instauré des cellules communes, de sorte que l'on compte actuellement 21 cellules d'arrondissement.

La cellule d'arrondissement est présidée par l'auditeur du travail [109)] et sa mission consiste principalement à organiser et à coordonner des contrôles portant sur l'application des différentes législations sociales dans le cadre de la lutte contre le travail illégal et la fraude sociale. Les cellules doivent organiser au moins deux contrôles par mois. Des réunions sont également organisées afin de permettre l'échange d'informations et de favoriser la discussion sur des sujets précis entre les différents participants.

5.b. 2) Le collège et le comité ministériel de lutte contre la fraude sociale et fiscale

35. - A ces nouvelles structures ci-dessus, l'on doit également ajouter le collège et le comité ministériel de lutte contre la fraude sociale et fiscale tous deux créés par arrêtés royaux du 29 avril 2008 [110)].

36. - La politique globale de lutte contre la fraude et les priorités des différents services sont définies par le Comité ministériel de lutte contre la fraude fiscale et sociale. Le Comité veille également à l'application uniforme de la législation dans tout le pays. Le Comité ministériel de lutte contre la fraude fiscale et sociale est présidé par le Premier ministre. Il se compose des membres du Gouvernement qui ont les finances, les affaires sociales, les affaires intérieures, la justice, le travail, les PME et indépendants, l'économie et la coordination de la lutte contre la fraude dans leurs attributions

37. - Chaque année, le Collège pour la lutte contre la fraude fiscale et sociale adopte un projet de plan d'action et le soumet à l'approbation du Comité ministériel pour la lutte contre la fraude fiscale et sociale. Le Collège pour la lutte contre la fraude fiscale et sociale veille à l'exécution coordonnée du plan d'action annuel. Il fait également rapport au Comité ministériel à propos de l'application uniforme de la législation dans tout le pays.

---

108)J-C HEIRMAN et M. GRATIA, ibidem.

109)Voyez Ph. GOSSERIES, "quelques réflexions sur l'auditorat du travail (...)", J.T.T., 2012, pp.295 et 299.

110)A ce sujet, voy. notre ouvrage M. MORSA, "les inspections sociales en mouvement", o.c., pp.137-138. I. Brisart, " structuren voor samenwerking inzake sociale fraude ", in in " sociaal strafrecht - van controle tot veoordeling ", Yves Jorens ed. Die Keure, 2011, pp.76-79.

Le Collège pour la lutte contre la fraude fiscale et sociale est présidé par le Secrétaire d'Etat à la Coordination de la lutte contre la fraude. Il se compose des fonctionnaires dirigeants des services sociaux, fiscaux et judiciaires, ainsi que des services de police concernés par la lutte contre la fraude fiscale et sociale.

6. Conclusions

38. - Comme le souligne le Conseil central de l'Économie, " *l'actuel gouvernement belge a affirmé sa volonté de réellement combattre la fraude sociale et la fraude fiscale grâce à une action coordonnée et une approche globale de la problématique et des moyens mis en œuvre pour lutter contre la fraude. Il semblerait que les moyens humains et les instruments nécessaires à cette lutte existent déjà mais qu'il manque cruellement de coordination entre les actions menées, de synergies entre les institutions concernées et de liens entre les différentes bases de données existantes* " [111)]. Les synergies et les échanges (massifs) de données au niveau européen doivent s'intensifier. Les partenaires sociaux, au terme de l'accord interprofessionnel 2009-2010, ont d'ailleurs demandé que la lutte contre la fraude fiscale et sociale soit intensifiée.

39. - Cet appel des partenaires sociaux lancé à l'endroit du gouvernement semble avoir été entendu et la coopération ainsi que la coordination ont été étendues et renforcées depuis lors par différentes initiatives telles que la mise en œuvre de nouveaux accords de coopération (avec les entités fédérées), par la mise en place de la cellule mixte de soutien pour la lutte contre la fraude grave et organisée ; cette dernière structure regroupant des représentants des services d'inspection sociale et de la Police judiciaire fédérale qui vont dorénavant coopérer au sein de cette nouvelle structure. Concrètement, la cellule se compose de 4 inspecteurs sociaux (de l'ONSS, de l'ONEM et des services d'inspection du SPF Sécurité sociale et du SPF Emploi, Travail et Concertation Sociale) et de 2 membres de la police, assistés d'un statisticien, qui proviennent de la direction "Lutte contre la fraude" de la Police judiciaire fédérale. Si la Cellule constate une fraude, il sera déterminé le plus vite possible qui va s'y attaquer. La règle générale est que la lutte contre la fraude sociale reste une mission des administrations sociales compétentes. Ce n'est que dans le cas où la Cellule constate des faits de fraude sociale grave et organisée, commise dans un but criminel, que la Police pourra être associée à l'enquête, via le Parquet. La Police dispose en effet d'instruments de détection supplémentaires, comme les techniques spéciales de recherche

111)M. MONVILLE, " Fraude : Fiscale vs sociale ", op. cit., p. 13.

II. L'APPORT DE LA BELGIQUE DANS LA COORDINATION DANS LA LUTTE CONTRE LA FRAUDE SOCIALE AU NIVEAU EUROPÉEN

1. La coopération et la coordination obligatoires

40. - Maîtres mots au niveau de l'intensification de la lutte contre la fraude à la sécurité sociale en Belgique, la coopération et la coordination - à l'échelon de l'Europe - figurent parmi les principes directeurs (obligatoires) [112)] du règlement n°883/2004 du Parlement Européen et du Conseil du 29 avril 2004 portant sur la coordination des systèmes de sécurité sociale [113)]. En effet, ce dernier (art.76 [114)]) introduit le principe directeur dit de " bonne administration " qui comprend *deux branches* :

- d'une part, une coopération accrue et une assistance mutuelle entre les institutions des États membres au bénéfice des citoyens, afin d'éviter que le citoyen soit renvoyé sans fin d'une institution à une autre ;
- d'autre part une obligation, pour les institutions, de répondre à toute demande dans un délai raisonnable et de communiquer aux personnes concernées toutes les informations nécessaires pour faire valoir leurs droits. À titre réciproque, les personnes concernées devront également communiquer aux institutions tout changement dans leur situation qui est susceptible d'avoir une incidence sur leurs droits aux prestations [115)].

41. - En outre, l'article 8, par.2, du règlement prévoit la possibilité pour " *Deux ou plusieurs États membres peuvent conclure entre eux, si nécessaire, des conventions fondées sur les principes et l'esprit du présent règlement* ".

---

112)M.MORSA, "libre circulation, sécurité sociale et citoyennetés européennes", Anthémis, bibl.de droit européen, Paris,, 2012, 482 pages.

113)JOUE n° L 166 du 30 avril 2004.

114)Le principe de bonne administration oblige les institutions à répondre à toute demande dans un délai raisonnable et l'obligation de communiquer à la personne concernée les informations nécessaires en vue de l'acquisition et la préservation de ses droits. En guise de réciprocité, les citoyens sont tenus d'informer dans les meilleurs délais les institutions de l'État membre compétent et de l'État membre de résidence de tout changement dans leur situation personnelle ou familiale ayant une incidence sur leurs droits aux prestations. Par ailleurs, le remplacement des formulaires papier par des nouveaux documents électroniques (les " Structured Electronic Documents " - " SED "), utilisés pour les échanges entre les institutions européennes et la réduction des documents portables (papier) pour les relations avec l'assuré contribuent à une simplification et à une modernisation des échanges et des traitements d'informations en matière de sécurité sociale. Ce nouveau système permet de mieux répartir les compétences et les responsabilités entre les institutions des divers États membres et d'accélérer et de faciliter le traitement des données par une réduction considérable de la charge administrative.

115)Ces dispositions ont déjà été reprises dans le règlement n°631/2004 du 31 mars 2004 qui modifie les règlements no 1408/71 et no 574/72 en ce qui concerne l'alignement des droits et la simplification des procédures et qui est entré en vigueur le 1er juin 2004 (J.O., no L 100 du 6 avril 2004).

42. - En liens étroits avec la problématique de la fraude, dans sa décision H5 [116)] du 18 mars 2012 - décision figurant parmi les dispositions de type horizontale, la commission administrative pour la coordination des systèmes de sécurité sociale (CACSS) établit (considérants 3 et 4), d'une part, que " *La lutte contre les fraudes et les erreurs s'inscrit donc dans le cadre de la bonne application des règlements (CE) n 883/2004 et (CE) n 987/2009* " et, d'autre part, qu' " ***une coopération plus étroite*** *et plus efficace entre les autorités compétentes et les institutions* ***est un facteur clé dans la lutte contre les fraudes et les erreurs***". La décision A1 de ladite CACSS du 12 juin 2009 concernant l'établissement d'une procédure de dialogue et de conciliation relative à la validité des documents, à la détermination de la législation applicable et au service des prestations au titre du règlement (CE) n°883/2004 du Parlement européen et du Conseil précise, dans son préambule, que " *le bon fonctionnement de la réglementation communautaire relative à la coordination des systèmes nationaux de sécurité sociale est notamment subordonné à une coopération mutuelle étroite et efficace entre les autorités et institutions des différents États membres* " (…) et qu' " *Une bonne coopération dans l'application des règlements passe notamment par l'échange d'informations entre les autorités et institutions, d'une part, et les personnes, d'autre part, lequel doit reposer sur les principes du service public, de l'efficacité, de l'assistance active, de la fourniture rapide et de l'accessibilité* ".

43. - Au niveau européen, la Belgique inscrit son apport dans la coopération et la coordination des activités dans la lutte contre la fraude à la sécurité sociale de différentes manières que ce soit par une politique renforcée de conclusion d'accords bi ou multilatéraux, de développement d'outils d'évaluation, d'exécution de projets européens, etc. [117)]

2. La fraude liée aux détachements et la décision A1 de la commission administrative : une préoccupation importante des autorités belges

2.a) Une préoccupation importante pour les autorités belges dans le cadre de la lutte contre la fraude sociale

44. - La fraude liée aux détachements est, à l'échelon européen, celle qui préoccupe le plus les autorités belges [118)]. Cette fraude prend diverses formes allant de formulaires A1 émis sans qu'une (ou des) condition(s) mise(s)

116)Décision H5 concernant la coopération dans le domaine de la lutte contre les fraudes et les erreurs dans le cadre du règlement (CE) n°883/2004 du Conseil et règlement (CE) n°987/2009 du Parlement européen et du Conseil portant sur la coordination des systèmes de sécurité sociale.

117)Voy. point 2 ci-après.

118)Un cahier sur la sécurité sociale (2013) sera d'ailleurs déposé par la Cour des comptes au parlement belge sur la fraude aux détachements.

au détachement ne soi(en)t réunie(s) [119) 120)], en passant par des montages frauduleux (véritable ingénierie de fraude sociale) dans lesquels par exemple le détachement frauduleux est réalisé via des entreprises ou filiales d'entreprises établies dans différents pays européens, ou encore les détachements fictifs où des travailleurs d'un Etat membre habitent et travaillent en permanence en Belgique, mais sont inscrits dans une firme étrangère et détachés en Belgique par des entreprises qui n'ont pas d'activité réelle à l'étranger (entreprises " boîtes aux lettres ") ou seulement établies fictivement à l'étranger jusqu'à la délivrance de faux formulaires de détachement. Pour la Belgique, les cas les plus fréquemment rencontrés sont ceux liés à la vérification des conditions mises au détachement.

45. - Les problèmes auxquels sont confrontés les services d'inspection en Belgique sont le manque de contrôle opéré par certaines institutions étrangères (par exemple concernant le respect des conditions mises au détachement par les règlements de coordination) lors de l'émission des formulaires A1, l'authenticité des formulaires émis par une institution étrangère dont la vérification est rendue difficile lorsque la coopération des services administratifs de l'Etat d'envoi n'est pas optimale. En outre, l'absence de formulaires A1 ne signifie pas que les conditions de détachement ne soient pas réunies ; le formulaire n'étant pas une condition constitutive du détachement. En outre, la Cour de justice a admis que les formulaires en question pouvaient rétroagir. Enfin, autre difficulté relevée au niveau de la perception des cotisations est celle de la récupération, le cas échéant forcée, des cotisations à verser dans le régime belge auprès de l'employeur établi dans un autre Etat membre de l'UE.

2.b) La force contraignante des formulaires A1 : possibilité de contestation ?

46 - La détention d'un certificat de détachement n'est pas une condition constitutive du détachement puisque dès que les conditions prévues à l'article 12 du règlement n 883/2004 pour le détachement sont remplies, les règles en matière de détachement s'appliquent [121) 122)]. D'ailleurs, dans

---

119)Par exemple l'entreprise qui détache un travailleur dans un autre Etat membre de l'UE n'exerce pas d'activités substantielles dans le pays d'envoi.

120)Pour le détail des conditions, voy. M. MORSA, " liberté de circulation, sécurité sociale et citoyenneté européennes ", o.c., pp.170 et s.

121)Fr. PENNINGS, Eur. S.S.L., op. cit., p.107. Voy.Cour AELE, 14 décembre 2004, n E 3/04, Athanasios e.a. Le texte anglais de cet arrêt est disponible sur : http://www.dinesider.no/customer/770660/archive/files/News%20related/e_3_04deci 432sion e.pdf.

122)Y. JORENS, "Le détachement des travailleurs en droit européen", JDE No 178 - 4/2011 - p. 89 - 15/04/2011 citant C.J., 30 mars 2000, Banks, C-178/97, Rec., 2000, p. I-2005, points 52 et 53. expose que " La possession du "formulaire E101" n'est cependant pas une condition constitutive au détachement et l'absence de ce formulaire ou un formulaire non valable n'exclut pas l'application des dispositions de détachement. Cette déclaration sera toutefois de préférence remise avant le début de la période de détachement, mais elle peut aussi l'être au cours de la période ou même après ".

l'affaire "Banks", la Cour admet qu'un certificat de détachement produise, le cas échéant, des effets rétroactifs [123]. En effet, le règlement n 574/72 n'impose pas que le certificat soit délivré avant que ne débute le travail sur le territoire du second État membre.

47. - Le détachement doit être déclaré auprès de l'institution de rattachement qui doit, sans délai, mettre à la disposition de la personne concernée et de l'institution de l'État où s'exerce l'activité les informations sur la législation applicable. L'institution compétente atteste de la législation applicable à la demande de l'employeur ou du travailleur. Devant les difficultés pratiques auxquelles sont confrontés les services d'inspection sociale (constatant sur le terrain que de nombreuses personnes ne sont pas en possession d'un formulaire E101), l'article 19, § 2 du nouveau règlement d'application n 987/2009 prévoit qu'" *à la demande de la personne concernée ou de l'employeur, l'institution compétente de l'État membre dont la législation est applicable en vertu d'une disposition du titre II du règlement de base atteste que cette législation est applicable et indique, le cas échéant, jusqu'à quelle date et à quelles conditions* ".

48 - La question de la force contraignante du certificat de détachement a été abordée, d'abord, dans l'arrêt Fitzwilliam [124], ensuite, dans l'arrêt Banks [125], puis a été précisée dans l'arrêt Herbosch Kiere [126]. Les juridictions de fond en Belgique appliquent l'enseignement des arrêts rendus par la Cour de justice.

49. - En raison du principe de coopération loyale, énoncé à l'article 5 du traité CE (devenu art. 10 CE) l'institution compétente doit procéder à une appréciation correcte des faits pertinents pour l'application des règles relatives à la détermination de la législation applicable en matière de sécurité sociale et, partant, tend à garantir l'exactitude des mentions figurant dans le certificat E101 [127]. Ensuite, la Cour de justice a considéré que le certificat de détachement E101 (et par extension le document portable A1) crée une présomption de régularité de l'affiliation du travailleur (non) salarié au régime de sécurité sociale où il exerce habituellement son activité, s'impose à l'institution compétente de l'État où le travailleur va exercer son activité [128].

La Cour de justice justifie sa solution en ce sens que si cette dernière n'était pas respectée, cela porterait atteinte au principe d'unicité de législation

---

123)CJUE, Affaire C 178/97, arrêt 30 mars 2000, Barry Banks E.A. c/Théâtre royal de la Monnaie, point 51 de l'arrêt.

124)CJCE, 10 février 2000, Fitzwilliam, aff. C 202/97.

125)CJUE, Affaire C 178/97, arrêt 30 mars 2000, Barry Banks E.A. c/Théâtre royal de la Monnaie.

126)CJCE, 26 janvier 2006, Herbosch Kiere, aff. C 2/05.

127)CJCE, 10 février 2000, Fitzwilliam, aff. C-202/97, point 51

128)CJUE, Affaire C 178/97, arrêt 30 mars 2000, Barry Banks E.A. c/Théâtre royal de la Monnaie.

comme au principe de sécurité juridique, dans la mesure où il serait impossible de déterminer le régime de sécurité social applicable. Néanmoins, ajoute la Cour de justice. Il en résulte, dès lors, que aussi longtemps que le certificat E101 (A1) n'est pas retiré ou déclaré invalide, l'institution compétente de l'État membre dans lequel le travailleur salarié effectue un travail doit tenir compte du fait que ce dernier est déjà soumis à la législation de sécurité sociale de l'État membre où il est établi et cette institution ne saurait, par conséquent, soumettre le travailleur salarié en question à son propre régime de sécurité sociale. Retenir la solution inverse, selon la cour de justice, serait de nature à porter atteinte au principe de l'affiliation des travailleurs non-salariés à un seul régime de sécurité sociale, ainsi qu'à la prévisibilité du régime applicable et, partant, à la sécurité juridique. En effet, dans des cas où le régime applicable serait difficile à déterminer, chacune des institutions compétentes des deux États membres concernés serait portée à considérer, au détriment du travailleur salarié concerné, que son propre régime de sécurité sociale est applicable [129)]. Néanmoins, l'institution compétente de l'État membre qui a établi ledit certificat E101 doit reconsidérer le bien-fondé de cette délivrance et, le cas échéant, retirer le certificat lorsque l'institution compétente de l'État membre dans lequel le travailleur non salarié effectue un travail émet des doutes quant à l'exactitude des faits qui sont à la base dudit certificat et, partant, des mentions qui y figurent. Cette obligation de réexamen dans le chef de l'Institution émettrice découle du principe de la coopération loyale en ce sens que l'institution émettrice d'un certificat E 101 est tenue de procéder à une appréciation correcte des faits pertinents pour l'application des règles relatives à la détermination de la législation applicable en matière de sécurité sociale et, partant, de garantir l'exactitude des mentions figurant dans ce certificat [130)].

Enfin, dans l'arrêt Herbosch Kiere [131) 132)], la Cour confirme la jurisprudence Banks et Fitzwilliam, mais précise qu'aussi longtemps qu'il n'est pas

---

129)CJUE, Affaire C 178/97, arrêt 30 mars 2000, Barry Banks, o.c., point 41.

130)Voy., en ce sens, arrêt FTS, précité, point 51, ainsi que du 30 mars 2000, Banks e.a., C-178/97, Rec., p. I-2005, point 38; voy. également, CJUE 4 X 2012, Format Urzdzenia i Montaze Przemyslowe sp. z.o.o. c. Zaklad Ubezpiecze Spotecznych - aff. C-115/11, JTT No 1141 - 27/2012 - p. 421 - 30/11/2012.

131)CJCE, 26 janvier 2006, Herbosch Kiere, aff. C-2/05.; voy. concernant cet arrêt - LHERNOULD, Jean-Philippe: L'actualité de la jurisprudence communautaire et internationale, Revue de jurisprudence sociale 2006 p.366-368;- MAVRIDIS, Prodromos: "Détachement des travailleurs dans l'Union européenne: le juge national, arbitre ou soumis au principe du pays d'origine? Commentaire sur l'arrêt Kiere de la Cour de justice (26 janvier 2006, C-2/05)", Journal des tribunaux du travail 2006 p.225-233;-HORN, Jan, "Zeitschrift für europäisches Sozial- und Arbeitsrecht", 2006 p.229-231.

