

If this is Europe. The indecent legal framework governing the posting of third-country nationals

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Abstract

This article critically examines the European Union legal framework governing the posting of third-country nationals (TCNs) in the context of the cross-border provision of services. It argues that the case law of the Court of Justice of the European Union has consistently privileged the freedom to provide services over the protection of migrant workers. By distinguishing between *in-employment mobility* and *mobility in search of employment*, the Court has allowed undertakings established in one Member State to post lawfully resident TCNs to another Member State without requiring compliance with the host State's residence permit regime, except in case of temporary agency work. The article analyses the evolution of the Court's jurisprudence, culminating in the *SN* judgment, which partially departs from previous case law by accepting residence permit requirements for postings exceeding three months, primarily on grounds of public policy. However, this shift fails to address the fundamental weaknesses of the existing legal framework. In cases of unlawful posting, TCNs risk losing both their employment and their lawful migration status, making access to justice largely illusory and discouraging the reporting of labour exploitation. The article concludes that the current EU regime institutionalises the exploitation of posted TCNs and remains difficult to reconcile with the Union's commitment to fundamental rights and effective judicial protection.

Keywords: Posted third-country nationals; In-employment mobility; Mobility in search of employment; Unlawful posting; Access to justice.

1. The posting of third-country nationals.

The Court of Justice has developed a substantial body of case law clarifying the rules applicable to the posting of third-country nationals. Until the partial shift in its approach in 2024, the Court consistently adopted a *market-friendly* interpretation, almost invariably giving

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precedence to the objective of removing obstacles to the freedom to provide services over the protection of workers, the safeguarding of fair competition, or the public policy considerations invoked by the host Member State to enforce its residence permit legislation. Consequently, third-country nationals holding a residence permit in the Member State of establishment may, as a general rule, be freely posted to other Member States, except in cases involving the provision of temporary agency work, where the host Member State may require workers to hold a residence permit.

The legal framework governing the posting of third-country workers follows an approach that is diametrically opposed to that governing the movement of third-country nationals within the Union. In the latter context, Member States – motivated by the need to protect their national labour markets, preserve the sustainability of their social protection systems, safeguard public policy, and respond to identity-based and xenophobic concerns – have jealously retained their competence over the admission of such workers (*see* Article 1(2) of Directive 2011/98 and Article 1(2) Directive 2024/1233).¹ Accordingly, a migrant lawfully residing in one Member State may work in another Member State only if he or she holds a residence permit issued by the competent authorities of that State.²

The apparent contradiction between these two approaches is explained by the fact that, in the case of posting, workers remain subject to the social security system of the Member State of origin (Article 12 of Regulation No 883/2004, which also applies to legally resident third-country nationals according to Regulation No 1231/2010). Moreover, posted workers do not benefit from the full labour regulation applicable in the host Member State. Despite the improvements introduced by Directive 2018/957, the host State may apply collective agreements only where they have *erga omnes* effect or do not discriminate against cross-border service providers vis-à-vis domestic undertakings. Furthermore, second-level collective agreements are never applicable, nor are certain employment rules – such as those governing dismissals – which Directive 2018/957 prevents the host State from applying even in cases of long-term posting. Posted workers therefore do not place any burden on the social protection system of the host Member State. At the same time, they enable user undertakings to reduce the cost of services by relying on lower-cost labour.

It should also be emphasised that posted workers generally do not integrate into the host Member State.³ Their working and living conditions remain closely tied to their employer, upon whom they often depend for transport, accommodation and meals. In the construction and agricultural sectors – and increasingly in other sectors – posted workers frequently experience social isolation, as they both work and live separately from local communities.

¹ On this issue *see* Costello C., *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, Oxford, 2015; Herzfeld Olsson P., *The development of an EU Policy on Workers from Third Countries – Adding New Categories of Workers to the EU Labour Market, Provided with New Combinations of Rights*, in Evju S. (ed.), *Regulating Transnational Labour in Europe: The quandaries of multilevel governance*, University of Oslo, Department of Private Law, Oslo, 196, 2014, 279 ff.

² Special rules apply to holders of long-term residence permits (Directive 2003/109/EC) and to highly qualified workers covered by the Blue Card Directive (Directive 2009/50/EC).

³ Caro E., Berntsen L., Lillie N., Wagner I., *Posted Migration and Segregation in the European Construction Sector*, in *Journal of Ethnic and Migration Studies*, 41, 10, 2015, 1602; Van Hoek A.A.H., *Re-embedding the transnational employment relationship: a tale about the limitations of (EU) Law?*, in *Common Market Law Review*, 55, 2, 2018, 480.