132)CJCE, 26 janvier 2006, Herbosch Kiere, aff. C-2/05.; voy. concernant cet arrêt - LHERNOULD, Jean-Philippe: L'actualité de la jurisprudence communautaire et internationale, Revue de jurisprudence sociale 2006 p.366-368;- MAVRIDIS, Prodromos: "Détachement des travailleurs dans l'Union européenne: le juge national, arbitre ou soumis au principe du pays d'origine? Commentaire sur l'arrêt Kiere de la Cour de justice (26 janvier 2006, C-2/05)", Journal des tribunaux du travail 2006 p.225-233;-HORN, Jan, "Zeitschrift für europäisches Sozial- und Arbeitsrecht", 2006 p.229-231.

retiré [133] ou déclaré invalide par les autorités de l'État membre l'ayant délivré, le certificat E101, délivré conformément à l'article 11, paragraphe 1, sous a), du règlement n 574/72, lie l'institution compétente **et les juridictions de l'État membre dans lequel sont détachés les travailleurs** [134]. Ainsi, une juridiction de l'État membre d'accueil n'est pas habilitée à vérifier la validité d'un certificat E 101 en ce qui concerne l'attestation des éléments sur la base desquels un tel certificat a été délivré, notamment l'existence d'un lien organique entre l'entreprise qui détache un travailleur et le travailleur détaché [135].Cette jurisprudence de la Cour de justice est très claire puisqu'elle dénie au juge national le pouvoir de se prononcer sur les conditions réelles du détachement, même si certains éléments mis en exergue par les services d'inspection tendaient à montrer l'existence d'une suspicion de fraude [136].

50. - Bien avant ces arrêts rendus par la Cour de justice, l'avocat général Lenz dans l'affaire "Calle" [137], avait déjà soutenu que " *le formulaire E 101 a pour objectif d'éviter, dans des cas précis, l'émergence de conflits de compétence tant positifs que négatifs. Le rôle d'un certificat E 101 est d'attester du régime de sécurité sociale qui s'applique à un travailleur détaché... Lorsque la déclaration figurant sur le formulaire E 101 n'est pas reconnue par l'autorité d'un autre Etat membre, cela ne peut que signifier que l'organisme qui porte ce jugement sur le formulaire en question estime que c'est une autre législation que celle désignée sur le formulaire qui est applicable, ce qui risque précisément d'entraîner une double assurance avec toutes les conséquences qui en découlent* ". Il concluait qu'une telle conséquence était contraire aux objectifs des (ex-) articles 48 à 51 du Traité C.E.

---

133)Tant la jurisprudence belge (Trib. trav. Bruxelles, 11 février 2005, Soc. Kron., 2007, p. 76) que néerlandaise (Centrale Raad van Beroep, 26 mars 2007, LJN BA4814, appel de la décision du tribunal de Middelburg du 9 janvier 2005, 05/725) estiment que le retrait opère avec effets rétroactifs.

134)Pour un cas d'application, voy. Trib. trav. Mons, 20 avril 2005, R.G. n°100.096/99, qui décide que " ni l'ONSS ni l'État belge ne sont habilités à remettre en cause unilatéralement et de leur seule autorité l'assujettissement découlant de ces E101, et ce, indépendamment des raisons qui les conduisent à cette remise en question ".

135)C-E CLESSE, "le détachement des travailleurs : questions spéciales et actualités", in "actualités en droit européen", sous la dir. de C-E CLESSE et S. GILSON, Larcier, coll. droit social, 2010, pp.68.-69.

136)Certains auteurs ont critiqué l'enseignement découlant de l'arrêt Herbosch Kiere rendu par la CJUE estimant la décision de la cour comme étant décevante, voire frustrante. En ce sens, voy. C-E CLESSE, o.c., "travailleurs détachés et mis à disposition", pp.257-258; voy. aussi P. VAN HAVERBEKE, o.c., p.1101 qui expose que "(...) cet arrêt rend ainsi plus difficile la lutte contre les distorsions de concurrence et le dumping social, mais bloque également la Cour de justice dans tout processus visant à compléter les conditions de détachement, vu que le juge national de l'Etat d'emploi ne peut plus lui soumettre les problèmes qui seraient rencontrés par voie de question préjudicielle". Nous ne partageons pas l'opinion exprimée dès lors qu'il ne peut juridiquement revenir à la Cour de compléter le règlement en y ajoutant des conditions qui n'y figurent pas. Le rôle de la Cour est d'interpréter en droit les termes de l'acte dérivé, sans rien y retrancher mais sans rien n'y ajouter non plus.

137)CJUE, arrêt du 16 février 1995, aff. C-425/93, Calle, Rec., p. I-269.

51. - Depuis lors, l'enseignement de la Cour de justice est suivi par les juridictions de fond. Ainsi, la Cour du travail de Bruxelles, dans un arrêt du novembre 2011, va réformer le jugement rendu en première instance par le tribunal du travail dans lequel ce dernier avait condamné la société appelante, en estimant (en synthèse) que la société appelante ne démontrait pas un lien de subordination entre la société de droit irlandais et les quatre travailleurs concernés par la procédure, et que les (trois) formulaires E101 déposés ne peuvent être pris en considération dès lors que l'État dont relèvent normalement les quatre travailleurs est la France (jugement du 26 mars 2003) [138)]. En appel, la Cour du travail va juger - en se fondant sur la jurisprudence de la Cour de justice (C.J.C.E.) et des juridictions belges [139) 140)] qui accorde une valeur de présomption absolue au certificat de détachement E101 - que "Lorsque les institutions des autres États membres font valoir des doutes sur la conformité des mentions du certificat avec l'article 14.1.a, du règlement no 1408/71, l'institution émettrice est tenue d'examiner à nouveau l'exactitude des faits qui sont à la base du certificat et, le cas échéant, de le retirer. Une procédure est prévue si les institutions concernées ne parviennent pas à se mettre d'accord. L'affaire peut être soumise à la commission administrative. Si la commission administrative ne peut offrir aucune solution, l'État membre sur le territoire duquel les travailleurs concernés sont détachés est libre d'introduire une procédure pour non-respect des obligations au sens de l'article 127 du Traité UE en conservant une possibilité éventuelle de recours en droit dans l'État membre de l'institution émettrice. Dans le cas présent, les certificats E101 n'ont pas été invalidés par l'autorité irlandaise compétente malgré la demande argumentée des autorités belges : aucune réponse de l'autorité irlandaise n'est produite. Les autorités belges n'ont pas mené d'autre procédure ou, en tous cas, ce n'est pas signalé ni invoqué. Alors que le règlement pose en

---

138)Cour du travail de Bruxelles (8e ch.), 3 XI 2011, JTT No 1122 - 8/2012 - p. 122.

139)C.J.C.E., 10 février 2000, FTS, C-202/97, Rec., p. 883, points 53 et 55; C.J.C.E., 26 janvier 2006, O.N.S.S. c. Herbosch Kiere, C-2/05, point 33 et dispositif, ce dernier arrêt étant rendu sur question préjudicielle posée par C.T. Bruxelles, 23 décembre 2004, R.G. no 42533; cfr aussi Cass., 3e ch., R.G. no S.02.0039.N, 2 juin 2003, Pas., 2003, livr. 5-6, 1099.

140)En substance, il ressort de l'enseignement de cette jurisprudence que

- *le certificat de détachement délivré par l'institution compétente d'un État membre lie les institutions de sécurité sociale des autres États membres dans la mesure où il atteste l'affiliation des travailleurs détachés au régime de sécurité sociale de l'État membre où l'entreprise détachante est établie;*
- *aussi longtemps que le certificat E101 n'est pas retiré ou déclaré invalide, l'institution compétente de l'État membre dans lequel sont détachés les travailleurs doit tenir compte du fait que ces derniers sont déjà soumis à la législation de sécurité sociale de l'État où l'entreprise qui les emploie est établie et cette institution ne saurait, par conséquent, soumettre les travailleurs en question à son propre régime de sécurité sociale;*
- *une juridiction de l'État d'accueil de ces travailleurs n'est pas habilitée à vérifier la validité d'un certificat E101 en ce qui concerne l'attestation des éléments sur la base desquels un tel certificat a été délivré, notamment l'existence d'un lien organique, au sens de l'article 14, § 1er, a, du règlement no 1408/71, entre l'entreprise établie dans un État membre et les travailleurs qu'elle a détachés sur le territoire d'un autre État membre, pendant la durée du détachement de ces derniers*

principe qu'un travailleur est affilié au régime de sécurité sociale de l'État où il effectue sa prestation de travail, le dossier soumis à la cour par l'O.N.S.S. illustre combien la valeur absolue accordée au certificat E101 et au principe d'une coopération loyale entre institutions de sécurité sociale, peut priver d'effet les conditions mises par l'article 14 du règlement à ce qui est pourtant conçu comme une dérogation. **Ainsi, il importe peu que l'examen ci-avant des éléments soumis à la cour mène au constat que les conditions d'un détachement prévues par l'article 14 du règlement ne sont pas réunies. La cour de céans, juge de l'État d'emploi, n'a aucun pouvoir de contrôle sur l'existence, durant la période du détachement, du lien organique entre la société de droit irlandais et les trois travailleurs pour la période pour lesquels les certificats E101 sont produits. Peu importe aussi l'absence de preuve d'un assujettissement à la sécurité sociale irlandaise avant ou au moment du détachement**".

2.c) La décision A1 de la commission administrative instaurant une procédure de dialogue et de conciliation relative à la détermination de la législation applicable et au service des prestations au titre du règlement (CE) n°883/2004

51. - Le 12 juin 2009, la CACSS a adopté une décision établissement d'une procédure de dialogue et de conciliation relative à la validité des documents, à la détermination de la législation applicable et au service des prestations au titre du règlement (CE) n°883/2004 [141)]. Cette décision constitue une concrétisation du principe directeur décrit ci-avant de la nécessaire coopération et coordination des acteurs.

52. - Ainsi, avant de saisir la commission administrative pour contester la validité d'un formulaire A1, une **procédure de dialogue et de conciliation** doit être appliquée entre les Etats membres concernés. La première phase de la procédure prévoit qu'en cas de doute sur la validité d'un A1 ou sur son contenu, l'institution de l'Etat membre demande à l'institution émettrice les éclaircissements nécessaires et, éventuellement, le retrait du formulaire [142)]. L'institution (belge) doit motiver sa demande, fournir les justificatifs et se référer à la décision A1 de la commission administrative qui prévoit les modalités de la procédure de conciliation. L'institution étrangère doit accuser réception de la demande d'éclaircissement dans les dix jours ouvrables de la réception de celle-ci. Elle doit informer l'institution belge du résultat de l'examen du dossier dans les trois mois de la demande. Si la décision initiale est confirmée ou annulée ou si le document est retiré ou invalidé, l'institution requise en informe l'institution requérante. Elle informe également la personne concernée et, s'il y a lieu, son employeur, de la décision qu'elle a

141)C106 du 24.04.2010, p. 1

142)Si la question fait l'objet d'une procédure de recours judiciaire ou administratif en application de la législation nationale de l'État membre dans lequel est située l'institution ayant délivré le document en cause, la procédure de dialogue et de conciliation est suspendue (point 4 de la décision A1).

prise et des procédures prévues par sa législation nationale pour contester cette décision. Ce délai peut être prolongé de trois mois.

Si les institutions ne parviennent pas à un accord durant la première phase de la procédure de dialogue ou si l'institution requise n'est pas en mesure de clôturer son examen dans un délai de six mois à compter de la réception de la demande, les institutions en informent leurs autorités compétentes. Les institutions préparent chacune un rapport sur leurs activités. Les autorités compétentes des États membres concernés peuvent décider d'entamer la seconde phase de la procédure de dialogue ou de saisir directement la commission administrative. Si les autorités compétentes entament la seconde phase de la procédure de dialogue, elles nomment chacune une personne de contact principale dans un délai de deux semaines à compter de la date à laquelle les institutions les ont informées de la situation. Les personnes de contact ne doivent pas nécessairement avoir compétence directe dans le domaine concerné. Les personnes de contact s'efforcent de trouver un accord dans un délai de six semaines à compter de leur nomination. Elles préparent chacune un rapport sur leurs activités et informent les institutions de l'issue de la seconde phase de la procédure de dialogue.

En l'absence d'accord à l'issue de la procédure de dialogue, les autorités compétentes peuvent saisir la commission administrative. Elles préparent chacune une note à l'attention de la commission administrative, contenant les principaux points litigieux. La commission administrative s'efforce de concilier les points de vue dans les six mois suivant sa saisine. Elle peut décider de saisir le comité de conciliation pouvant être créé conformément à ses statuts.

53.- Il ressort du prescrit de la décision A1 de la commission administrative, non seulement que la procédure y décrite peut être longue mais surtout que l'issue peut être aléatoire. En outre, l'absence de réaction de l'institution requise ne permet pas d'établir une différence de vues permettant de recourir à la décision A1. La seule possibilité étant alors de porter le différend au niveau de la commission administrative.

54. - Néanmoins, dans la pratique la coopération fonctionne normalement et de manière correcte, à l'exception d'une nombre très limité d'Etats qui ne " jouent pas le jeu de la coopération ". Différentes raisons peuvent ralentir le processus de coopération qu'il s'agisse notamment de la complexité des faits constatés/rapportés par l'institution requérante à l'institution requise, la complexité de l'organisation administrative dans certains Etats qui rend difficile l'identification de l'institution et ou du collègue à contacter, la langue utilisée [143)], le renvoi à des procédures internes de contrôle à l'Etat membre

143)Souvent les pièces de l'enquête seront rédigées dans la (les) langue(s) nationales même si souvent l'institution requérante accompagnera ces dernières d'un rapport de synthèse des faits établi en Anglais.

de l'institution requérante connues par elle seule (par ex. les déclarations Limosa comme indice de preuve de la période d'occupation réelle en Belgique), etc.

55. - Afin d'optimaliser cette nécessaire coopération et obvier les difficultés précitées, la Belgique dans le cadre du projet H5NCP [144)] a développé une e-plateforme interactive permettant de mettre en réseau toutes les institutions de sécurité sociales au sein de l'Union européenne. Cette e-plateforme permet d'accéder à un répertoire des experts désignés comme points de contact, leurs domaines d'expertise, leurs coordonnées, etc. Conformément au guide pratique développé simultanément à ladite plateforme, les points de contacts ont une obligation de réorientation (transmettre la demande de l'institution requérante au bon interlocuteur dans leurs propres réseaux nationaux), de communiquer tous les éléments d'information sur les législations et/ou pratiques en vigueur dans leur Etat en matière de fraude et erreur. Ce faisant, cette e-plateforme permet de répondre aux difficultés relevées et son déploiement permet d'optimaliser la coopération et coordination en cette matière où le facteur " temps " joue un rôle crucial.

3. Les accords bilatéraux instaurant une coopération renforcée dans l'esprit des règlements de coordination

56. - Parallèlement aux démarches et projets précités, la Belgique a également développé un nouveau modèle d'accord-cadre en vue de renforcer la coopération mutuelle entre les institutions des Etats membres de l'UE dans l'esprit des règlements européens. La gamme de ces instruments est variée puisqu'il peut s'agir de simples arrangements administratifs entre directeurs de services d'inspection/contrôle exécutant des normes de droit de l'UE dérivé, mais aussi d'instruments beaucoup plus développés permettant par exemple un croisement transfrontaliers de fichiers (datamining/datamatching), voire la mise en place d'un " embryon " d'inspection européenne.

57. - Ainsi, en droite ligne des instruments de coordination la Belgique va conclure les 27, 28 et 29 octobre 2008 avec la Bulgarie un accord de principe en vue de la conclusion à court terme d'un accord de coopération en ce qui concerne les conditions de travail et salariales et les droits de sécurité sociale des travailleurs détachés dans le cadre d'une occupation transfrontalière. Cette collaboration sera bénéfique pour le fonctionnement des services d'inspection du travail et sociale des deux pays, dans leur lutte contre la fraude sociale transfrontalière liée à l'augmentation des détachements de travailleurs au sein de l'UE. Un deuxième acquis concerne les initiatives communes qui seront prises pour certains thèmes importants tels que, entre

144)Voy. infra.

autres, la " flexicurité " [145], la politique du marché du travail, l'inclusion et l'intégration sociale, le bien-être au travail… À cet effet, il y aura un échange d'experts et des programmes de formation mutuelle ont été élaborés pour 2009. Par ailleurs, la Belgique continuera à soutenir le développement du service d'inspection du travail bulgare. La Bulgarie a manifesté sa volonté de jouer un rôle mobilisateur dans la région des Balkans et souhaite associer les autorités belges à cette démarche.

58. - L'accord-cadre conclu avec la France en octobre 2008 visant à renforcer la coopération mutuelle appartient à la seconde catégorie d'instruments précités (§ 55). un accord de coopération en matière de sécurité sociale a été conclu entre la Belgique et la France le 17 novembre 2008 destiné à réduire la fraude, les erreurs et les abus et à garantir l'efficience des droits sociaux [146]. Cet accord met en place un cadre de coopération pour les institutions de sécurité sociale et permet notamment un échange (massif) de flux de données entre les deux pays, l'échange d'agents en vue d'effectuer des contrôles conjoints, la mise en place de bonnes pratiques et le recouvrement transfrontalier des dus et indus en cotisations (contributions) sociales et allocations. Pour la France comme pour la Belgique, c'est la première fois qu'un accord prévoit la transmission et le croisement de fichiers entre deux pays pour lutter contre la fraude [147]; c'est aussi la première fois qu'un accord international prévoit la possibilité aux services d'inspection du travail d'un État de pouvoir prendre part à des contrôles organisés sur le territoire de l'autre État.

Il s'agit d'un accord-cadre fixant les " règles générales " de la coopération et de la coordination dont les mesures d'exécution sont précisées dans un arrangement administratif ; cet ensemble permettant ensuite aux institutions de définir, dans le cadre ainsi tracé, les modalités concrètes de leur coopération.

Il s'agit d'accords de type mixte dans la mesure où dans l'Etat fédéral belge ceux-ci portent sur des matières relevant à la fois de celles de l'Etat fédéral mais aussi de celles des entités fédérées. Cette précision constitutionnelle nécessite que ces accords soient soumis à l'assentiment dans chacun des parlements (fédéral et fédérés).

---

145)Conclusions du Conseil européen du 23 novembre 2007, 15497/07, intitulées " Towards Common Principles of Flexicurity ", en ligne sur le portail de l'Union européenne : http:// register.consilium.europa.eu/pdf/en/07/st15/st15497.en07.pdf

146)http://www.socialsecurity.fgov.be/fr/nieuws-publicaties/nieuwsoverzicht/2008/11.htm ;voy. aussi http://www.gouvernement.fr/gouvernement/un-an-de-lutte-contre-les-fraudessociales-premier-bilan.; voy. aussi M. MORSA, " les inspections sociales en mouvement ", o.c., pp.60 et s.

147)Dans son rapport du 16 novembre 2009 à la Commission administrative pour la sécurité sociale des travailleurs migrants (CASSTM), le groupe ad hoc " Combating fraud and error " (réf. CASSTM/560/09) indique en annexe n° 3, " Report on data matching survey on original AHG report " (CASSTM 349/09), que la directive 95/46/CE en combinaison avec l'article 84 du règlement (CEE) n° 1408/71 " leave sufficient room for data exchange for the social security sectors under Regulation (EEC) n° 1408/71 ".

Un accord-cadre similaire a été conclu avec les Pays-Bas le 6 décembre 2010 et signé en marge d'une réunion des ministres européens à Bruxelles. Cet accord de coopération a pour finalité de lutter ensemble contre les fraudes aux allocations, permettra de mieux contrôler les allocations versées aux Néerlandais vivant ou travaillant en Belgique, et inversement. A cet effet, les deux pays s'échangeront et compareront les données sur les revenus de leurs citoyens établis par-delà la frontière, ainsi que les biens des personnes bénéficiant d'une assistance sociale. Les signataires entendent de la sorte mieux contrôler la légitimité des allocations versées, et éviter que certains ne profitent de la frontière pour frauder et toucher des allocations auxquelles ils n'ont pas ou plus droit.