This isolation is compounded by linguistic and cultural barriers that hinder contact with trade unions and public authorities. In many cases, posted workers are also unaware of the rights they enjoy in the host Member State. As a result, they are often reluctant to report the abuses to which they are subjected. Collective organisation of posted workers is equally difficult, both in the Member State of origin and in the host Member State.⁴

In the case of third-country nationals, the absence of complaints is also explained by the fact that workers who challenge breaches of the rules governing posting risk seeing their legal status transformed from that of a regular migrant in the Member State of origin to that of an irregular migrant in the host Member State. Indeed, if the posting undertaking is merely a letter-box company (that is, an undertaking that carries out no genuine economic activity in the Member State of establishment), or the worker has never actually pursued any activity in the Member State of origin, the situation falls outside the scope of the rules on posting. Consequently, the rule preventing the host Member State from enforcing its residence permit legislation may no longer apply.⁵

The Court of Justice's permissive approach towards the posting of third-country nationals has therefore provided European undertakings with an army of "*no-frills*" workers: silent, invisible and highly vulnerable. This conclusion is proven by the fact that, throughout decades of case law on the subject, the Court has never addressed the issue of access to justice for posted workers, either generally or specifically in relation to third-country nationals. In fact, until 2024, every case concerning the posting of third-country nationals originated from employers challenging decisions by the host Member State alleging non-compliance with national residence permit requirements.

2. The case law of the Court of Justice on the posting of third-country nationals.

A considerable portion of the Court of Justice's case law on the posting of workers has addressed issues relating to third-country nationals. Indeed, the very distinction between *in-employment mobility* and *mobility in search of employment* was developed in the landmark judgment *Rush Portuguesa* (Court of Justice, 27 March 1990, Case C-113/89) in order to ensure that workers from newly acceded Member States, who did not yet enjoy the right to free movement, could nevertheless be employed by their employer in the context of the cross-border provision of services. At the time, France was relying on the transitional arrangements

⁴ Hayes L., Novitz T., Herzfeld Olsson P., *Migrant workers and collective bargaining: institutional isomorphism and legitimacy in a Resocialised Europe*, in Countouris N., Freedland M. (eds), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge, 2011, 451; Van Hoek A.A.H., nt. (3), 487.

⁵ Problems relating to residence permit add to the many other barriers to access to justice – such as limited knowledge of the language spoken in the Member State of origin, lack of awareness of rights, poverty, and the cost and duration of judicial proceedings – which have been extensively documented in studies conducted by the European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights*, Publications Office of the EU, Luxembourg, 2015; European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers' perspectives*, Publications Office of the EU, Luxembourg, 2019.

provided for in the Act of Accession of Spain and Portugal in order to restrict the free movement of workers from those countries.

According to the Court, the derogations contained in the Act of Accession were intended to prevent, following the accession of the two States, “disturbances on the employment market” resulting from “large and immediate movements of workers” (para. 13). However, the Court went on to observe that no such concern arose in the case of the temporary transfer of workers sent to another Member State in order to perform work in the context of a provision of services by their employer, since “such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State” (para. 15).

The temporary transfer of workers in the context of the provision of services (the so-called *in-employment mobility*) was therefore brought within the scope of Article 56 TFEU. Consequently, “the authorities of the Member State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower in situ or the obtaining of work permits for the Portuguese work-force” (para. 19).

The opening of the services (and labour) market achieved in this manner was nevertheless limited by three important propositions. First, the prohibition on applying the provisions of the Act of Accession restricting the free movement of workers did not extend to temporary work agencies which, although providing services within the meaning of the Treaty, pursue an activity “intended to enable workers to gain access to the labour market of the host Member State” (para. 16). Secondly, the host Member State had to be able to carry out checks on the service provider in order to ascertain whether the latter was relying on the rules governing the freedom to provide services for the purpose of placing workers or making them available, thereby circumventing the provisions of the Act of Accession (abuse of rights; para. 17). Finally, the Court held that “Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means” (para. 18).

This final statement remained particularly problematic. At the time *Rush Portuguesa* was decided, Directive 96/71/EC had not yet been adopted. Since the principle of non-discrimination laid down in Article 45 TFEU was inapplicable, the legal framework was governed by the Treaty provisions on the freedom to provide services together with the relevant rules of private international law, most notably the 1980 Rome Convention on the law applicable to contractual obligations.

In *Vander Elst* (Court of Justice, 9 August 1994, Case C-43/93), the distinction between *in-employment mobility* and *mobility in search of employment* was applied to a Belgian undertaking which, in the context of a cross-border provision of services, posted to France several Moroccan workers who were permanently employed and lawfully resident in Belgium. Once again, the Court held that France could not require the Belgian employer to obtain, in respect of those Moroccan workers, a work permit issued by the French immigration authorities (para. 26).