59. - Ces accords permettent également de renforcer le contrôle des conditions mises au détachement ainsi de vérifier l'exactitude de la nature de l'activité exercée (salariée ou non salariée).

60. - Prochainement, la Belgique espère pouvoir conclure pareil accord-cadre avec le Luxembourg.

4. La coopération et la coordination avec le soutien de la commission européenne

4.a) ICENUW et ICENUW Beyond

61. - Une étude "ICENUW - Mise en œuvre de la coopération dans un réseau européen contre le travail non déclaré" (2010), a examiné la façon dont la coopération transfrontalière des inspecteurs du travail contre le travail non déclaré pouvait mieux fonctionner [148)]. L'étude s'est concentrée sur les documents et procédures nécessaires à la conduite d'une inspection et la nécessité d'une comparabilité entre les États membres. Le 18 février 2011, dans le cadre de la coopération ICENUW, la charte de Bruges - "Avancées dans la lutte transfrontalière contre le travail non déclaré" - a été signée par 11 États membres de l'UE et la Norvège.

62. - Mais il ne s'agit pas que d'une étude puisque, outre l'étude réalisée portant sur l'environnement légal pour l'échange des données (*de lege lata* et *de lege ferenda*), l'étude sur les mesures dissuasives, le projet a surtout livré deux outils directement opérationnels pour les services d'inspection, savoir d'une part, une plateforme électronique interactive permettant la digitalisation du catalogue reprenant les documents liés au contrôle à dimension transfrontalière et, d'autre part, les pratiques y liées et aux inspecteurs d'échanger avec leurs homologues étrangers en temps réels.

63. - Etant donné la pression " morale " exercée par les Etats membres partenaires dans le projet, la Belgique a décidé de poursuivre le développé

148)http://www.socialsecurity.fgov.be/fr/nieuws-publicaties/conferenties/icenuw/deliverables.htm

des livrables du projet Icenuw d'une part en l'étendant géographiquement à tous les Etats membres de l'Union européenne et EEE et matériellement en couvrant les documents (et pratiques y liées) de contrôle en matière de droit fiscal et droit du travail. Ces matériaux jettent les bases sur lesquelles peut reposer une inspection européenne.

4 b) Leading delegation au sein de la commission administrative

4.b.1) La méthode FERM " Fraud Error Risk Management "

64. - La Belgique, en tant que délégation chef de file pour les questions de fraudes et erreurs au sein de la commission administrative, a présenté la méthode d'évaluation des rapports nationaux de fraude et erreurs qu'elle a développée [149) 150)] durant la 329e réunion de la commission administrative. Cet instrument s'inscrit dans le cadre d'une politique intégrée pour le risk management pour traiter les problèmes de fraudes et erreurs dans le contexte de l'application des règlements européens de coordination n°883/ 2004 and 987/2009 [151)].

65. - Ainsi, la méthode FERM ne se résume pas à un simple instrument d'évaluation systématique ou automatique mais plus généralement comme un outil bien structuré permettant à la commission administrative de prendre en considération les problèmes de fraudes et erreurs dans le cadre de ses activités quotidiennes [152)].

66. - A la fin de 329ème réunion de la commission administrative, la délégation belge a été mandatée pour évaluer les rapports fraudes et erreurs déposés par les autres Etats membres pour les années 2012 et 2013 [153)].

67. - Les résultats de l'application de la méthode FERM aux fins d'évaluation des rapports nationaux en 2012 a permis de fournir à la

---

149)Procès-verbal du groupe de travail du 17 novembre 2012 (AC 431/10), point 8 " Integrated policy on managing fraud and error risks in the framework of social security and its implementation into AC working methods " ,et réunion de la commission administrative du 15-16.12.2010.

150)Note de la commission administrative, réf. AC 415/10

151)En particulier, la méthode FERM fournit de la guidance pour:

- *predicting probable impacts / determining impacts of strategies or decisions that will be or have been implemented as to fraud and error*
- *identifying which factors of a decision may lead or are leading to unwanted (fraud and error enhancing) side effects*
- *if possible, isolating those factors and make (re-)evaluation possible (close the gaps, find alternative solutions)*
- *if isolation prior to the decision is impossible, developing mitigation mechanisms to reduce the harmful side effects*
- *evaluating decisions / actions to counter fraud and error in order to learn from experience*

152)Procès-verbal du groupe de travail de la commission administrative du_17.11.2010 (AC 431/10)

153)Procès-verbal de la 329ème réunion de la commission administrative- note réf. AC 339/11, point XII.

commission européenne ainsi qu'aux Etats membres une vue complète des problèmes de fraudes et erreurs dans l'application des règlements européens de coordination, de prendre connaissance des bonnes pratiques dans certains Etats ainsi que des accords bi (ou multi) latéraux conclus. Enfin, les résultats produisent certaines suggestions pour appréhender/résoudre les problèmes soulevés (amendement de décisions adoptées par la commission administrative ; renvoi vers un groupe ad-hoc spécifique, etc.).

68. - Le processus, en l'absence d'un forum en ligne, reste assez statique et ne permet pas réellement un échange de vues entre les Etats membres et les représentants de la Commission européenne. La Belgique a ainsi proposé de mettre à disposition des membres de la commission administrative un espace au sein de la plateforme H5NCP permettant cet échange tout au long de l'année, de nourrir le débat au sein de la commission administrative, mais aussi de pouvoir prendre connaissance des bonnes pratiques développées dans d'autres Etats pouvant servir utilement de modèle à d'autres.

4c) Projet H5NCP

69. - Dans son point 3, la décision H5 adoptée par la commission administrative (§ 42 supra) précise que " les États membres désignent un point de contact en matière de fraudes et d'erreurs, auquel les autorités compétentes ou les institutions peuvent signaler des risques de fraudes ou d'abus ou des difficultés systématiques à l'origine de retards et d'erreurs. Ces points de contact sont inscrits sur une liste publiée par le secrétariat de la Commission administrative " dans sa note du 20 juillet 2011. La liste est incomplète dans la mesure où non seulement certaines données fournies sont parcellaires mais surtout parce que certains Etats membres n'ont pas désigné de points de contact.

70. - Un premier résultat lié à l'exécution de ce projet est que tous les Etats membres ont désigné un point de contact. Concernant les livrables de ce projet, tous les membres ont accepté l'idée de développer un guide pratique fournissant aux Etats membres les indications relatives à la désignation des points de contact nationaux, sur la responsabilité de ceux-ci dans le cadre de leurs missions, sur l'étendue de leurs domaines d'activités. En outre, et parallèlement, une plateforme dédiée au réseau des points de contacts nationaux a été développée et actuellement en déploiement au sein de tous les Etats membres de l'UE et EEE.

71. - Cette plateforme permet, par ses fonctionnalités diverses et multiples, des échanges en directs, de travailler en sous-groupes sur des questions spécifiques (pensions ; soins de santé, etc.), de travailler virtuellement sur un même document. Bref, cette plateforme accroît la coopération et la coordination entre les toutes les institutions des Etats membres en matière de sécurité sociale avec pour objectif ultime une correcte application des règlements européens de coordination au bénéfice des citoyens européens.

72. - Ce projet cofinancé par la commission européenne se termine le 31 décembre 2013, mais la demande unanime des Etats membres est de pouvoir disposer d'une telle plateforme de communication de manière permanente. Gageons que la commission puisse dégager une solution structurelle pour répondre aux vœux des Etats membres.

III. CONCLUSIONS FINALES

72. - Qu'il s'agisse de l'échelon national ou européen, la lutte efficiente contre la fraude sociale repose sur la nécessaire coopération et coordination entre tous ses acteurs. Davantage au niveau européen eu égard à la diversité des régimes de sécurité sociale, des structures institutionnelles et administratifs des Etats, une coopération et coordination efficaces sont la clef du succès dans la lutte contre la fraude sociale. Aucune initiative unilatérale ne permettra à elle seule d'endiguer la fraude.

73. - Si la Belgique s'est montrée active dans ce domaine, c'est surtout pour préserver la solidarité entre les peuples, éviter le dumping social auquel se livrent certaines multinationales qui contournent sciemment les règlements européens de coordination, préserver une protection sociale forte au niveau des Etats membres, des services sociaux et publics de haute qualité tant au bénéfice des citoyens que des entreprises.

73. - Les règlements européens ne forment pas un mauvais corpus législatif. Au contraire, ces derniers ont montré l'étendue de toute leur efficacité au service de la liberté de circulation des personnes se déplaçant quotidiennement sur le territoire de l'Union européenne. Toutefois, le rôle de la commission européenne ne doit pas être négligé dans la problématique de la fraude. Au contraire, la commission a un véritable rôle à jouer en soutenant les initiatives telles que H5NCP ou ICENUW car de telles actions permettront aussi (et avant tout) de réconcilier le citoyen européen au projet européen.

LAW AND THE RISE OF THE REPRESSIVE WELFARE STATE

Gijsbert VONK

University of Groningen

This article discusses the trend of introducing increasingly strict obligations and sanctions for social security claimants in the Netherlands, the UK and in Germany. It is argued that this trend should be judged critically because it upsets the balance between rights and obligations for claimants of benefit and may undermine the "elevating function" of social security. Courts play an important role in maintaining the balance between rights and obligations. The article discusses recent case law in the three countries and refers to a remarkable case at the Czech constitutional court of November 2012 which paves to way to a more fundamental approach to scrutinize repressive welfare state excesses.

1. INTRODUCTION

In our present climate social security fraud has become a true public concern. Individual fraudsters who are caught out are paraded in front of the camera and collectively scorned and ridiculed in the newspapers. People massively report suspected cases of benefit fraud to specially created complaints lines. Politicians from the left and right promise stricter rules and tougher sanctions. If there ever was a time that an improper use of benefit rights was a taboo, now it has become more like a public obsession.

The increasing attention for social security fraud is not an isolated phenomenon, but part of a wider trend which I refer to as the 'rise of the repressive welfare state'. This is a trend that has been commented upon by several social academics, particularly in Northern America. The uncrowned champion among them is the French sociologist Loïc Wacquant who wrote a

stirring account of the changes in welfare state in the United States. The book bears an ominous title: Punishing the Poor. [1)] Wacquant argues that in American problems are no longer solved on the basis of a social agenda. Instead the citizen is made fully responsible for his own life and the degree in which he or she can participate in society. Where these policies fail the state reacts with sanctions and criminal measures. In this way the 'light' American liberal state has developed a 'heavy' substructure to suppress the poor.

According to Wacquant the repressive wind is blowing over to this side of the Atlantic. Whether or not he is right is of course a question of qualification of the term: 'repressive'. Whatever can be said about this, the fact of the matter is that many European welfare states witness a pattern of formulating stricter obligations for social security recipients, followed by calls for a hardening of sanctions and a tougher criminal law response. For the purposes of this article , I will discuss such changes in social security law by looking at the situation in three countries, i.e. Germany, Great Britain and the Netherlands (in reverse order). The purpose of this article is the following:

a. To describe the spiralling obligations and sanctions in Germany, the Netherland and the UK with reference to legislative developments (section 3)
b. To interpret these changes with reference to possible explanations and common elements (section 4)
c. To monitor the responses of the judiciary to the repressive trend in the legislation (section 5).

The latter point is of particular importance to this contribution. Our social security systems function under the rule of law. This means that the balance of rights and obligations ideally is subject to an interplay between the legislature, the administration and the judiciary. If the legislator and the administration are focussing strongly on the disciplinary function of social security and neglect the rights of the beneficiaries, it is up to the courts of restore the balance. The more uncompromising the policies are, the more robust and constitutional the response of the judiciary can be expected to be, addressing the needs of the individual and formulating clear limitations. It is interesting to see to what extent courts take up this role. Below we will look in particular at the way courts react to the obligation too carry out unpaid activities under the threat of benefit sanctions.

2. FRAUD AND ABUSE OF BENEFITS RIGHTS: BIRDS OF A FEATHER

Before starting on the agenda, I shall first give some conceptual clarification. In order to capture the repressive trend in our welfare states, we will deal not only with the question of fraud and the reaction to it but also with the

1) *Loïc Wacquant, Punishing the Poor, the Neoliberal Government of Insecurity, Duke University Press, 2009*

perceived abuse of benefit rights. The concept of 'abuse of rights' is quite a murky one. I use it to circumscribe the situation of a claimant who is deemed to be not entitled to benefit because he or she is unwilling to work and participate in the society. It may be argued that mixing up fraud and abuse is unwanted and unjustified because these are two different things. From a legal point of view this is correct. In social security law a distinction can be made between information duties and co-operation duties. If one gives false information in order to gain some financial advantage, this is an offence under criminal law which can be sanctioned by fines, obligatory community services or a prison sentence. These are punitive sanctions which come under the protection offered by art. 6 ECHR to persons charged with a criminal offence. The same is the case if one withholds information which is relevant for the level of benefit, for example by not reporting earnings or a change in the household situation. Contrarily, if one fails to apply for a job or to agree to do community services, this merely constitutes a breach of an administrative obligation which can only be sanctioned by withholding benefit rights. Such sanctions may hit beneficiaries hard, but they are not part of the criminal law system.

Nonetheless, while technically speaking fraud and abuse of rights are different things, they also touch upon each other. Both forms of conduct are subject to the same spiral of formulating increasingly stricter obligations and tougher sanctions. More importantly, both operate as boundary markers establishing a line between those who are deserving and those are undeserving of social security support. From the latter perspective there is an interesting grey zone where welfare fraud merges into *welfare as fraud*. [2)] When policies increasingly emphasise personal responsibility, benefit dependency is more easily perceived as somebody's failure to take up this responsibility. And when such failure is subsequently sanctioned by withholding benefit rights, it easy to see why fraud and perceived abuse of benefits rights are birds of a feather. Both types of behaviour are deemed incorrect, both are followed by negative legal response.

3. SPIRALLING OBLIGATIONS AND SANCTIONS, A TALE OF THREE COUNTRIES

Netherlands

In the Netherlands the first act to step up the obligations and sanctions for beneficiaries was the *Wet boeten, maatregelen terug- en invordering Sociale zekerheid* 1996. It was felt that various institutions charged with the administration of social security acts underperformed in enforcing social security obligations. The act was supposed to force a break with the past by

2) *Cf. Dorothy E. Chunn and Shelley A.M.Gavigan, Welfare Law, Welfare Fraud, and the Moral Regulation of the 'Never Deserving Poor'" (2004) Social & Legal Studies 13(2): 219-243*

imposing a duty on the administration of social security to always fully recover every penny of undue payments and to always sanction violations of any obligation by means of withholding benefit payment or imposing fines.

The act was prepared under the responsibility of the then Secretary of State of Justice, Ernst Hirsch-Ballin, who is a respected professor of constitutional law. On the one hand the act was strict, on the other hand it took into account procedural rights for beneficiaries taken from art. 6 ECHR and various principles of administrative fairness (una via, ne bis in idem, presumption of innocence, the right to remain silent, to translator services, etc.).

The act gave rise to a system of enforcement governance, including obligations to develop anti- fraud policies, to monitor the progress and to report about this to the Ministry and then to Parliament. With this a whole enforcement bureaucracy evolved, with fraud officers, enforcement specialists and policy managers, partly reporting to the office of the Attorney General. This branch of activity also extends beyond the borders. The Dutch government imposed a ban on the export of benefits, but allowed for the conclusion of international agreements to make such export possible nonetheless, on the condition that the authorities of other countries would submit to the Dutch demands for control and information. All this has to be monitored. Sometime Dutch fraud busting teams are sent out to pay visits to disabled or old age pensioners abroad, often to the great surprise of expatriates who have left the country many years ago.

Despite the obvious progress made in the field of enforcement [3)], in 2011 the Dutch government announced a new act, the Fraud Act, with the idea of drastically rising the fines and in case of re-offence: an exile from the entire social security system. The latter proposal was strongly rejected by the Council of State because, in its view, it violated various constitutional principles. But this did not deter the government to go ahead with the proposal, with only slight amendments.

In the final version of the Fraud Act adopted by Parliament in 2012, it is possible to cash the fines by fully setting aside the statutory protected earnings level of 90% of the minimum subsistence norm for a period of five years. For social assistance claimants this period is maximum three months. The fines are at least the same as the amount of benefit to be recovered and further increased for re-offenders. This is harsh. When one compares the severity of the sanctions in social security with other sanctions applied in other fields of legislation, such as the Health and Safety at Work Act and the Employment of Foreign Nationals Act, it appears that they are far higher. According to some, social security sanctions have spiralled out control. [4)]

---

3) Cf. F.Noordam, 'Hoe fraude en handhaving Nederland en de Sociale Verzekeringsbank veranderden', SMA 2003, 16-29.

4) Albertjan Tollenaar, 'Aanscherping sanctiebeleid SZW-Wetten: vliegt de wetgever uit de bocht? ', Beleid en Maatschappij, 2013, (40) 2, 118-131

In the meantime a steady increase of co-operation obligations can be reported in the field of social assistance. In 2004 the duty to accept suitable employment was replaced by a duty to accept generally accepted employment, a concept which is supposed to not take into account the level of person's previous employment experience. Subsequently, workfare practices were introduced, made possible by the so called participation jobs which force beneficiaries to work without any wages for the purposes of gaining work experience for a maximum of two years. Then 2012 saw the introduction of a so called *maatschappelijk nuttige tegenprestatie.* This is a duty to make oneself available for community services in addition to the duty to find employment. The introduction of the *tegenprestatie* was accompanied by a bombardment of moralistic jargon: the reciprocity principle, everything comes at a price, *voor wat hoort wat.* [5)] Sometimes the tone is more scornful; let them sweep up the leaves, or clear the snow! This language is mostly symbolical. Collecting autumn leaves is a highly professionalised business in the Netherlands, whereas snow clearing is difficult when everything has melted away within 24 hours.

In the meantime patience with beneficiaries who fail to become active and find a job is quickly running out. Despite the fact that under the present legislative system municipalities have been given all the possibilities to impose strict sanctions, politicians think it is not enough. The present Dutch government has announced a new act which centrally prescribes tougher benefit cuts that all local councils must adhere to. In this way the 2012 Fraud Act is going to have a younger brother in the form a Lex Discipline

Great Britain

Moving over to Britain we find a very similar pattern in the legislation as the Netherlands. Here the spiral of obligations and sanctions was kick started by the policies of Tony Blair's government. The changes have been systematically studied by the Manchester Professor of social policy Peter Dwyer, who refers to them as a process of 'creeping conditionality' [6)], a pattern of formulating increasingly strict benefit conditions, thereby gradually undermining welfare rights for recipients. In social security the conditions mostly affect the unemployed and single parents, but in Dwyer's observations other areas such as health, housing, education and welfare rights are also affected.

Anti-fraud policies are also part of the process. The Social Security Fraud Act of 1997 introduced more powers to collect and exchange information which

---

5) Alex Corra, 'De maatschappelijk nuttige tegenprestatie: de magische grens tussen sociale re-integratie en repressie' in: Lokale verzorgingsstaat, nieuwe uitdagingen voor de sociale rechtsstaat , G.J. Vonk en A.Tollenaar (red.), Groningen, 2012

6) Peter Dwyer 'Creeping Conditionality in the UK: From Welfare Rights to Conditional Entitlements?' Canadian Journal of Sociology 2004, 29(2): 265-287

set a system of criminal fines. In lieu of prosecution, the claimant is offered the chance to repay the amount fraudulently claimed along with an additional 30 per cent of the overpayment. These powers and sanctions were increased by the Social Security Fraud Act of 2001 and then again by the Welfare reform bill of 2009. There is now a system of benefits cuts in operation which operates upon the notion of one strike and two strike offences. One strike is for one month benefit withdrawal; with two strikes the claimant faces a much longer period.

The British policies of conditionality have not altered much under the present coalition government. In 2011 the British government introduced the Mandatory Work Activity, advocated as a chance to develop work discipline and behaviour and to contribute to the local community. Once a claimant is referred to Mandatory Work Activity, participation is mandatory and sanctions apply if a claimant fails to participate without good cause. The placements last for four weeks and for 30 hours a week. There are no wages.

Germany

In Germany tougher conditions and sanctions were introduced as part of the systematic overhaul of the social assistance system by the then Schröder government. The overhaul resulted in *Grundsicherung für Arbeitssuchende*, popularly referred to as Hartz IV (after the architect of the system Peter Hartz), or more technically as *Arbeitslosengeld II*. This system introduced minimum benefits, strict work conditions and tough sanctions for those not adhering to them. Part of the system is the *Arbeitsgelegenheiten mit Mehraufwandsentschädigung* (work opportunity with compensation for addition expenses) often referred to as the *ein-Euro-job-scheme*. These are additional jobs created for Hartz-IV recipients in the community sphere. The recipients keep their benefit and can earn one or two Euro's per hour in addition.

In order to avoid that the ein-Euro-job-scheme runs contrary to the German constitutional requirements, the activities and the rights of the beneficiaries are well regulated in the law. For example, the work offered must be proportional and suitable for beneficiary. The extent, mode and duration of the work carried out must clearly circumscribed in a public law agreement concluded between the administration and the beneficiary. Health and safety must protected and the person is insured for occupation accidents. The maximum working week is 30 hours.

Hartz IV has been in operation for almost ten years without any substantial changes. Around 2010 some politicians, most notably the CDU Ministerpräsident of Hessen Roland Koch, started a campaign to introduce a general *Arbeitspflicht* for Hartz-IV recipients. But these voices were silenced by Angela Merkel who remarked in the Bundestag: "*Ich glaube, dass die rechtlichen Rahmenbedingungen, was die Notwendigkeit der*

Arbeitsaufnahme betrifft, eindeutig ausreichend sind [7]". This was, seemingly, the end of the matter. And yes, the powers to impose sanctions on unwillingness to work included in Hartz-IV are already quite severe, at the minimum a 30% benefit cut going up to a total withdrawal of benefit.

Finally a short word about fraud policies in Germany. Here the Germans rely on the consistency of the Sozial- and the Strafgesetzbuch which include powers to collect information and treats information fraud as a criminal offence. If there is any intensification of these anti-fraud measures, these do not come from the legislature, but rather from the administration, particularly die *Bundesagentur für Arbeit* which continues to discover increasingly large numbers of irregular payments of *Arbeitslosengeld II*. [8]

4. BACKGROUND AND IMPLICATIONS OF THE NEW REPRESSIVE POLICIES

The spiral of obligations and sanctions can be interpreted in various ways. Some will point a the diminishing support among the populous for solidarity with some groups of welfare recipients thus creating a new image, a category of 'underserving poor', single parents, long term unemployed, immigrants, etc. Others will argue that the new repressive policies are rooted in the need to reform social security, by making the system more activating and by reducing costs. An alternative explanation comes from the Dutch sociologist Willem Trommel. [9] He points at structural changes which undermine the old welfare state such as globalisation and individualisation and argues that this gives rise to a New Social Governance. This is - in Trommel's terms - 'a greedy government' which is characterized by a state that is desperately trying to restore the social fibre of society. A characteristic of these policies is that the state in trying to mould society into a uniform pattern of values and norms so as to create a responsible civil society from a top down perspective.

Wacquant makes an equally interesting remark when he points out the role of symbolism of repressive welfare policies. [10] Such symbolism is important from the point of view of legitimacy of state. By constantly pointing the finger at those who are not deserving of our support: the unruly, the outcasts, the irresponsible, newcomers to society and worst of all fraudulent immigrants, the state is busy strengthening the bond with the rest of the population, thereby creating a basis for its survival.

---

7) http://www.faz.net/aktuell/wirtschaft/arbeitspflicht-fuer-hartz-iv-empfaenger-ein-basta-der-kanzlerin-zu-kochs-vorschlaegen-1910484.html

8) Bundesagentur fÃ¼r Arbeit, Jarhresbericht Grundsicherung fÃ¼r Arbeitssuchende, 2010, 2011 and 2012

9) Willem Trommel, Gulzig bestuur (oratie VU Amsterdam), Den Haag, Lemma 2009

10) Loïc Wacquant, Punishing the Poor, the Neoliberal Government of Insecurity, Duke University Press, 2009

Such theories offer an alternative to the mainstream marketing arguments for tougher obligations and sanctions dished up by politicians. Indeed, there are good reasons for being critical of these mainstream arguments. I mention four.

First of all, the new policies are not always based upon empirical evidence or rational considerations. For example, the latest Dutch Fraud Act was a response to political pressure, not at all to rising fraud and abuse statistics. In fact, the figures show that these do not increase at all. It is also quite shocking to note how often fraud cases are reported to the press suggesting large scale illegal practices involving millions of Euros damage, while in the end such cases appear simply not exist. Thus in the Netherlands, only twelve Moroccans and Turks appeared to have claimed double child benefit, not a quarter of the relevant population as was earlier suggested by some politicians. [11)] Similarly, in Amsterdam after two years of researching address data, it appeared there were only six so called phantom citizens claiming benefits, instead of the hundreds suggested earlier. [12)] Remarkably, no politician is ever held accountable for spreading rumours which subsequently prove to be manifestly exaggerated or downright false.

Secondly, it should be pointed out that the call for higher fines is made on the assumptions of wrongful behaviour which in practice cannot always be upheld. Not all recipients who do not adhere to the rules are intentional fraudsters. As is testified by the contribution in the present volume by there is a difference between intentionally and unintentionally violating obligations (Reindl-Krauskopf), the extent of error may far outreach the extent of fraude (Van Stolk) and suspected fraud is not the same as the real extent of fraud (Van Oirschot). Some people just get lost in the rules or suffer from the events in their life paths which make them unfit to do what is expected of them. Perhaps also for this reason local administrators often find it hard to actually impose the tough sanctions that are prescribed by central guidelines. [13)]

Thirdly, new repressive policies can come with an overdose of paternalistic interference which damages the dignity of benefit claimants. Thus, the former Dutch Secretary of State for social affairs Henk Kamp made a serious point describing how social assistance recipients should dress. They are not supposed to show piercings, tattoos, *décolletés* or belly buttons, let alone heads scarfs or burkas, otherwise they not attractive to employers. But again research has pointed out that in practice it is very hard for social services to actually enforce such instructions borne in the fantasy of some correct

11) Sociale Verzekeringsbank: evaluatie onderzoek uitwonende kinderen in Turkije en Marokko, 2008 accessed via http://www.journalistiekennieuwemedia.nl/NC/?p=742

12) Reinart Barth, NRC-handelsblad 12 september 2013

13) In the Netherlands: Uijl, M. den, Tollenaar, A., Bröring, H.E., Kwakman, N.J.M., & Keulen, B.F. (2012). Boetes in het strafrecht en het bestuursrecht: de rationaliteit van boetehoogte en vormgeving in boetestelsels. Tijdschrift voor sanctierecht & compliance 2012, nr. 6.

politician. [14] In Britain, the press targets for example people who suffer from overweight. No dole for fatties.

Fourthly, the repressive welfare state reforms are so much focussed on discipline and sanctions, that they undermine the balance between rights and obligations, thus exposing the claimants to benefit to unwarranted intrusions of their privacy, the arbitrary decisions of fraud officers and degrading treatment. In the end this may jeopardise the "elevating function" social security is supposed to have for its citizens. For example, in our research into the implementation of the latest Dutch mandatory work activity programme we found out that there are less regulatory guarantees for this type of work than the obligatory community services which must be carried out be detainees. In this way social security and criminal law will become mutually exchangeable areas of government concern. The British government introduced at least a set of quality guarantees for the British Mandatory Work Activity Scheme. There are Internal guidelines which deal not only with working times, health and safety matters, but which also require the work to be beneficial for the development of the claimant, not to go against his personal beliefs or lead to any degrading practices. [15]

5. RESPONSE OF THE JUDICIARY

As was mentioned in the introduction, it is important that new repressive welfare policies operate under the rule of law, which can help to maintain a just balance between rights and obligations for benefit claimants. In this respect it is relevant to monitor the response of the judiciary to these new policies.

It emerges that the courts are very much in the business of counterbalancing the new sanctions regime, both in cases of information fraud and in cases of suspected abuse. This is not only the case in the Netherlands [16], but also in the UK [17] and in Germany. The red strand of the case law is that each individual case must continue to be judged on the basis of the merits, however strict and standardized the rules may be. When individual circumstances are taken into account very often the conclusion must be that sanctions should be mitigated.

---

14) Research carried out by the Dutch Social and Cultural Planning Office Verzorgd uit de bijstand, De rol van gedrag, uiterlijk en taal bij de re-integratie van bijstandsontvangers, SCP 29 augustus 2012.

15) Mandatory Work Activity Provider Guidance - Incorporating Universal Credit (UC) Guidance (August 2013) accessed at http://www.dwp.gov.uk/docs/pg-part-p.pdf

16) Cf. G.J. Vonk, `Kroniek jurisprudentie werknemersverzekeringen en bijstand 2011, Tijdschrift voor recht en Arbeid 2012, 20-25 and G.J. Vonk Hoofdzaken zekerheidsrecht, Kluwer, Deventer, 2013, Chapters 13 and 14.

17) Grainne McKeever, Balancing rights and responsibilities: the case of social security fraud, Journal of Social Security Law 2009.

Another trend, at least in the Netherlands, is that case law is becoming more constitutional in character, meaning that courts do not refrain from taking a principle stance and derive rules from fundamental rights. One of the reasons for this may be that the basis for the rights in the social security statutes themselves has become so much weakened by constant legislative interferences that courts must almost automatically resort to higher legal norms, in particular human rights standards, as a basis for their decisions. Examples of the more principle case law are the rulings dealing with the powers of the administration to enter the homes of claimants for verification purposes. According to the Dutch Central Appeals Tribunal this is not allowed unless the occupant gives his explicit consent. [18)] Failure to do so may not result in any loss of benefit rights, unless there is clear indication that there is something wrong with payments. Typically the Dutch legislature has reacted to this with a new act to grant more powers to the administration to enter people's homes, but it is questionable whether this attempt is really going to be successful, as the courts will probably remain critical.

Another interesting strand in case law deals with the question of whether it is allowed to force beneficiaries to accept workfare duties, for which beneficiaries receive no, or reduced earnings. The question arise to what extent this is in line with some fundamental rights, such as the right to work (in particular the freedom of occupation) and the prohibition of slavery and forced labour as contained in several international human rights instruments, such as art. 4 ECHR.

For a long time there were hardly any national or international cases in which concrete decisions of social security administrations to withhold benefit rights were considered to be in violation of any of these rights. The general understanding seems to be that work duties may be imposed as a benefit condition and that withholding benefit rights does not impede someone's freedom of occupation, let alone constitute forced labour. Up to now this has also been the point of view of the European Court of Human rights. [19)]

I have some trouble in accepting the way courts tend to reject outright the relevance of the prohibition to forced labour in social security cases. Firstly, by doing so courts fail to appreciate the great responsibility which rests upon them to protect the proper balance between rights and obligations in times of the introduction of workfare policies. Secondly, case law does not recognize that withholding benefits rights may constitute a serious form of pressure and coercion upon the person involved. According to the European Court of human rights forced labour is labour exacted under menace of any penalty and performed against the will of the person involved, that is work for which

18) See the cases of 11 April 2007 by the Central Appeals Tribunal , inter alia LJN BA2447

19) ECHR no. 30300/96, decisions of 26 February 1997, J.H. Talmon v. Netherlands, EHRLR 1997, 448-449 and more recently ECtHR in the decision of 4 May 2010 in Schuitemaker v.The Netherlands, Application no. 15906/08.

he has not offered himself voluntarily". [20] I fail to see why under some circumstances, particularly long term benefit dependency, sanctions would not amount to such a penalty. In the light of this argument it is interesting to be able to observe that some courts seem to be adopting a more critical attitude.

In the Netherlands the first court to create a breakthrough was the local court of Arnhem. [21] The case dealt with a social assistance beneficiary with an academic background who had been told to accept certain activities, offered to him by the 'training centre', a facility set up under the work first programme of the town of Arnhem. The claimant was told to sign a 'job experience agreement' under which he was given the choice either to work as a public gardener (weeding, hoeing), or to pack boxes of super glue. He had signed the agreement but subsequently refused to co-operate in the activities imposed on him by his 'case manager'. This resulted in a penalty of a 40% benefit cut, during the period of one month. In its judgement the court came to the conclusion that the practices of the local council of Arnhem were not contrary to the prohibition of slavery and forced labour contained in art. 4 ECHR. The fact that the workfare activities were not voluntary because imposed under the threat of a penalty, did not alter this conclusion because, according to the court, social assistance is merely a safety net which presupposes that a person will return to paid employment as soon as possible. But while on the one hand the court ruled that in this case the activities offered should not be considered as disproportionate and excessive, it did on the other hand envisage that work first practices may run contrary to art. 4 ECHR, i.e. in the case of a beneficiary who is forced to carry out activities under threat of a penalty for a longer time when it is clear that such activities are in no way conducive to the re-integration in the regular labour market.

Later, in another case the Central Appeals Tribunal upheld the rationale of the Arnhem court and offered a more extensive abstract framework for deciding when workfare may run contrary to the prohibition of forced labour. [22] This is a new approach in the case law.

In the meantime, the British Supreme Court has delivered a judgment on the lawfulness of Mandatory Work Activity. [23] The case was brought up by an unemployed geology graduate, miss Caitlin Reilly. She was doing voluntary work in a museum, but was then forced to take on unpaid work in a Poundland store in Birmingham. After a couple of days work she quitted because she did not get any wiser from unschooled labour. The Supreme Court rejected the argument that the work activity was forced labour within

20) ECrtHR judgement of 23 November 1983, Van der Mussele v. Belgium, para 34.
21) Court of Arnhem, 8 October 2008, LJN BF 7284
22) CRvB 8 februari 2010, LJN BL1093
23) Supreme Court 30 October 2013 [2013] UKSC 68 | UKSC 2013/0064

the meaning of art. 4 ECHR. According to the Court the case law of the ECtHR clearly pressuposes that the activities should somehow be degrading. Thus, quoting from the case law, the Supreme Court ruled: *To amount to a violation of article 4, the work had to be not only compulsory and involuntary, but the obligation to work, or its performance, must be "unjust", "oppressive", "an avoidable hardship", "needlessly distressing" or "somewhat harassing"*.

Furthermore, the Supreme Court upheld the judgement of the lower courts that the Mandatory Work Activity scheme run contrary to the Act of Parliament. Lower legislation just repeated the vague terms of this act instead of providing further rules. But this formal defect has already been repaired with retroactive effect..

In Germany the ein-Euro-job-scheme under Hartz IV was tested in 2008 by the Bundessozialgericht. [24)] This case dealt with a 58 year old engineer who had to place protective casing around young trees for a local council company in Bavaria. For this job he merely received a small compensation fee. He refused because his 30 hours' work week made it impossible for him to apply for a regular job. This argument was rejected by the court on grounds that the labour was organised by the local community for public purposes and had to be considered as additional to regular work.

The forced labour argument also figured quite prominenty in a ruling of the Czech Constitutional Court of 27 November 2012. [25)] This was a case brought in by some opposition MPs of the Czech parliament against a Mandatory Labour Programme in the Czech Republic. The MPs complained that this scheme is against the forced Labour convention of the ILO, the prohibition of forced labour of the ECHR and the very right to social security itself. The Czech court's decision is a remarkable one. It crushed the scheme to bits: benefits cuts are a disproportional means of forcing people to accept work forced upon them by the authorities.

The Czech ruling is an uncompromising one, unique among its sort, made possible by the harshness of the mandatory work scheme introduced. People who are unemployed for longer than two months have to accept any unpaid labour. When they refuse, they are scrapped from the employment register with the effect that they lose benefit all together. Except for some exceptional cases, the claimants have no influence over the work and the conditions under which it has to be carried out. According to the court:

> "*the state treats them in the same manner as persons sentenced for a crime, only for the reason that they became unemployed and are exercising their legal rights, without violating any legal obligation. Therefore, the obligation to accept an offer of public service does not*

24) BSG 16 Dezember 2008 AZ: B 4 AS 60/07 R

25) Download in the English language: http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl_US_1-12.pdf

> *serve to limit social exclusion, but to intensify it, and it can cause those performing it, whose work has the same elements externally (for other people) as serving a sentence, humiliation to their personal dignity*".

This is a relevant judgement which I would recommend to any person who is interested in workfare policies. Many aspects also pertaining to the work schemes in other countries are critically scrutinized: the curious status of the labour relationship, the risk of arbitrary practices, the coincidental nature of the type of jobs available and the argument that the work must be done for the purposes of work training. Many of the arguments defending such aspects are utterly rejected or refuted.

One wonders how the Czech court would have looked upon the Mandatory Work Programmes applying in the Netherlands, Germany and the UK. Would they pass the test? The ein-Euro-job-scheme probably would by reason of its strict regulation of rights of beneficiaries in the SGB. Perhaps the Mandatory Work programme would if only because of the short duration the work has to be carried out (30 hours a week for four weeks). But what about the Netherlands, where the *maatschappelijk nuttige tegenprestatie* may be imposed for unlimited duration in a way which is left virtually unregulated by law?

What we learn from the fresh approach of the Czech court is that the rights the claimants under the workfare schemes should be made explicit. The work may not be degrading, there should be some right of choice, the work should benefit the claimant, individual circumstances must be taken into account as well personal beliefs, working conditions and working times should be adhered to, etc. These things must be regulated in the law, not just in internal guidelines like the ones that exist in the UK, or not simply left unregulated as is the case in the Netherlands' *maatschappelijk nuttige tegenprestatie*. [26)]

It is lessons such as these which illustrate exactly what role the judiciary can play in counterbalancing the rise of the repressive welfare state.

6. CONCLUSION

In this article we discussed the trend of introducing increasingly strict obligations and sanctions for social security claimants in the Netherlands, the UK and Germany. We referred to this trend as the rise of the repressive welfare state. It was argued that such a welfare state must be looked upon in a critical way because it upsets the balance between rights and obligations in social security and may result in degrading treatment and an undermining of the "elevating function" of social security. Courts play an important role in maintaining the balance between rights and obligations. We have discussed

---

26) A first case of a lower Dutch court is indeed highly critical upon the maatschappelijke nuttige tegenprestatie as a ground for imposing work duties. See Court of Zeeland-West-Brabant 25 Februari 2013, LJN BZ5171.

some examples of case law in the three countries, but the champion of all courts is the Czech constitutional court which in November 2012 led the way to a more fundamental human rights approach to scrutinize repressive welfare state excesses.

USE AND ABUSE OF SOCIAL SECURITY RIGHTS: LOOKING BEYOND THE EU

Klaus KAPUY [1)]

Austrian Federal Economic Chamber

Bernhard ZAGLMAYER [2)]

EFTA Surveillance Authority

1. INTRODUCTION

This article deals with the question of in how far international law provides for assistance to persons who allegedly abuse rights in the field of social security. The focus is directed to two situations:

- (potentially) abusing national social security law and seeking remedy in the international law; and
- creating a situation of (potential) social security abuse by applying international law.

The analysis of these situations is inseparably linked to the question where the line is to be drawn between using and abusing rights, which will accompany the reader throughout the text.

---

1) *Austrian Federal Economic Chamber; responsible for chapter 3; the views expressed in this article are strictly personal.*

2) *Deputy Director, Internal Market Affairs Directorate, EFTA Surveillance Authority; responsible for chapter 2; the views expressed in this article are strictly personal.*

In recent years, questions of using rules and rights of Community law in order to gain unjustified advantages have come to public attention. In particular, fundamental free movement rights inherent to the Treaty on the Functioning of the European Union (TFEU) have been discussed against the background of potential immigration fraud (e.g. Belgian route) and social tourism. [3)]

This article shall add a new angle to this discussion by scrutinising other European legal instruments that go beyond the borders of the European Union. How do they address potential abuse of social security rights? Do they assist persons who move from one country to another with the sole purpose to obtain social benefits, or do they have some kind of safeguard mechanisms in this respect?