According to the Court, Article 56 TFEU requires the abolition of any measure which prohibits, impedes or renders less attractive the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services may be restricted by rules justified by overriding reasons relating to the public interest and applicable to all undertakings operating in the host State, provided that the interest pursued is not already safeguarded by the rules to which the provider is subject in the Member State of establishment. Furthermore, “Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions whose object is to guarantee the freedom to provide services” (paras. 15, 16 and 17).

Having established these principles, which constitute the leitmotif of the Court of Justice’s case law on the freedom to provide services,⁶ the Court reaffirmed the distinction between *in-employment mobility* and *mobility in search of employment*, reiterating that posted workers do not seek, in any way, to gain access to the labour market of the host Member State since they “return to their country of origin or residence after completion of their work” (Court of Justice, 9 August 1994, Case C-43/93, *Vander Elst*, para. 21). The Court further observed that the application of the legislation of the Member State of origin “excludes any substantial risk of workers being exploited or of competition between undertakings being distorted” (para. 25). For those reasons, the Court held that Article 56 TFEU precludes a Member State from requiring cross-border service providers “which lawfully and habitually employ” third-country nationals to obtain a work permit issued by its national immigration authorities in respect of those workers (para. 26).

In the early 2000s, the Commission initiated three infringement proceedings against Luxembourg, Germany and Austria on the ground that they had imposed restrictive conditions on the posting of third-country workers. Once again, the Court adopted a market-friendly approach, holding incompatible with Article 56 TFEU: the Luxembourg legislation requiring posted third-country workers to obtain either an individual work permit or a collective authorisation, the granting of which was conditional upon the existence of an open-ended employment contract and upon the worker having been employed by the service provider for at least six months prior to the posting (CJEU 21.10.2004, C-445/03, *Commission v Grand Duchy of Luxembourg*); the German legislation requiring third-country workers posted for more than three months to hold a residence permit, which was issued only to workers who had been employed by the posting undertaking for at least one year (CJEU 19.1.2006, C-244/04, *Commission v Federal Republic of Germany*); and the Austrian legislation making the posting of third-country workers subject to the issue of a posting certificate, which was granted only where the worker had been lawfully and continuously employed for at least one

⁶ On this point, see CJEU, Case C-445/03, *Commission v Grand Duchy of Luxembourg*, 21 October 2004, paras. 20-21; CJEU, Case C-244/04, *Commission v Federal Republic of Germany*, 19 January 2006, paras. 30-31; CJEU, Case C-168/04, *Commission v Republic of Austria*, 21 September 2006, paras. 36-37; CJEU, Case C-91/13, *Essent Energie Productie*, 11 September 2014, paras. 44 and 48; CJEU, Case C-18/17, *Danieli*, 14 November 2018, para. 46; Opinion of Advocate General, Case C-540/22, *SN*, 30 November 2023, para. 30.

year by the posting undertaking in its Member State of establishment, or where the employment relationship was based on an open-ended contract.⁷

The Member States concerned argued that the requirement of an open-ended employment contract and/or of employment having commenced several months before the posting was intended to ensure that the worker had “a stable link with the Member State of origin and a close and lawful link to the undertaking deploying him, in order to avoid the risk of abusive exploitation of workers from non-member countries and distortion of competition through social dumping practices”.⁸ The Luxembourg Government further challenged the distinction between *in-employment mobility* and *mobility in search of employment*, arguing that, “if there are no long-term prospects for work with his undertaking of origin, a deployed worker, once in the Luxembourg labour market for a certain time, might be tempted to remain there”.⁹

According to the Court, although the protection of workers constitutes a legitimate objective capable of justifying restrictions on the freedom to provide services, the measures adopted by Austria, Germany and Luxembourg went beyond what was necessary to achieve that objective. In particular, the requirement that workers be employed under an open-ended contract and/or that the employment relationship pre-date the posting by several months considerably complicated the posting of workers in sectors where short-term employment contracts are widely used and placed newly established undertakings at a competitive disadvantage.¹⁰

According to the Court, nor could the objective of preventing the national labour market from being disrupted by an inflow of workers from third countries justify the national measures challenged in the infringement proceedings. On the one hand, the Court reiterated that posted workers do not seek to gain access to the labour market of the host Member State.¹¹ On the other hand, it recalled that Member States remain entitled to carry out checks in order to ascertain whether an undertaking is relying on the freedom to provide services “for a purpose other than the accomplishment of the service in question, for instance, that

⁷ In the Austrian case, the Court likewise held that the automatic refusal to issue an entry or residence permit to a worker who had entered the national territory without the required visa was contrary to Article 56 TFEU. According to the Court, such a sanction was disproportionate to the seriousness of the infringement, since it failed to take into account the fact that the worker was lawfully resident in the Member State from which he or she had been posted and, consequently, could not, merely by virtue of that circumstance, be regarded as posing a threat to public policy or public security (CJEU, *Commission v Republic of Austria*, nt. (6), para. 65).