Being limited by space, this article will focus on two European regimes that are closely linked to the EU legal framework, namely the association agreements (AA) concluded between the EU and third countries and the European Convention on Human Rights.

The first part of this article deals with AA and will start with briefly introducing the concept of association, which is fundamental for the application of the provisions on social security coordination in the agreements. Also the essential definitions and objectives as well as the institutional structures of the agreements will be explained (2.1). In addition, of course, the application of association law and its interpretation are of essence (2.2). As AA differ a lot from each other, the authors will focus on the Agreements with Turkey and the Maghreb States and explain their basic concepts and rights guaranteed by them in relation to social security (2.3 and 2.4). In the last and main part, three issues will be presented to illustrate where fraud and abuse in the field of social security come into play due to the specific nature and circumstance of AA (2.5).

The European Convention on Human Rights ("the Convention") is the key convention of the Council of Europe. Over the past almost three decades the Convention has gained importance in the field of social security law. The second part of this article, will therefore investigate whether the Convention and the Court's case law contain any indication on how to deal with cases of potential or confirmed social security abuse.

Both contributions are showing potential risks and unanswered questions that would merit further research and do not represent a fully-fledged

---

3) See, for instance, Boris Kálnoky, "Wie reiche Türken den deutschen Staat ausnehmen", Die Welt, 21 May 2012; "Sociale inspectie slaat alarm over frauderende EU-migranten", Het Nieuwsblad, 20 September 2012; Dominic Raab, "Copy Germany to crack down on benefits tourists," The Times, 5 March 2013; Peter Dominiczak, "Britain and Germany demand EU cracks down on 'benefits tourism'", The Telegraph, 24 April 2013. Reference shall also be made to the recent joint initiative of the Ministers of Interior of Austria, Germany, the Netherlands and the United Kingdom, who wrote a common letter to the Council of the European Union demanding an end to abuse of benefit tourism under the Residence Directive 2004/38/EC.

research. This is why apart from preliminary remarks and comments no conclusions are drawn.

2. ASSOCIATION AGREEMENTS

2.1 Introduction to association agreements

On European level the coordination of social security is not limited to the EU Member States (EU-MS). It extends, at least in fragments, to third countries with which the EU has concluded agreements, so called Association Agreements (AA). The concept of association implies an approach to the process of European integration without being a member of the EU and participating in its organs.

Legal basis and Framework of an Association

The legal basis to close agreements with third countries is Art 217 TFEU: *The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.* Basically three types of association can be distinguished: the association for accession, an approach that, as the name suggests, envisages a potential future accession; the *free trade association*, which is primarily directed towards a customs union and the *development association* to assist developing countries. This categorization is only ideal. In practice, there are many overlapping and transitions between these association types. Hence the distinction of agreements-species per se has neither effect on the scope nor extent of their content.

The only real criterion of AA to be found in Art 217 TFEU is the "*common action and special procedures*." AA require a specific organizational structure, namely its own decision-making organs which are competent to guide and develop the association. The structure of these institutions is essentially identical in all AA consisting of Association Councils of which the individual name can vary according to agreements. In the AA with Turkey it is expressly referred to as the Association Council, in the Cooperation Agreements with the Maghreb States it is called Cooperation Council. These Councils are the governing bodies with political guiding function and binding decision competence.

Association law

AA are international treaties without the establishment of an intergovernmental organization between the Union and the associated countries. A distinction between primary and secondary legislation, similar to the concept of EU law in the context of the TFEU.

The primary law of AA comprises the actual Agreements including all annexes, protocols, exchange of letters etc. This is especially important in the case of the accession of a new EU-MS, where the scope of Agreements is extended by an Additional Protocol.

The Court of Justice of the European Union (CJEU) referred to AA simply as "*an integral part of the Community legal order*"; initially with no real legal grounds. The Court later added in Case *Kupferberg* that by fulfilling the obligations from such Agreements, the EU-MS have an obligation not only towards the third country concerned, but also, and especially, towards the Community, which has assumed the responsibility for the proper implementation of these Agreements. [4)] This approach has been consolidated over the years in the jurisprudence of the CJEU. [5)]

The criteria developed by the CJEU for the direct applicability of the AA are analogous to those for the direct effect of international law agreements. Primarily reference has to be made to the judgment in Case *Demirel*, where the CJEU held that a provision in an agreement concluded by the Community with third countries is to be regarded as being directly applicable when considering its wording and in view of the meaning and purpose of the Agreement contains a clear and precise obligation, in its implementation or effects, to the adoption of any subsequent measure. [6)]

The AA provide for the regulation by Association Councils, which can adopt either non-binding resolutions, declarations, recommendations and opinions or binding decisions (Association Council Decisions, ACD). Initially, decisions were classified as acts of treaty bodies of international law agreements and required transformation into Community law. However, since the judgment in Case *Sevince* in 1990, the Court stated that the acts of the Association Councils are directly related to obligations arising from the AA and therefore do not need further implementation into Community law. [7)] As the CJEU held in Cases *Taflan-Met, Kus* and *Sürül*, the provisions of ACD are also directly applicable, if they fulfil the requirements established in case *Demirel.* [8)]

It can therefore be concluded that AA and ACD are part of the EU *acquis*, on which the CJEU has full jurisdiction for its interpretation and application, and which, in case they are sufficiently precise, can be directly applicable.

AA only cover the *acquis*, which existed at the time of the conclusion of the agreement. An extension of Agreements must be renegotiated in every case. A "deepening" of an Agreement can only occur via secondary association

4) Case 104/81 Kupferberg, ECR 1982, 3641.

5) See also Case 12/86 Demirel [1987] ECR p. 3719, paragraph 7; Case C-192/89 Sevince [1990] ECR I-3461, Paragraph 8.

6) Case12/86 Demirel [1987] ECR 3719, paragraph 14.

7) Case C-192/89 Sevince [1990] ECR I-3461.

8) See also C-277/94 Taflan-Met [1996] ECR I-4085, paragraph 24; Case C-237/91 Kus [1992] ECR I-6781, paragraph 31; and Case C-262/96 Sürül [1999] ECR I-2685.

law, namely through ACD. This means that changes in EU secondary legislation or in-law of the CJEU over time do not automatically apply to the AA, but must be included individually for each individual AA.

2.2 Interpretation of Association Agreements

Since the AA are international treaties, they are so far the rules of international law relating to the interpretation and application of international treaties. For this purpose, the rules of the second Vienna Convention on the Law of Treaties in international law between international organizations and the countries of 20 March 1986 (VCLT II) apply. Since this convention is not yet in force, the CJEU basically refers to the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT).

As the CJEU has held in its judgment in Case *El-Yassini*, an international treaty is to be interpreted not only to its wording but also in the light of its objectives. [9)] The Court has further pointed out that Article 31 of the VCLT determines that a contract is to be interpreted in good faith in accordance with the ordinary rules its meaning in their context and in the light of its object and purpose.

From these two statements of the CJEU it can be deducted that, first, it is a balancing act how an AA is to be interpreted, partly under the WCLT, or based on the objectives of the TFEU itself. It is clear that the closer the purpose of an AA matches with the objectives of the TFEU, the more these objectives can be used for its interpretation. Second, it can be concluded that the jurisprudence of the CJEU to one specific AA cannot be transferred automatically to another one. Object and purpose of each AA must always be kept in mind in order to interpret and apply it correctly.

2.3 The Association Agreement with Turkey

Framework and structure

The Agreement establishing an Association between the EEC and Turkey ("Ankara-Agreement") is one of the oldest AA. [10)] Relations with Turkey date back to the first membership application to the EEC in 1959. After the rejection, the Ankara-Agreement was signed in 1963, which entered into force on 1 January 1964. Later, an Additional Protocol was signed in 1970, which became applicable on 1 January 1973. [11)] According to its Article 62, it is a part of the AA.

---

9) Case C-416/96 El-Yassini [1999] ECR I?1209.

10) Agreement establishing an Association between the European Economic Community and the Republic of Turkey, OJ L 1964/217, 3685.

11) Introduced via Regulation 2760/72 of 19 December 1972, OJ L 1972/293, 1.

The aim of Agreement is the strengthening of trade and economic relations, which should facilitate Turkey's eventual accession to the EC. To this end, a timetable for the establishment of a customs union and the manufacture of persons was targeted, namely 12 to 22 years. The Association Council adopted in 1976 the first Decision No. 2/76, which made a first step to freedom of movement for workers between the Community and Turkey. Although in 1980, two ACD on the development of the Association were adopted (ACD No. 1/80 on workers and ACD No. 3/80 on the coordination of social security), the free movement of workers was not achieved.

In 1987, another of Turkey's application for membership was rejected again. The timetable for the establishment of the free movement of persons expired without reaching the target. However, a customs union was created with ACD No. 1/95. Accession negotiations were resumed in 2005, and adopted a revised "Accession Partnership" in 2008.

Material Scope - substantive provisions in primary association law

Title 2 of the Ankara-Agreement establishes the framework of the transitional period and, in addition to a ban on the introduction of new restrictions in Article 7, the prohibition of discrimination in Article 9 and the requirement to establish free movement of persons was laid down in Article 12. Moreover, limitations of services and freedom of establishment should be abolished (see Article 13f).

The Additional Protocol is divided into four titles, of which only the 2nd and 4th are of relevance here. Title 2 contains the provisions on the free movement of persons. First, Article 36 sets out that the movement of persons should be gradually introduced between 12 and 22 years and the Association Council should take the necessary Decisions. The CJEU has found in the Case *Demirel*, that Article 36 is not just directly applicable because the limitation period has expired. [12)] As the provision is solely of programmatic character, it requires an ACD to implement it.

Article 39 of the Additional Protocol is the equivalent to Article 48 TFEU, in somewhat modified form, and thus represents the central core of the rules on social security coordination in the Ankara Agreement. Accordingly, pursuant to paragraph 1, it shall refer to the Association Council at the end of the first year after entry into force of the Protocol to introduce provisions in the field of social security for workers of Turkish nationality who travel from one MS to another, and for their families residing in the Community. [13)]

In paragraph 2 of Article 39, it is referred to the principle of aggregation of insurance periods that should be applied, at least for different kinds of

12) Case 12/86 Demirel [1987] ECR 3719, paragraphs 23 und 25; later confirmed by Case C-37/98 Savas [2000] ECR I-2927, paragraph 41.

13) Obsolete due to Regulation 1231/2010.

pensions in a manner to be determined. However, the EU-MS should not be forced to aggregation of periods completed in Turkey. According to paragraph 4, pensions based on paragraph 2 shall be exportable to Turkey. Paragraph 3 limits the application of the rules on family benefits to family members who live in the Community, thus excludes those members of family from being taken into account who are living back in Turkey. Finally, paragraph 5 clarifies that bilateral agreements between each EU-MS and Turkey providing more favourable provisions are not affected by this agreement.

Secondary association law

On 19 September 1980, the ACD No. 1/80 was adopted, implementing Article 12 of the Ankara Agreements and Article 36 of the Additional Protocol to the Association. [14)] However, this ACD has not created the free movement of workers, but leaves the competence to the legislation of the EU-MS as regards immigration and access to the first workplace in the MS. It regulates primarily the situation of the Turkish workers, who are already integrated in a labour market of a MS by legitimate work for a certain duration. Article 6 stipulates that after 1 year of work, the migrant has a right to a renewal of his work permit, if a workplace is available. Moreover, after 3 years he may apply for the same work with another employer and after 4 years he enjoys free access to the labour market in the host State. Article 7 grants rights to family members, who may access the labour market after 3 year residence and children who finalized their education in the host state may even immediately access the labour market.

On the same day, based on Article 39 of the Additional Protocol, the Association Council has also adopted ACD No. 3/80 on the coordination of social security which entered into force on 1 December 1980. [15)] The ACD is linked to the migration of workers, without providing a right to freedom of movement to the Turkish nationals.

The ACD No. 3/80 consists of a total of 30 articles, referring on the one hand to the application of the provisions of Regulation 1408/71 (in particular definitions) or are formulated identical, like the principle of equal treatment for all persons residing in the MS in Article 3, the export of services in kind 6 and anti-cumulation of benefits in Article 8. As to the provisions concerning the various categories of benefits, it is to be noted that no provisions are included for unemployment benefits in Title III and the provisions of invalidity (Article 12), old age and death (pensions) (Article 13) and family benefits (Article 19) foresee differences compared to the provisions of Regulation 1408/71, which either allow limitations on the aggregation of insurance periods or only the

14) ACD 1/80 has not been published in the OJ.
15) OJ L C 1983/110, 60.

take into account family members residing in Community territory in relation to family benefits. ACD No. 3/80 has never been renewed, ie no change of the Regulation 1408/71 was ever made part of the Ankara-Agreement, just as the later case-law of the CJEU.

There was also no implementation-decision taken by the Association Council analogous to Regulation 574/72, as a draft of such has not reached the necessary majority quorum within the Council. This fact takes much of the substance of ACD No. 3/80.

After the introduction of Regulation 859/2003 and its successor-Regulation 1231/2010, ACD No. 3/80 is not anymore of relevance for cross-border cases within the EU (except for Denmark), as Turkish citizens are now covered by VO 883/2004 and 987/2009.

In December 2012, a new proposal to replace ACD No. 3/80 has been issued by the Council. It substantially keeps the same content, but is reduced in the size due to the fact that all rights which are already guaranteed by Regulation 1231/2010 are not anymore included. Moreover, aligns to the status quo of Regulation 883/2004 (personal and material scope) and specifically introduces the category of special-non-contributory benefits. [16)] It shall be pointed out here that the personal scope refers explicitly to Turkish migrants that work legally in an EU-MS. The exact text has now to be negotiated with the Turkish Government in the Association Council.

2.4 The Association Agreements with the Maghreb States

Basic structure and objectives

In 1976, the EEC signed three cooperation Agreements with Algeria, Morocco and Tunisia ("the Maghreb-States") containing largely the same provisions and were adopted by the EEC via three Regulations. [17)] The aim of these Agreements was to promote a global cooperation between the Parties in order to contribute to economic and social development of the Maghreb-States, and the deepening of their relations to the single market, including in the labour sector. The Agreements aimed neither at the accession of States to the EEC nor at the establishment of the free movement of workers in relation to nationals of Maghreb countries within the Community from, but only to guarantee secure the social situation of workers and exclusively their family members living with them in the MS. [18)] The Agreement with Morocco shall be used as example.

---

16) See issue of exporting special non-contributory benefits arising of Case C-485/07 Akdas [2001] ECR I-4499.

17) Regulations 2210/78, 2211/78 and 2212/78 of 26 September 1978, OJ L 1978/263, 264 and 265. The texts of the agreements are published under the same OJ reference.

18) Case C-179/98 Mesbah [1999] ECR I-07955, paragraph 31.

Primary association law

The cooperation in the field of labour, which is the subject of Title III of the respective Agreements are based on the principle that any discrimination based on nationality of the territory of a State Party concerned workers compared to its own nationals of that State at the pay and working conditions prohibited (prohibition of discrimination).

Furthermore, the social rights of workers and their families were regulated. This guaranteed workers and their families not only equal treatment with regard to social rights, but confirmed in particular the aggregation of insurance, employment or residence periods in different EU-MS concerning old-age, survivors or Invalidity pensions and health care.

In addition to family benefits also for family members who live in the Community, be made available. Family members who live in the Maghreb States, are explicitly excluded. Ultimately also the export of certain benefits in the Maghreb States is allowed, namely for old-age, survivors or invalidity pensions, and benefits from work-related accidents or occupational diseases.

In 1995, a conference was held in Barcelona by the Ministers of Foreign Affairs of the Mediterranean countries to promote peace, security and justice in the region. According to the results of the conference, the Community replaced the old Agreements with new ones ("Euro-Mediterranean Agreements"). [19)] All have a similar structure and a similar content to their predecessors Agreements.

Article 1 of the agreements states the objectives, namely to provide an appropriate framework for political dialogue between the parties and the progressive liberalization of trade in goods, services and capital movements, trade expansion and development of balanced economic and social relations, i.e. through dialogue and cooperation, to promote the integration of Maghreb countries and to promote cooperation in the economic, social, cultural and financial field.

Title VI (cooperation in the social and cultural fields), Chapter I (Provisions on Labour) is determined for each EU-MS that the worker with Tunisian, Moroccan or Algerian nationality employed in its territory, has treatment granted as regards working conditions, remuneration and dismissal free from any discrimination based on nationality in relation to its own nationals (non-discrimination clause). These provisions are the same words as the old Cooperation-Agreements. The provisions concerning the social rights of workers and their family members are also substantially the same, with the exception of the addition of a definition of "social security". A novelty is that the provisions of this chapter do not "*apply to nationals of the Parties residing*

19) For agreement with Tunisia see OJ L 1998/97, 2; for agreement with Morocco see OJ L 2000/70, 2; and for agreement with Algeria see OJ L 2005/264, 1.

or working illegally in the territory of the host country" (see Article 66). Unfortunately the agreements do not mention further what "illegal" in this context means, therefore it can only be assumed that this has to be addressed under the various national legal systems. Last, but not least, special non-contributory benefits were excluded from the export.

Secondary association law

The Cooperation Councils of the Agreements had the competence to adopt decisions to implement these provisions (see in the Final Provisions of the respective agreements), but this had never happened in the field of social security. Therefore, only the relevant provisions of the agreements that meet the conditions of direct effect are applicable.

Proposals for ACD have been issued by the Council in December 2007, which are currently negotiated with the associated states. The content is very similar to the Turkish proposal, however the material scope is more restricted, being limited to old-age, survivors or invalidity pensions, benefits from work-related accidents or occupational diseases and family benefits.

2.5 Association agreements and abuse of social security rights

As the CJEU declared the AA to be integral part of the Community *acquis*, it consequently applied the established case law concerning fraud and abuse under the EU Treaties to these agreements. The agreements contain to a certain extent the same or similar provisions as guaranteed under the TFEU and its secondary legislation, but, as explained above, it is more "bits and pieces here and there" rather than "nearly everything". In literature these agreements were also compared to Swiss cheese, being rich in substance, but full of holes.

I will try now to scrutinise what the consequences of these holes are in terms of access to social security benefits and possible cases of fraud of migrant workers coming from Turkey and the Maghreb States to the EU.

Legal entry/residence/work

Contrary to the rights guaranteed under the TFEU, the AA with Turkey and the Maghreb countries do not establish the free movement of workers in the sense that migrants from these countries can freely enter the Community territory and start residing or working there based on the AA (the AA with Turkey at least envisages free movement of workers, but it has not been realised so far, see above under 2.3).

Thus, the AA leave the power to such entry and residence rights and related work permits to the national (immigration) legislation of the individual MS. This means that the migrants have to fulfil the national requirements, like obtaining visas, fulfilling quotas of demand of workers and having issued

work permits, in order to become covered by the AA. Only as a second step the AA provide migrants workers with certain rights, i.e. equal treatment (see Article 64 of Morocco AA, Article 9 of Turkey AA + Article 10 of ACD 1/80) and to remain further in the Community territory (see Article 6 and 7 of Turkey AA) and also to grant access to social security benefits (see Article 65 of Morocco AA and Article 39 of Turkey AA + ACD 3/80).

From this follows that it is essential for the entitlement to benefits for these migrant workers to be clear about the circumstances under which and intentions with which they migrate from Turkey and the Maghreb countries to an EU-MS and remain on the Community territory. Therefore, it is necessary to scrutinise the case law of the CJEU on abusive behaviour to enter or remain in a MS as a starting point.

In case *Kol* [20] (1997), a Turkish national made false declarations to get a residence permit. He pretended that he and his German wife, who he married after having entered Germany in 1988, were living in marriage. However, the national administrations found out that the marriage was actually of convenience. The question referred to the CJEU was whether he could still rely on the rights guaranteed under the AA despite of having made fraudulent statements. Although, the Turkish migrant had been issued a residence and work permit by the German authorities, the Court declared that he could not invoke rights under the AA, even if he would have fulfilled the conditions for permanent residence by then. The CJEU based its decision on the fact that there has actually never been a genuine legal residence and, consequently, also no actual legal employment, as both permits were acquired by fraudulent declarations.

In case *Altun* [21] (2008), the Court elaborated on the consequences of such fraudulent declaration for family members. The Court held that due to the close the connection which exists between the rights which the Turkish worker has by virtue of ACD No. 1/80 and those on which his family members who have been allowed to join him may rely on the basis of Article 7 ACD No. 1/80, such fraudulent conduct is capable of having effects as regards legal rights of his family members. Those effects must, however, be determined with regard to the date on which the national authorities of the host MS adopted a decision to withdraw the residence permit of that worker. If on that date the rights of his family members were not completed, the MS are entitled to draw also the appropriate conclusions from the fraudulent conduct of that worker with respect to his family members. However, if the latter have acquired an autonomous right of access to the employment market of the host MS in the meantime, those rights may no longer be called into question on account of irregularities which, in the past, affected the Turkish worker's right of residence. Any other solution would be contrary to

20) Case C-285/95 Kol [1997] ECR p. I-3069.

21) Case C-337/07 Altun [2008] ECR p. I-10323, paragraphs 54-59.

the principle of legal certainty which, as is clear from settled case-law, requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals. [22)]

This means that the if family members have gained their independent rights, although this way was only opened via fraudulent behaviour of the migrant worker. An example of this would be children who joined the parents in an EU-MS by right of family reunification under the AA, finished their education there and then acquired the right to enter the labour market. They can continue to profit from the rights guaranteed under the AA and remain in the country, while, eventually the parents would have to leave the MS due to the fraudulent behaviour.

So far cases of entry have been illustrated, where the certain permits were acquired by fraudulent declarations. Now, the situation gets more complex. It is about persons who entered the country legally, but then did not stick to the rules.

In case *Bozkurt* [23)] (2010), a Turkish husband was convicted by a court for violating and injuring his wife and was to be expelled from Community territory, but he claimed his right to remain in the MS, which he initially acquired under the AA via his wife. The question arose whether a migrant can derive rights on family reunion from a spouse, who he raped and injured after having acquired legal residence status in an EU-MS or whether this could be refused and classified as abuse of rights. The CJEU stated that this was not abuse of rights, as the husband entered and remained legally on the Community territory based on rights derived by his (at that time) spouse and there was no indication that the marriage was of convenience with the sole purpose of enjoying abusively advantages provided for by the AA. The act of violence against his wife was not the trigger of granting him rights, so this was not a fraudulent behaviour. Although his conduct makes him 'unworthy' of receiving rights under the AA, such unworthiness and abuse of rights under Community law are not the same thing. Therefore, his situation should rather be assessed under a public policy-public security aspect than from an abuse point of view.

There was another case where Turkish nationals entered an EU MS with a tourist visa for one month in 1984, but simply continued to stay (Case *Savas* [24)]) (2000). The visa held the express condition prohibiting them from taking up employment or engaging in any business or profession. The migrants, however, being very business oriented started their small kebab stand without any authorisation in 1989 and were seeking to regularise their

22) See, to that effect, Case C-143/93 Van Es Douane Agenten [1996] ECR I-431, paragraph 27, and Case C-158/07 Förster [2008] ECR I-0000, paragraph 67.

23) Case C-303/08 Bozkurt [2010] ECR p. I-13445.

24) Case C-37/98 Savas [2000] ECR p. I-2927

status in 1991. This was refused by the national authorities, based on reasons of circumvention of national immigration law. The migrants invoked provisions of permanent residence under the AA.

The CJEU also rejected the applicant's position, as the provisions concerning the EEC-Turkey Association do not interfere with the competence retained by the EU-MS to regulate both the entry into their territories of Turkish nationals as well as the conditions under which they may take up their first employment, but merely regulate the situation of Turkish workers who are *already* lawfully integrated into the labour force of MS. Further, the Court held that Turkish workers are not entitled to move freely within the Community, but benefit only from certain rights in the host MS whose territory they have lawfully entered and where they have been in legal employment for a specific period. Thus, the employment rights conferred on Turkish workers necessarily imply the existence of a corresponding right of residence for the persons concerned. Otherwise the right of access to the labour market and the right to work as an employed person would be rendered entirely ineffective. The AA does not allow for illegalities to be regularised within their framework. [25)] Thus the Court assured that the EU-MS can fully apply their legislation on immigration and residence before having to take into account employment periods that might trigger any rights under the AA.

In the *Savas* case, the migrant had from the beginning a different intention than being simply a tourist. The legal assessment becomes far more complex, when the migrant actually changes his mind some time after having entered the Community territory.

It so happened in case *Günaydin* [26)] (1997), where the migrant came to Germany in 1986 to pursue a training course of some years in a big international company in order to return one day to manage the subsidiary of the company in Turkey. Accordingly, he received a visa specifying that it has been given for exactly this purpose. Mr Günaydin also declared that he had the firm intention to return with his family to Turkey afterwards the education. In 1990, however, he applied for a permanent residence permit in Germany on the ground that, as a result of his career development, Germany has become his home and Turkey would seem strange, in particular to his children who spent most of their life in Germany. Also his employer was committed to keep him in the firm. His application was refused by the German authorities, as it would go against the state's policy of development aid to bring in migrants to be educated to be able to work in their home country and, moreover, could be used to circumvent immigration legislation. In particular, as Mr Günaydin stated explicitly that he would not stay at the time when he entered the country.

25) Case C-37/98 Savas [2000] ECR p. I-2927, paragraphs 56-65.
26) Case C-36/96 Günaydin [1997] ECR p. I-5143.

The question brought before the CJEU was whether Art 6 of the AA could bring any rights to the applicant to stay, although his explicit intention and granted visa was for the purpose of returning to Turkey. The Court held that such situation does not constitute an abuse, as long as the national court cannot establish that the migrant had his permit issued on false premises, namely with the sole intention to come to the EU-MS and stay there from the beginning. Thus, if it cannot be proven that the migrant was giving false statements to obtain his residence and work permit, he could rely fully on the rights guaranteed under the AA. [27)]

Similar was the issue in case *Tetik* [28)] (1997), where a Turkish migrant had a visa which was strictly limited to employment on vessels and excluded work on the main land. After 8 years, he decided to take up work on the main land, based on the rights guaranteed under Article 6 of ACD 1/80. The national authorities referred to the restriction of the visa to employment on vessels. The CJEU, however stated that the rights under the AA (Article 6) guarantee the right to seek employment with another employer after 4 years. In addition it even granted for a certain "appropriate time" to seek work, which might have even entitled him to unemployment benefits in that state.

From the above the following conclusions in relation to abuse and the application of AA can be drawn:

- Firstly, once fraudulent behaviour is identified, the migrant and even his family members lose their rights under the AA. However, family members might retain their rights, if they have established their own rights under the AA in the meantime, although their entry into the scope of the AA was based on a derived right which was acquired by fraudulent declarations.
- Secondly, fraud has to be strictly interpreted in the sense that there should be room for manoeuvre, e.g. the acceptance that a migrant actually changes his minds while being in Community territory as to the reasons why he came initially.
- Thirdly, once the provisions of the AA become applicable, they overrule national rules on residence and work, e.g. as to visa and work permits, that grant les extensive rights.

In addition to these preliminary conclusions, these cases raise also one important question in relation to social security rights. In the circumstances where fraudulent conduct for purposes of immigration or work had been established, migrants had been working prior to this decision in the EU-MS and also paying social security contributions (so-called "*white workers*"). It would be interesting to know what happens in these cases with the

27) See also Case C-186/10 Oguz [2011] ECR p. I-6957.
28) Case C-171/95 Tetik [1997] ECR p. I-329.

contributions. Do these contributions simply forfeit, are they to be paid back, or can actually certain rights to benefits be created based on them?

It would seem natural to first scrutinise the national legislation of the concerned EU-MS to see whether they deal explicitly with such question. Certain States, where the social system is based on legal residence or legal employment, do not allow for any creation of rights. However, there are systems, which do not look at the aspect of legal residence or employment, but focus solely on the existence of employment or the payment of contributions. In such cases it is not excluded that insurance periods may actually be acquired under national law.

In this context, it is worth mentioning that some AA contain clauses that rights are only coordinated in cases with legal residence as a prerequisite, e.g. Article 66 in the AA with Morocco. It is, however unclear, what this legal residence or work status refers to: all the time legal status? What if legal and illegal status alternated? Or is it sufficient to have acquired legal status at the time of application for a benefit? The Austrian Supreme Court recently interpreted an issue under Regulation 859/2003 as requiring legal residence at the time of application for a benefit. [29)] In any event, whenever the criterion becomes applicable, it has as consequence that such (national) rights might only be coordinated under the national legislation of the EU-MS and eventually under a bilateral agreement with the associated State, if provisions there allow so, but not under the AA.

The AA with Turkey does not contain such a "legal residence" clause in connection with the coordination of social security rights. In this framework, it would be interesting to see whether a migrant could actually rely on the coordination provisions of the agreement, although he has been illegally resident. It would go beyond the framework of this contribution to analyse this here in detail.

One last thought should be placed here namely the potential influence of different international legal instruments from Council of Europe, ILO or UNO in respect to the creation or safeguarding of acquired social security rights when fraud was involved. Dr. Kapuy already investigated the question of acquired social security rights of irregular migrant workers and undeclared worker. [30)] He came to the conclusion that legally binding international obligations which are explicit and unambiguous are rather scarce.

---

29) Austrian Supreme Court of Justice (OGH), 29 January 2013, 10 ObS 159/12y.

30) Klaus Kapuy, The social security position of irregular migrant workers, New insights from national social security law and international law, Cambridge, Antwerp, Portland: Intersentia, 2011, p 167-186.

Dual nationality

Another interesting matter is the determination of the personal scope of AA from the perspective of migrants with dual citizenship. In case *Mesbah* [31] the question was referred to the CJEU whether a family member of an originally Moroccan national, who later acquired Belgian citizenship, can continue to rely on the principle of equal treatment under the AA.

In this context, the ruling of the CJEU in Case *Micheletti* [32] in an internal-EU context shall be recalled. There the Court ruled in relation to a person with Italian and Argentinean citizenship who lived in Italy and wanted to establish himself in Spain. The Spanish authorities denied the entry into the country simply by presenting an ID card, but required everything (visa etc) which a third country (TC) national, an Argentinean national, would have to present. The Court was very clear in his reasoning that such practise is not permissible, as it would lead to a consequence that rules on entry and establishment would be differently applied in MS, which would prevent a uniform application of EU law. MS have to recognise citizenship of other MS independent of whether the migrant has still another citizenship from a TC. [33]

However, in case *Mesbah*, the Court came to a different conclusion in the framework of AA. The facts were that a couple of Moroccan origin moved to Belgium reside and the husband to work there. Some years later, both acquired Belgian nationality in addition to their Moroccan one. When the mother of the spouse joined them in Belgian, she claimed one day a benefit for handicapped persons, which she thought herself to be entitled to as family member of the migrant worker under the AA between EU and Morocco. However, Belgium refused the claim with the argument that according to its national legislation, the Belgian nationality has priority over the Moroccan one, and therefore her son in law could not derive anymore any rights under the AA. Otherwise, persons with dual nationality could just use the nationality that suits in the moment to pick and choose their rights, which would equal abusive behaviour.

The CJEU did not see abuse behaviour, but did also not follow the reasoning in case *Micheletti*, as it saw the factual situation to be different. In the present case no fundamental freedom under the ECT was concerned - the AA EU-Morocco does not aim at securing freedom of movement, but solely on the secure social position of Moroccan workers and their cohabiting family members in the MS-, nor was an EU nationality at stake but a TC nationality and, moreover, the person had the nationality of the host state. Therefore, no rights of equal treatment could be derived from the AA.

---

31) Case C-179/98 Mesbah [1999] ECR p. I-7955

32) Case C-369/90 Micheletti [1992], ECR I-4239.

33) This logic has been confirmed by analogy e.g. in case C-336/96, Gilly [1998] ECR I-2793.

This conclusion is remarkable and can be criticised as the reasoning is rather weak by simply stating that the facts were different than in case *Micheletti*, and does not even provide for its own assessment of the case. Even if *Micheletti* concerned a fundamental freedom, it cannot be concluded that other rights would not be guaranteed by for citizens with dual citizenship. The applicant would have been entitled to the benefit if the migrant would have had only Moroccan nationality. Moreover, the argument that only a TC citizenship is concerned could be understood, if no AA existed. However, such agreements are precisely concluded with the purpose to provide for equal treatment between EU nationals and the nationals of the associated state. And lastly the argument that the case is a purely internal Belgian issue is not very plausible either, as the person clearly legally migrated from another State (Morocco) to Belgium and (again legally) worked and resided there making use of his rights under the AA. Still, the Court concluded that it depends solely on the national legislation whether or not the nationality of a TC can be taken into account without adding any reasons to it. This approach was also confirmed by the Court in Case *El Yousfi* from 2007 in connection with the new Euro-Mediterranean Agreement. [34)]

Now, what is the consequence of this? Clearly, a person with double nationality cannot make use of rights under the AA to the same extent a person with solely Moroccan nationality. Such a deviation of the rights guaranteed in an AA only because of the possession of an additional citizenship of an EU-MS is difficult to understand. It is not because of the invoking of dual nationality that rights are gained, but the rights result directly from the AA based on one nationality.

It is interesting that the CJEU has recently ruled in connection with the Ankara Agreement (rights emanating from ACD No. 1/80) in Case *Kahveci* and *Ianan* on an similar dual nationality issue. [35)] The case concerned a Turkish migrant who was covered by the AA via his spouse in terms of family reunion who had already been living in the NL and acquired Dutch nationality in addition to her Turkish one. When the husband was to be deported following a criminal conviction, the question arose whether he could still rely on the AA as family member of his wife and keep his right of residence. In this case the Court saw the spouse with dual nationality still in the personal scope of application of the AA.

The primary argument was that the AA with the Turkey promotes further integration than the agreements with the Maghreb countries. This is true, but things bring me back to my question raised above: Why can only rights connected to fundamental freedoms be secured?

34) Case C-276/06 El Yousfi [2007] ECR p. I-2851, paragraph 72.

35) Joined Cases C-7/10 und C-9/10 Kahveci and Ianan [2012] ECR I-0000.

What is indeed remarkable is that the Court stated further that MS are not in a position to modify AA unilaterally, which would undermine the status of Turkish migrants who would enjoy rights expressly conferred to them by the AA. This is quite the opposite of its approach in the *Mesbah* (and *El-Yousfi*) judgment, and makes more sense. Also AG *Sharpston* illustrated clearly in her opinion that migrants would otherwise be put in a dilemma, namely either to integrate into a society by naturalisation or safeguarding their rights under the AA. Anyway, as one cannot foresee the future for what will be the more beneficial position for the migrant and therefore this cannot be seen as a case of abuse. On the contrary a loss of rights would rather be unfair and unreasonable.

In the end, it has to be said that as the AA of Turkey and the Maghreb States have indeed different objectives and provisions. Therefore, case law cannot automatically be transferred from one AA to the other. Which leaves us with the result that currently the *Mesbah* judgment has to be applied in relation to the Maghreb States while for the AA with Turkey the *Micheletti*/*Kahveci* reasoning can be applied and migrants with dual nationality can enjoy a better position. Nevertheless, this leaves us currently with a rather unsatisfactory situation of which rights do exist under the AA EU-Morocco for persons with dual nationality, as it depends on national legislation of the concerned MS whether or not a migrant can invoke his second (Moroccan) nationality to make use of the right conferred to under the AA.

It will be interesting to see whether the CJEU might change its approach in this respect once the new ACD for the Maghreb States will become applicable, which foresee a more detailed coordination of social security rights as now and are substantially the same as the proposal for the Turkey-Agreement.

Personal data + EESSI

Lastly it will be outlined where fraud or abuse could occur on a more administrative level in relation to associated countries.

Again, as a starting point, a judgment of the CJEU in an internal EU context should be recalled. In case *Dafeki* (1997) where the German administration refused to accept a rectification of a birth date from a Greek court. The Commission claimed that it is the state whose citizen is concerned to clarify the status of the person. Official documents by another MS cannot be doubted, except in cases where there are justified reasons, e.g. if the rectification was only requested shortly before the application of an pre-retirement benefit, as at stake in the case. The Commission was aware of different practises in MS where e.g. in Greece two witnesses testifying in front of a court suffice to have a birth date changed.

In the judgment the Court ruled that for determining the entitlements to social security benefits of a migrant worker, the competent social security

institutions and the courts of a MS must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other MS, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question, otherwise this would amount to a discrimination based on nationality. It thus, accepted the view that free movement would not be possible, if official documents of other MS could on a general basis be rejected by MS, still it kept an opening to combat fraud and abuse.

A similar issue was decided by the CJEU in cases *Kocak* and *Örs*. [36)] Two migrant workers came from Turkey to Germany in the 1960ies and 70ies respectively and registered according to the national legislation with the German social security administration indicating their respective birth dates. After many years in Germany, both submitted in 1985 decisions from a Turkish court correcting their birth dates which made them a couple of years older. Germany refused to accept these, as their national legislation would only accept documentation which dates back to before the date of the initial registration with the German social security administration, independent whether the document is from Germany or any other State. The court decided that such rules is not discriminatory. It grants the States the possibility to regulate which kind of documentation should be accepted and is sufficiently wide to cover different kinds of documentation, as long as it dates back to before the initial regulation in a state.

The consequence of these two judgments is twofold: One the one hand, official documents from other MS have to be accepted in general. As there is no harmonisation on EU level, it is possible for MS to exclude certain types of documentation from other MS, if this is also the case on national level. On the other hand, the Court also acknowledges that documents can have different effects or legal consequences in MS or associated States, meaning that the same type of document can have important legal consequences in one State while in the other State no legal consequences at all are linked to it, which could mean that those national administrations do not scrutinise the evidence for such documents with the same accuracy, as they do not see any harm in it. Therefore, the Court leaves it open to MS to assess the accuracy of documents based on objective proof, in order to avoid abuse.

The exchange of data in the field of social security coordination on European level is about to be done mostly in electronic way, via the so-called EESSI system. Most of the data should be produced directly by the national administration and be presented in a standardised document (SED), which is sent according to a specific pre-determined work-flow. This system is however not related to the associated countries. One would have to think for a solution to avoid problems in relation to fraud and abuse.

---

36) Joined Cases C-102/98 und C-211/98 Kocak und Örs [2000] ECR I-1287.

One could e.g. imagine to provide the SEDs in paper version for associated States, eventually even in their official language. Should such a transfer go via specific liaison bodies, which make already a pre check of the data to be transmitted? They could also serve as contact persons where administrations of EU-MS could ask questions etc. [37] These are issues that have to be thought through and negotiated with the associated countries if a successful coordination shall take place.

3. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Over recent decades the European Convention on Human Rights ("the Convention") has gained importance in the field of social security in the Council of Europe Member States. This is remarkable, because the Convention does not contain any right to social security. Quite the contrary, the Convention and its Protocols mostly contain civil and political rights, like the right to life, the right to respect for private and family life and the freedom of expression. However, individuals have also brought cases in the field of social security to the Convention's judicial supervision organs in Strasbourg. There are two main reasons for that: first, the strong legal effect of the Convention in the Council of Europe Member States and, second, the robust supervision mechanism.

Concerning the first, all 47 Member States have to secure to everyone within their jurisdiction the rights and freedoms set forth in the Convention. To comply with this obligation, the vast majority of states have incorporated the Convention into domestic law. In Austria, as the only country, the Convention has the status of constitutional law. In most of the other states it has either the status of ordinary domestic law (e.g. Denmark, Finland, Germany, Italy, Norway, Sweden) or an intermediate status, higher than ordinary law but lower than the constitution (e.g. Belgium, Czech Republic, France, Greece, Luxembourg, Spain, Switzerland).

Second, there is a robust supervision mechanism. Individuals who are direct victims of a violation by a Member State of the rights set forth in the Convention can lodge an application with the European Court of Human Rights ("the Court"). Certain procedural criteria must be fulfilled, such as exhaustion of all domestic remedies and six months deadline from the date of the final decision at domestic level. Once the Court has reached a final judgment, it is binding on the respondent States concerned.

So, this strong legal effect and the robust supervision mechanism have led to the situation that the Convention's judicial supervision organs in Strasbourg were confronted with social security cases. Over the time, the former European Commission and the European Court of Human Rights have

37) See Interim report of Dr. Bernhard Spiegel for the Administrative Commission for the Coordination of Social Security Systems on Practical Aspects of the Application of the Decision of the EU-Morocco Association Council, 27.11.2012, pages 23-24.

recognised that the Convention's civil rights, as well as the economic right of protection of property, have implications of a social and economic nature [38] and have started to subsume single aspects of social security under the Convention's guarantees. [39]

- The issues presented in the following are based on the outline presented in the introduction, namely either applying the Convention for potential abuse or seeking to remedy abuse via the Convention.

An example of the first situation would be the situation of an individual, who is convicted of long-time social fraud under national law and who invokes the protection of property for the alleged disproportionally high back payments. An example of the second situation would be the situation of an ill foreigner who enters a Convention State illegally in order to receive medical treatment; once being confronted with expulsion, the foreigner invokes the prohibition of torture in order to continue to stay in the Convention State and to receive medical treatment which would not be available in his or her country of origin.

In the following, it will be examined how the Convention and the Court deal with such or similar situations. To this end, it will be proceeded as follows: first, we it will be investigated whether the Convention and its Protocols contain any guidance on how to deal with cases of (potential) social security abuse. Thereafter the case law will be analysed and it will be seen what answers the Court offers to (potential) social security abuse.

3.1. Article 17 - the prohibition of abuse of rights

The Convention itself contains a provision which explicitly prohibits the abuse of Convention rights. Article 17, the prohibition of abuse of rights, reads as follows:

> "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*"

Article 17, the so-called abuse clause, prevents individuals from relying on the Convention's rights to destroy the fundamental rights and freedoms. This provision has its origin in the idea to defend democracy against the threats of totalitarianism, such as Nazism, fascism and communism. [40] Or as the Court

---

38) Judgment of 9 October 1979, Airey v. Ireland, Appl. 6289/73, § 26.

39) For the connection between the Convention and social security see Klaus Kapuy, Danny Pieters and Bernhard Zaglmayer, Social security cases in Europe: The European Court of Human Rights. Antwerp, Oxford: Intersentia, 2007; and Klaus Kapuy, "Social security and the European Convention on Human Rights: How an odd couple has become presentable." European Journal of Social Security, 221-242, 3 (2007).

40) See Collected Edition of the "Travaux Préparatoires": Official Report of the Consultative Assembly, 1949, pp. 1235-39; and Jochen Frowein and Wolfgang Peukert, Europäische Menschenrechskonvention: EMRK Kommentar, 3rd ed. Berlin: N.P. Engel, 2009, 430-431.

put it: "the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention". [41)]

Not only the Convention, but also other international human rights treaties - like Article 5 of the UN Covenant on Civil and Political Rights or Article 54 of the Charta of Fundamental Rights of the EU - and national constitutions - like Articles 18 and 21 of the German Grundgesetz - possess such an abuse clause.

This strong link with democracy and rule of law also becomes clear from the Court's case law to Article 17. The vast majority of "abuse clause" cases deal with the freedom of expression (Article 10). Sometimes also the freedom of assembly and association (Article 11) or the right to free elections (Article 3 of Protocol No. 1) are involved. [42)] Fraud cases, let alone cases of social security fraud, are not at stake when the Court decides on Article 17's prohibition of abuse of rights.

It can be concluded that it will be rather unrealistic that the Court will draw upon Article 17 in potential or confirmed cases of social security fraud. One could take, for instance, above mentioned example of an ill foreigner, who relies on Convention rights in order to remain in a Convention State and benefit from its health care system. In such a case no threat for democracy will arise from totalitarian movements. To conclude, the abuse clause is no instrument under the Convention to tackle issues of potential or real social security fraud.

3.2. Social fraud investigations and legal proceedings

The first group of cases where the Court lend its assistance to persons engaged in social fraud are cases of allegedly unfair national social fraud investigations and legal proceedings. Applicants accused of committing social fraud complained, for instance, about unreasonable length of proceedings [43)] and about unfair hearings. [44)] They invoked Article 6 - the right to a fair trial. Criminal, but also social security proceedings, [45)] come within the scope *ratione materiae* of Article 6. The Court then has to make a judgment on the merits - like in any other case unrelated to social fraud.

---

41) Decision of 2 September 2004, W.P and Others v. Poland, Appl. 42264/98.

42) Own research via the Court database HUDOC; see also Hannes Cannie and Dirk Voorhoof, "The abuse clause and freedom of expression in the European Human Rights Convention: An added value for democracy and human rights protection?", in Netherlands Quarterly of Human Rights, 54-83, 1 (2011), 58.

43) Judgment of 22 May 1998, Hozee v. The Netherlands, Appl. 21961/93.

44) Decision of 11 January 1995, Trakzel v. The Netherlands, Appl. 22052/93.

45) Judgment of 29 May 1986, Deumeland v. Germany, Appl. 9384/81; Judgment of 29 May 1986, Feldbrugge v. The Netherlands, Appl. 8562/79; Judgment of 26 February 1993, Salesi v. Italy, Appl. 13023/87.

It does not come as a surprise that the Convention and the Court lend its assistance to individuals engaged in national social fraud when it comes to the right to a fair trial does. In addition, the judgments of the Court do not add anything new to the interpretation of Article 6. However, it can be concluded that this is an area where the Convention provides for legal protection in cases of social fraud and sets limits to Convention States.

3.3. Recovery of overpayments

More interesting is the following case. It is about violating the duty to report material change in circumstances for entitlement to social security benefits and complaining about the recovery of the overpayments.

In *B. v. The United Kingdom* [46] the applicant, a mother of three, received a child benefit and means-tested income support - the latter at a family rate. When her children were taken into care, she did not report this to the social security authorities. This was probably attributed to the fact that she has a severe learning disability. After the social security authorities found out about the changed circumstances, it was decided to recover her overpayment by reducing her future income support benefit - to which she was still entitled to, although at a lower rate. The applicant contested the decision of repayment and claimed a violation of Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property). She claimed that she should have been treated differently from someone who did have the capacity to understand the obligation to report.

Because of the severe learning disability of the applicant, this case is no classical case of benefit fraud. However, the Court's answer in this matter is interesting and will serve as guidance also for typical benefit fraud cases.

The Court first had to decide on the admissibility. That social security benefits can be possessions in terms of Article 1 of Protocol No. 1 is already settled case law - see the Court's judgments in *Gaygusuz v. Austria, Koua Poirrez v. France*, and *Stec and Others v. The United Kingdom*. [47] But can the overpaid benefit be regarded as possession in the sense of Article 1 of Protocol No. 1? The Court gave a yes and a no answer.

First to the no answer: The applicant argued that she had remained entitled to the increased benefit until it was formally superseded. Consequently, the benefit payments until the formal supersession should be regarded as possession. To back her argumentation the applicant referred to the case *Moskal v. Poland*. [48] The Court rejected the applicant's arguments. In more detail, in *Moskal v. Poland* the wrongly awarded benefit could be attributed to

---

46) Judgment of 14 February 2012, B. v. The United Kingdom, Appl. 36571/06.

47) Judgment of 16 September 1996, Gaygusuz v. Austria, Appl. 17371/90; Judgment of 30 September 2003, Koua Poirrez v. France, Appl. 40892/98; Judgment of 12 April 2006, Stec and Others v. The United Kingdom, Appl. 65731/01 and 65900/01.

48) Judgment of 15 September 2009, Moskal v. Poland, Appl. 10373/05.

a mistake of the social security authority. In the present case, however, the payment of benefit to which the applicant was not entitled was the failure of the applicant herself, since she did not report the fact that her children had been taken into care. The Court stated:

> "Where a benefit system relies on recipients to report any change in their circumstances, the Court considers that it would be perverse if they could acquire an assertable right to overpaid benefit where they have failed to report such a change. To hold otherwise would enable recipients of benefits to profit from their own omissions and, in some cases, fraud." [49)]

So, the Court's answer seems to be clear: overpaid benefits are no possessions in terms of Article 1 of Protocol No. 1 when the wrong award can be attributed to a failure of the recipient - be it in cases of fraud or error. As a consequence, the recovery of the overpayment by the social security authority is outside the scope *ratione materiae* of Article 1 of Protocol 1 and can therefore not be considered as interference with the right to peaceful enjoyment of property.

This doctrine requires a clear distinction between a failure on the recipient's side and a failure with the sphere of the authority. In some cases it will be difficult to make this clear distinction: for instance, where an applicant bribes a medical doctor for an advantageous assessment for a disability pension. Would that be attributed to the sphere of the recipient or the social security authority?

However, there may be exceptions to above-outlined doctrine. The Court itself established an exception - this is the "yes answer" to above raised question whether the overpaid benefit can be regarded as possession in the sense of Article 1 of Protocol No. 1. As mentioned before, the British social security authorities decided to recover the applicant's overpayment by reducing her future income support benefit. According to the Court, the applicant continued to meet the criteria for the basic award (at the normal, and not the family rate). Therefore, she was considered by the Court to have an assertable right to the receipt of income support at this reduced rate; and the Court considered the applicant's interest to fall within the scope of Article 1 of Protocol No. 1.

To sum up, basically overpaid benefits are no possessions in terms of Article 1 of Protocol No. 1 when the wrong award can be attributed to a failure of the recipient. However, in case the recipient is still entitled to the benefit and the authorities decide to recover the overpayment by reducing the rate of this benefit, the entitlement is regarded as possession under the Convention's right to the peaceful enjoyment of possessions. The consequences of this distinction are serious: in case overpaid benefits are recovered by reducing

49) Judgment of 14 February 2012, B. v. The United Kingdom, Appl. 36571/06, § 31.

the benefit, the legitimacy or the proportionality of the recovery must comply with the standards of the Convention and may be subject to assessment by the Court; in any other case of recovery of overpaid benefits, this will not be the case.

From a practical point of view, this distinction is dissatisfying. Coming within the material scope of application of Article 1 of Protocol No. 1 depends on the way the authorities recover the overpayment. Actually, authorities which accommodate the recipient by reducing the benefit, to which the recipient is still entitled to, are in a disadvantaged position since their action is subject to the Convention-standards and may be subject to assessment by the Court.

From a legal point of view, however, this distinction is in line with the Court's case law on social security benefits and Article 1 of Protocol No. 1: if a Contracting State has legislation in force that provides for the payment of a social security benefit, that legislation must be regarded as generating proprietary interest falling within the ambit of Article 1 1P for persons satisfying its requirements. To simplify: the individual's legal position in social security law is regarded as ownership.

There are still some questions: what if the authorities recover overpayments not by reducing the benefit in question, like in the case at hand, but any other benefit? For instance, a person had feigned a medical problem in order to be declared disabled and fraudulently obtained a special social assistance for the disabled. After detecting this fraud, the authority decided to recover the overpayments by reducing the general social assistance, to which the individual would still be entitled. In application of the Court's case law, the reduction of the general social assistance - provided that the individual has an assertable right under domestic law to this welfare benefit and granting of this payment is not within the discretionary power of the authority [50)] - would fall under the scope *ratione materiae* of Article 1 of Protocol No. 1. So, it should not matter whether the overpayment is recovered by reducing the benefit in question or any other benefit.

Finally, the Court's decision in the merits should be mentioned: the Court held that there had been no discrimination and thus no violation of Article 14 read together with Article 1 of Protocol No. 1. The Court rejected the applicant's argument that someone who did not have the capacity to understand the obligation to report, should be treated differently from someone who did. In more detail, the Court found that it has a legitimate aim - namely that of ensuring the smooth operation of the welfare system and the facilitation of the recovery of overpaid benefits - and is proportional - mainly because the applicant was not required to pay interest on the overpaid sums, there was a statutory limit on the amount that could be deducted each months from her benefit, and the amount to be repaid was reduced.

---

50) Decision of 6 July 2005, Stec and Others v. The United Kingdom, Appl. 65731/01 and 65900/01, §§ 51 and 55.

3.4. Reduction or discontinuation of benefit

The Court has also been confronted with the reduction or discontinuation of a social security benefit after fraud cases. In contrast to the previous section, here it is not about recovering overpayments, but reducing or stopping the benefit *ex nunc*.

In *Iwaszkiewicz v. Poland*, the Court had to deal with a particular case of large-scale disability fraud. [51)] An individual had been granted a disability pension, together with so-called "veteran status". The veteran's disability pension had been granted on the basis of the fact that his ill-health *had been caused* by his deportation and imprisonment in a labour camp by the Soviet authorities. A few years later, the regional prosecutor instituted an investigation in respect of charges of bribery concerning certain medical doctors working for the social insurance authority. 115 disability pension cases, including the one of Mr. Iwaszkiewicz, were under review. However, no allegation was ever made that the decision on his veteran's disability pension had been obtained by Mr. Iwaszkiewicz in a fraudulent manner. As a consequence of the review, the authorities found that there had been no causal link between his deportation and imprisonment and his health problems. Mr. Iwaszkiewicz's was thus only entitled to an ordinary disability pension and not the privileged veteran's disability pension. The legal successors of the late Mr. Iwaszkiewicz claimed a violation of Article 1 of Protocol No. 1 (protection of property). They were of the view that the existence of a causal link between the health and the suffering of the past is not something that could reasonably change over time.

The Court did not go into detail regarding the admissibility and simply declared the case admissible. This is correct since it is well established case law that the reduction or discontinuation of a social insurance benefit comes within the scope *ratione materiae* of Article 1 of Protocol No. 1.

In the merits, the Court found that the interference was lawful - since it was provided for by law - and that it pursued a legitimate aim. The latter because the interference's "aim was to protect the financial stability of the social insurance system and to ensure that it was not threatened by the subsidising of pensions of recipients who had acquired them on the basis of superficial, erroneous or fraudulently obtained medical assessments". [52)] Finally the Court had to find whether the interference caused an excessive individual burden. This was not the case. Amongst other reasons, because:

- the decision to re-assess the benefit was not unreasonable, since there was the suspicion of large-scale fraud

51) Judgment of 26 July 2011, Iwaszkiewicz v. Poland, Appl. 30614/06.
52) Judgment of 26 July 2011, Iwaszkiewicz v. Poland, Appl. 30614/06, § 48.

- it was not argued or shown that the applicants' means of subsistence were at stake
- the benefits enjoyed by Mr. Iwaszkiewicz originated from a privileged status which is perceived as a special honour
- Mr. Iwaszkiewicz was entitled to an ordinary disability pension from the date on he was divested of his veteran status
- neither Mr. Iwaszkiewicz nor his legal successors were at any time obliged to pay back any amount

Eventually, the Court found no violation of Article 1 of Protocol No. 1, because a fair balance was struck between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights and the burden on the applicants was neither disproportionate nor excessive.

The whole case in based on a large-scale disability fraud. However, fraud allegations were only directed against the medical doctors, not against the beneficiary. The Court reiterated a few times that there were no allegations in the proceedings that the beneficiary obtained the benefit in a fraudulent manner - despite the fact that the prosecuting authorities had instituted an investigation in respect of charges of bribery concerning certain doctors working for the social insurance authority. Accordingly, in the Court's assessment on the proportionality of the discontinuation of the benefit, fraud played only a minor role.

The question is how the proportionality test would have looked like, if the beneficiary had been accused or convicted of fraud. Would other arguments, like the one that the applicant's means of subsistence were not at stake or the one that the beneficiary was at least entitled to an ordinary pension, have weighed less? Or would these other arguments have not counted at all, meaning that in case of fraudulent behaviour of the beneficiary the reduction or discontinuation of benefits would always be proportional? Similar like the Court decided with respect to overpayments, which are no possessions in terms of Article 1 of Protocol No. 1 when the wrong award can be attributed to the failure of the recipient - be it in case of fraud or error. This crucial question is still to be decided.

3.5. Moving to another country in order to obtain health care and to remain in the country

Over the past two decades, the Court had been confronted with cases of foreigners with medical problems who were staying unlawfully or semi-lawfully in a Convention State and were facing expulsion. Due to their bad state of health, these foreigners were receiving health care in the expelling State. The applicants claimed that the impossibility or difficulty to obtain access to adequate health care and medication in their countries of origin, as

a consequence of an expulsion, would violate the right to life (Article 2) and the prohibition of torture (Article 3). [53)]

In some cases, the disease seems to have existed even before the individuals entered the Convention State. [54)] One can ask whether these foreigners acted in a fraudulent manner in that they sought to enter the country to benefit from the health care system. Even if they did so, can that be qualified as social fraud?

The Court, when dealing with these cases, did not raise the question of fraud. A review of the documented facts of these cases suggests that in most cases benefiting from the health care system has not been the driver for migration. These individuals appear to have rather moved to the Convention States out of economic or political reasons, or entered the Convention State for criminal purposes, such as drug dealing. However, there might have been cases, where benefiting from the Convention State's health care system played a role in the decision to move. For instance in *N. v. The United Kingdom*, [55)] where a Ugandan woman was already seriously ill when she entered the UK. She was admitted to hospital and was diagnosed as HIV-positive. The applicant had been medically treated in the UK for some years. When asylum was refused and the applicant was being confronted with expulsion, she invoked the Convention's prohibition of torture (Article 3). She argued that that the poor medical HIV-treatment in Uganda would exposure her to acute physical and mental suffering, followed by an early death.

Can we talk about abuse of the British health care system in the case at hand? Or is it a use of rights, since the British rules provide for health care in such situations? Would the application of the Convention's prohibition of torture create a situation of abuse of the Convention State's health care system?

The Court, in any case, did not discuss the question of use and abuse. In the end, the Court did not lend its assistance to the applicant: the Court rejected her arguments and found no violation of Article 3.

---

53) Judgment of 7 September 1998, B.B. v. France, Appl. 30930/96; Judgment of 6 February 2001, Bensaid v. The United Kingdom, Appl. 44599/98; Decision of 24 June 2003, Arcila Henao v. The Netherlands, Appl. 13669/03; Decision of 29 June 2004, Salkic and Others v. Sweden, Appl. 7702/04; Decision of 25 November 2004, Amegnigan v. The Netherlands, Appl. 25629/04; Judgment of 20 October 2011, Samina v. Sweden, Appl. 55463/09.

54) Decision of 19 May 1994, Tanko v. Finland, Appl. 23634/94; Judgment of 2 May 1997, D. v. The United Kingdom, Appl. 30240/96; Judgment of 27 May 2008, N. v. The United Kingdom, Appl. 26565/05.

55) Judgment of 27 May 2008, N. v. The United Kingdom, Appl. 26565/05.

3.6. Conclusions on the European Convention on Human Rights

In this part on the European Convention on Human Rights, the question has been whether the Convention lends its assistance to persons who abuse rights in the field of social security. To a certain extent, this is the case.

First, the Convention provides protection to social defrauders when it comes to procedural rights. Article 6 - the right to a fair trial - applies in cases of social security fraud.

Second, the proportionality of the recovery of benefit overpayments in cases of fraud may be subject to assessment by the Court; this, however, only if the recovery is done by way of reducing entitlement to a social security benefit. Only in recent years, the Court developed a doctrine on when to provide protection in case of recovery of overpayment.

Third, reducing or discontinuing of social security benefits as a consequence of social security fraud is subject to assessment by the Court. However, thus far the Court only dealt with a case where fraud allegations were directed against the medical doctors, not against the beneficiary. The question is still how the Court would assess cases of reduction or discontinuation of benefit, if the beneficiary had been accused or convicted of fraud.

Finally, it seems that the Court has not yet addressed the question of whether granting Convention rights would create a situation where social security abuse could be at stake. In this article, a set of relevant cases has been discussed and it has been illustrated that a possible abuse of rights has not been the focus of the Court.

MORALE ET MORALITÉ DE ROBIN DES BOIS

Franz CLÉMENT

Dr en sociologie, CEPS/INSTEAD

INTRODUCTION

En 1228, un acte judiciaire anglais fait mention pour la première fois d'un certain " Robinhood " emprisonné pour le non paiement d'une amende ou d'une taxe. Ce parchemin marquera la naissance d'une légende mondialement célèbre de nos jours, celle d'un certain Robin des Bois, connu pour détrousser les riches et redistribuer le produit de ses larcins aux habitants miséreux de la région de Nottingham. Robin volait les riches, mais surtout " le " riche, soit l'Etat anglais de l'époque taxant et imposant probablement à outrance les populations, Etat incarné dans la légende par la cupidité du Prince Jean et la méchanceté du Sheriff de Nottingham.

Il est permis de se poser la question de la morale située au creuset de cette légende, mais aussi la question de sa moralité. Partant du principe que la morale est l'enseignement que l'on peut tirer d'une histoire et la moralité le caractère ou la valeur de cette histoire d'un point de vue éthique, voyons ce qu'il en est. La morale veut sans doute que Robin des Bois ait été un personnage empli de générosité, se rendant compte d'une situation de terrible injustice créant un monde des nantis et un monde des pauvres, une situation pour lui tellement intolérable qu'il tentait d'y remédier de la manière que l'on sait. Si la morale de la légende est donc imprégnée de générosité et même d'un bon sens certain, qu'en est-il de la moralité et de la valeur éthique des gestes posés par Robin ? Il commet des vols. Le vol n'est pas éthique, n'est pas moral. Le vol est d'ailleurs puni sur le plan du droit pénal précisément parce qu'il n'est pas un acte éthique, mais bien illicite et délictueux. La morale de générosité de la légende contiendrait donc une moralité douteuse.

J'ai le sentiment que cette question de moralité est aussi située au creuset de l'acte de fraude. En effet, le fraudeur n'est-il pas un Robin des Bois moderne et permanent ? Le fraudeur estime que les pouvoirs publics au sens large,

l'Etat en particulier, prennent trop au commun des mortels. En les fraudant, il est ainsi permis de récupérer, de garder, de conserver une partie de ce que l'Etat gourmand prend ou pourrait prendre en trop. La morale de Robin des Bois est bien présente dans l'acte de fraude. Et la question de la moralité soulevée ci-dessus l'est bien aussi en conséquence.

Pourquoi ? A première vue, au su des conceptions et des valeurs morales répandues dans nos sociétés occidentales, frauder est bien un genre de vol. Ce n'est pas un acte direct comme voler son sac à une vieille dame en rue ou dans un hall de gare ; c'est un acte indirect, plus insidieux, mais dont le résultat est identique : la spoliation d'une personne ou d'un pouvoir public entraînant pour lui une perte ou un manque à gagner. La vue idéale et la plus évidente que l'on peut avoir dans les représentations qui sont couramment les nôtres veut que la fraude appartienne au monde du mal, tandis que l'Etat-providence, assurant une redistribution sociale des richesses en fonction des besoins, appartient quant à lui au monde du bien.

Pourtant, les deux journées du colloque " Social Security and Fraud ", organisé par l'EISS, l'ALOSS et le CEPS/INSTEAD les 19 et 20 septembre 2013 à Luxembourg-Kirchberg, ont semble-t-il contredit cette version manichéenne de la société par laquelle le monde est soit tout blanc, soit tout noir, soit bien, soit mal. La question de la moralité de la fraude a traversé ce colloque sans y être franchement invitée. Cette question est apparue discrètement, sans faire de bruit, pour s'imposer finalement de façon évidente sans avoir pourtant jamais été citée. Que l'on me comprenne bien : il ne s'agit pas ici de la question de la moralité de la fraude. La fraude, nous l'avons déjà vu, est un acte immoral, dépourvu d'éthique. La question de la moralité doit ici être plutôt envisagée dans le chef des acteurs de l'acte de fraude, soit le fraudeur, mais aussi le fraudé et donc finalement le coupable et la victime.

Cette question a bien traversé comme un fil rouge l'ensemble des travaux du colloque au travers des quatre grands blocs thématiques qui, me semble-t-il, l'ont constitué. Il y a tout d'abord le bloc des concepts, puis celui des moyens d'action, en troisième lieu celui plus global des conséquences et des impacts de la fraude et en dernier lieu celui ayant trait aux relations de coordination et de coopération en matière de combat de la fraude.

Reprenons-les les uns après les autres et tentons de voir comment la question de la moralité s'y est insérée.

1. LES CONCEPTS RELATIFS À LA FRAUDE

Le colloque a eu un immense mérite, entre bien d'autres. Il a permis dans un premier temps de clarifier certains concepts et de préciser certaines acceptions, tant du mot " fraude " que d'autres qui lui sont proches ou avec lesquels on le confond parfois. Tout d'abord, une fraude ne doit pas être confondue avec une erreur. Pour produire des effets, la fraude nécessite un

comportement intentionnel à la base. Ce comportement se caractérise par une volonté nette et délibérée de tromper. Cette tromperie entraînera toujours un dommage, résultat d'une intention malhonnête dès le départ. La question de la moralité s'impose donc de façon éclatante dans l'acte de fraude et dans l'intention malveillante qui la sous-tend. Quantités d'exemples de fraudes ont été communiqués durant les travaux du colloque. En voici un florilège non limitatif : faux indépendants, sociétés organisant leurs propres faillites avant d'aller se reconstituer ailleurs, importation de travailleurs clandestins, fausses représentations d'une situation d'emploi, entreprises ne disposant pour tout bien que d'une boîte-aux-lettres, perception d'allocations de façon abusive, communication volontaire d'informations inexactes ou incomplètes, non-déclaration de changements de ressources, adoption de fausses identités, falsification d'actes médicaux en vue de l'obtention d'un remboursement de sécurité sociale…

L'erreur, quant à elle, se distingue nettement de la fraude. L'erreur entraînera sans doute un résultat comparable à celui de la fraude, mais elle sera sous-tendue par un comportement non intentionnel, dépourvu de volonté de nuire. Du moins en principe. Si la moralité veut qu'une erreur ne soit pas intentionnelle, que faut-il dire de certaines prétendues erreurs dissimulant en réalité des fraudes ? L'erreur peut parfois avoir bon dos et devenir elle-même ainsi… frauduleuse.

Mais en principe, moralement parlant, la fraude ne peut se confondre avec l'erreur. Les deux ont encore, soulignons-le, des interprétations de leurs définitions qui peuvent varier selon les Etats, les coutumes, les schèmes de pensées, les façons d'interpréter. Cela peut donner à ces concepts des aspects quelque peu flottants et laisser cours à des interprétations parfois très relatives. Et puis certaines activités particulières peuvent encore s'insérer dans le mécanisme de la fraude ou de l'erreur. Ne songeons qu'au phénomène de la corruption, répandu largement dans certains pays.

Un troisième concept est apparu dans les débats : l'abus. Ce dernier se distingue totalement, tant de la fraude que de l'erreur. L'abus peut profiter d'un système institué et non frauduleux, sans qu'il n'y ait fraude ou erreur. Ainsi, sous l'empire de l'ancien règlement européen 1408/71 en matière de coordination des régimes de sécurité sociale dans l'Union européenne, le phénomène du détachement a pu connaître pareil développement. Ce fut le cas au Luxembourg dans le domaine du travail intérimaire où l'on atteignit un moment donné un taux de détachement à l'étranger des intérimaires frôlant les 25%. Et l'étranger se trouvait parfois dans la première ville française après avoir franchi la frontière à Dudelange ou à Esch… Il ne s'agissait pas d'une fraude vu que l'ancien règlement européen permettait cette pratique, mais il s'agissait d'un système dont on a tellement usé afin de profiter des basses charges patronales luxembourgeoises en comparaison des pays limitrophes, qu'on a fini par abuser dudit système.

Le colloque a donc bien mis en évidence la difficulté qu'il y avait parfois à tracer des limites claires entre ces concepts a priori évidents que sont la fraude, l'erreur et l'abus.

2. LES MOYENS D'ACTION CONTRE LA FRAUDE

Si l'imagination des fraudeurs, de ceux qui commettent certaines erreurs ou pratiquent certains abus paraît, comme nous l'avons vu, sans limites, il semble qu'il n'en aille pas de même quant aux méthodes mises en place par les pouvoirs publics en général pour contrer les actes menant à un résultat frauduleux. Les moyens d'actions incombant aux Etats et dans une certaine mesure à l'Union européenne sont bien plus limités en nombre, sans préjuger pour autant de leur efficacité réelle. Des stratégies anti-fraude ont été mises en place depuis longtemps et des catalogues de bonnes pratiques sur le sujet existent bel et bien. L'exemple le plus évident, entre autres, est bien la mise sur pied dans chacun des Etats de l'Union d'inspections du travail portant des dénominations différentes de l'un à l'autre, mais œuvrant dans le même sens. Le problème majeur sis au sein des méthodes élaborées semble bien avoir pour fondement la difficulté réelle à coordonner divers législations : fiscale, pénale, sociale, particulièrement.

Quoi qu'il en soit, les différentes méthodes exposées pour combattre la fraude fonctionnent toutes selon une triade de base communément admise : prévention, détection et répression. La question de la moralité s'insère dès le premier stade de la triade. Par l'activité de prévention, les pouvoirs publics donnent tant aux particuliers, qu'aux sociétés, les informations de base sur leurs droits et obligations. Ils délivrent aux intéressés l'ensemble des informations nécessaires pour les inciter à avoir un comportement moral en leur disant ce qui est permis et ce qui ne l'est pas. Les pouvoirs publics, dès le début, attendent donc de ceux-ci qu'ils adoptent un comportement moral avec les instruments d'information adéquats et parfois avec d'autres comme des incitants fiscaux à des déclarations de revenus correctes, par exemple. Le particulier et les sociétés ont ainsi reçu les avertissements nécessaires pour agir en bonne moralité.

Si la prévention a manqué son but et que des fraudes se font jour, une détection de celles-ci s'avère ensuite nécessaire, via diverses activités de contrôle. La panoplie est diversifiée aussi, allant d'une coopération entre diverses autorités nationales à une autre coopération entre celles-ci et une autorité supranationale. Mais on trouve encore des accords multilatéraux en la matière, ainsi que des échanges d'informations, des audits, des inspections in situ lorsque cela s'avère nécessaire.

Le troisième et dernier stade est alors celui de la répression. Si la prévention n'a pas fonctionné et que le contrôle s'avère fructueux dans la détection de la fraude, l'accès au troisième stade est inévitable. La répression peut aussi revêtir diverses formes. Elle n'est pas unique, ne s'abat pas comme un

couperet automatique. Le plus souvent elle est graduée, allant de sanctions administratives et civiles pour les fraudes les moins lourdes à des sanctions pénales pour les cas les plus graves. Dans ce dernier cas, la moralité du pouvoir public a trouvé à se profiler aussi car il est tenu compte du degré de gravité de la fraude et il en résulte l'application de sanctions appropriées à des cas différenciés, en évitant toute généralisation des sanctions.

3. L'IMPACT ET LES CONSÉQUENCES DE LA FRAUDE

Dans les propos que nous avons consignés jusqu'à présent, il peut se dégager une impression, bien légitime d'ailleurs, que la fraude est l'apanage du particulier, qu'il soit une personne physique, une association ou une société commerciale. La fraude ne peut ainsi être l'œuvre de l'Etat qui ne va pas se frauder lui-même. Toutefois, certaines des manières d'agir de ce dernier pourraient être assimilées à des actes de fraude, mais cette fois au détriment de ses administrés. L'Etat peut en effet effectuer des sous-paiements lorsqu'il ne consacre pas la totalité des fonds qu'il a affectés à une action en faveur des particuliers et en la transférant à d'autres objectifs. La question de la moralité, cette fois dans le chef du pouvoir public, de l'Etat idéal et idéalisé, du fraudé par excellence, finit par se poser aussi et ce d'autant plus qu'il adopte de tant à autres des comportements dont on se demande s'ils sont bien moraux.

J'en prendrai trois exemples qui ont jailli dans le colloque de manière éclatante. L'Etat, pour diverses raisons liées au marché du travail, oblige parfois certains de ses administrés à occuper des emplois très mal payés, générant des revenus difficilement acceptables eu égard au coût de la vie. Est-ce moral ? Lorsque des artistes ou des sportifs fortunés habitent tel ou tel Etat et que ce dernier ferme volontairement les yeux sur des questions de fiscalité et de revenus liés à ces personnes afin de les maintenir chez lui et de garantir une certain image de prestige national, est-ce moral ? L'Etat agit-il moralement en s'occultant volontairement le regard envers des personnes disposant des moyens suffisants de s'acquitter de leurs impôts et taxes alors que d'un autre côté il en pourchasse d'autres qui ne se trouvent pas forcément dans des situations financières aussi favorables ? De plus en plus d'Etats développent des systèmes encourageant la dénonciation lorsque des fraudes sont supposées. Est-il moral cet Etat qui agit en encourageant ainsi la délation entre ses citoyens ? La délation à ce que je sache n'a jamais fait partie du catalogue des valeurs universelles à promouvoir !

Les conséquences des actes de fraude peuvent donc avoir divers effets, toujours imprégnés de cette question de la moralité. Certes, dans les moyens mis en place par l'Etat pour combattre la fraude, reproche ne peut lui être fait d'élaborer certaines méthodes, mais ces dernières semblent parfois douteuses sur le plan de la morale. A cela s'ajoute le fait que les mesures de la fraude ne sont pas les mêmes d'un pays à l'autre, ce qui pose clairement

la question du problème d'une méthode et d'une mesure uniques encore à mettre en place dans l'Union européenne. Le colloque a révélé aussi que la fraude et les erreurs coûtent cher aux pouvoirs publics et que, globalement, l'erreur coûte plus cher que la fraude alors que les moyens financiers à la détection de la fraude sont plus élevés que ceux déployés dans la traque aux erreurs ? Est-ce à nouveau moral de confondre ainsi des affectations financières onéreuses visant des objectifs inversés ? En effet, si le crime organisé en général s'intéresse de près à la sécurité sociale, il semble que l'Etat soit parfois défaillant au niveau de ses agents pour agir contre. L'erreur peut être imputable au fraudeur, mais elle peut se lover aussi dans le personnel responsable de la traque chez le fraudé.

A bien y réfléchir, dans le chef du pouvoir public se trouvent divers éléments de nature à démontrer que le fraudé qu'il est logiquement peut s'auto-flageller. Songeons en effet aux problèmes de formation du personnel des administrations dans la lutte contre la fraude, aux réductions des moyens de lutte sous l'empire de la crise économique et financière, aux travaux en réseaux parfois mal organisés, à la complexité du système administratif mis en place par l'Etat et dans lequel le commun des mortels, en toute honnêteté, peut peiner à s'y retrouver. Songeons encore au personnel administratif débordé, aux systèmes informatiques défectueux engendrant des erreurs, aux confusions dans les administrations, à la corruption de certains agents… In fine, moralement, l'Etat ne porte-t-il pas une responsabilité dans les conséquences de la fraude ? Le donneur de leçons n'est-il pas parfois trop candide ?

4. LA COORDINATION ET LA COOPÉRATION DANS LA LUTTE CONTRE LA FRAUDE

Un dernier grand bloc discursif du colloque fut consacré aux méthodes mises en place par les acteurs pour coordonner leurs actions ou au minimum instituer des mécanismes coopératifs en matière de fraude.

Il a été souligné par plusieurs intervenants que, tant pour éviter la fraude que pour la combattre, il était utile qu'acteurs publics et privés s'entendent, collaborent et coopèrent. Cette évidence ne se fait toutefois pas sans difficultés réelles. Un exemple éclairant a souligné cet état de fait. En août 2013, l'Inspection du travail et des mines du Luxembourg a fait une descente de contrôle sur le chantier de rénovation des hauts-fourneaux à Esch-Belval. Lors de la visite, il a pu être décelé qu'une dizaine d'ouvriers du chantier travaillaient dans des conditions illégales. Ce chantier a bien été commandé par l'Etat luxembourgeois avec tout ce que cela suppose comme formalités administratives diverses à respecter, notamment en matière de passation des marchés publics. Il faut constater que le partenaire privé qui a obtenu le chantier a été malhonnête vis-à-vis de l'Etat commanditaire. La question de la moralité se réinvite ainsi logiquement dans le débat de la coopération entre

acteurs publics et privés. Dans le cas précis, l'entrepreneur privé a fraudé en utilisant du personnel inadéquat, mais il a aussi abusé l'Etat qui lui avait fait confiance en lui attribuant le chantier. On voit toute la difficulté à créer une symbiose public-privé en la matière, puisque dans ce cas la trahison de confiance a empoisonné la relation.

Bref, c'est aussi une espèce de criminalité organisée qui peut s'insérer dans des relations entre le binôme public-privé qui devrait pourtant connaître une collaboration sereine. Cet exemple particulier, mais certainement transposable à d'autres cas à travers l'Europe, laisse en plus la désagréable sensation que nous avons affaire à des sociétés généralisées de fraudeurs et de coupables puisque pareil acte de fraude peut aller de la société commerciale au particulier, du notable à celui qui ne l'est pas, par exemple le médecin délivrant de faux certificats. Tout ceci est encore accentué par la perception que l'on a de la fraude en tant qu'acte immoral. Elle n'est pas la même selon que l'on soit plus jeune ou plus âgé, que l'on adopte telle ou telle échelle de valeurs que l'on veut relative.

Certes les autorités européennes tentent de renforcer ces mécanismes de coopération et de coordination. Ne songeons qu'aux obligations d'échanges d'informations prévues par le nouveau règlement 883/2004 en matière de coordination des régimes de sécurité sociale. D'autres méthodes aussi ont été suggérées comme la mise en place d'un cadastre des inspections du travail nationales, des plateformes interactives entre administrations ou encore l'utilisation de l'outil informatique, instrument du privé mis au service du public, permettant diverses formes de coopération comme le " profiling ", par exemple.

CONCLUSION

Que dire en conclusion ? Ce n'est sans doute pas par hasard si la légende de Robin des Bois, née dans la nuit du Moyen-Âge, est parvenue jusqu'à nous aujourd'hui, semant au passage depuis le livre de Walter Scott, quantités d'adaptations cinématographiques, de bandes dessinées, de livres illustrés et autres spectacles de théâtre. Une pareille longévité peut peut-être s'expliquer par le fait que la morale de l'histoire est toujours aussi d'actualité. Depuis l'emprisonnement de Robinhood en 1228, il y a toujours dans la société des riches et des pauvres. La morale de l'histoire est donc toujours applicable dans les sociétés contemporaines où la fraude constitue sans doute une manière plus moderne de reprendre à l'Etat ce qu'on devrait lui donner afin de le garder pour notre propre compte.

Nous avons vu en passant en revue les quatre grands blocs de réflexion composant le colloque que la question de la moralité y est bien présente. Nous avons vu que la fraude, acte immoral en soi, est parfois suscitée par un fraudeur qui n'a peut-être d'autre choix que d'être immoral vis-à-vis de l'Etat pour pouvoir survivre. Nous avons vu que par certaines des méthodes qu'il

déploie, l'Etat fraudé et victime n'est pas toujours moral non plus. Ni le fraudeur, ni le fraudé ne sont totalement blancs et innocents, ni noirs ou mauvais. La vieille conception manichéenne entre le monde du bien et le monde du mal est entièrement à reconsidérer à l'issue du colloque de Luxembourg. La nuit peut se fondre avec le jour et le jour avec la nuit.

S'il fallait après coup renommer ce colloque, je pense qu'il s'agirait de mettre le mot " fraude " au pluriel pour y laisser place à toutes les acceptions du mot. On pourrait le rebaptiser de ce titre : " Sécurité sociale, fraudes et… questions de moralité ".

TABLE DES MATIÈRES