⁸ CJEU, *Commission v Grand Duchy of Luxembourg*, nt. (6), para. 18. See also CJEU, *Commission v Federal Republic of Germany*, nt. (6), paras. 27, 39 and 55; CJEU, *Commission v Republic of Austria*, nt. (6), para. 30.

⁹ CJEU, *Commission v Grand Duchy of Luxembourg*, nt. (6), para. 18.

¹⁰ CJEU, *Commission v Grand Duchy of Luxembourg*, nt. (6), paras. 33, 34 and 44. See also CJEU, *Commission v Federal Republic of Germany*, nt. (6), para. 53. According to the Court, requiring service providers to notify the competent national authorities in advance of the presence of posted workers, the anticipated duration of their posting, and the provision of services giving rise to the posting would constitute a measure that is equally effective yet less restrictive. Such prior notification would enable the authorities of the host Member State to monitor compliance with its labour legislation, while taking into account the obligations to which the undertaking is already subject in the Member State of establishment (CJEU, *Commission v Grand Duchy of Luxembourg*, nt. (6), para. 31; see CJEU, *Commission v Federal Republic of Germany*, nt. (6), para. 45; CJEU, *Commission v Republic of Austria*, nt. (6), para. 52).

¹¹ CJEU, *Commission v Grand Duchy of Luxembourg*, nt. (6), para. 38. See also CJEU, *Commission v Republic of Austria*, nt. (6), para. 55.

of bringing his workers for the purpose of placing workers or making them available”.¹² In the Court’s view, the objective of preventing disturbances to the labour market could have been achieved by requiring the service provider “to provide the local authorities with information showing that the situation of the workers concerned is lawful as regards matters such as residence, work permit and social coverage in the Member State in which that undertaking employs them”,¹³ thereby enabling those authorities to verify the information provided and to adopt the necessary measures where the workers’ status proved to be irregular.

Following the three infringement proceedings, the Court of Justice was called upon to rule on the posting of third-country nationals in the context of the cross-border provision of services on four further occasions, all of which concerned the transnational supply of temporary agency workers.¹⁴ In those judgments, the Court reaffirmed the approach first adopted in *Rush Portuguesa*, making clear that posted temporary agency workers cannot benefit from the rules governing *in-employment mobility*, since they occupy “a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking”.¹⁵

3. Issues left unaddressed by the case law on the posting of third-country nationals.

The case law of the Court of Justice on the posting of third-country workers leaves a number of important issues unresolved. First, under EU law, an undertaking may recruit workers for the sole purpose of posting them to another Member State, even where they have not previously performed any work in the Member State of establishment.¹⁶ Combined with the fact that each Member State retains the power to determine both the number and

¹² CJEU, *Commission v Grand Duchy of Luxembourg*, nt. (6), para. 39. See also CJEU, *Commission v Republic of Austria*, nt. (6), para. 56.

¹³ CJEU, *Commission v Grand Duchy of Luxembourg*, nt. (6), para. 46. See also CJEU, *Commission v Federal Republic of Germany*, nt. (6), para. 41; CJEU, *Commission v Republic of Austria*, nt. (6), para. 57.

¹⁴ CJEU, joined Cases C-307/09 and C-309/09, *Vicoplus*, 10 February 2011; CJEU, *Essent Energie Productie*, nt. (6); CJEU, Case C-586/13, *Martin Meat*, 18 June 2015; CJEU, *Danieli*, nt. (6).

¹⁵ CJEU, *Vicoplus*, nt. (14), para. 31. In *Vicoplus* the Court identified the criteria for distinguishing the legal regime governing the posting of workers in the context of the supply of labour and that applicable to posting in the context of the provision of services. The supply of labour exists where “the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services and [...] worker carries out his tasks under the control and direction of the user undertaking” (para. 51). The practical difficulties involved in drawing that distinction are clearly illustrated by *Martin Meat* (CJEU, nt. (14)). In that case, a Hungarian undertaking (*Martin Meat*) posted its employees – who at the time remained subject to the transitional restrictions on free movement laid down in the Act of Accession of Hungary – to the slaughterhouses of the Austrian undertaking *Alpenrind*, which instructed *Martin Meat* as to the methods by which the meat was to be processed. On the basis of those instructions, *Martin Meat*’s unit manager organised the work of its employees and issued operational directions. *Alpenrind* subsequently verified the quality of the work performed. According to the Court, the mere fact that *Alpenrind* monitored whether the services complied with the contractual arrangements concluded with *Martin Meat* and issued general instructions concerning the work to be carried out was not, in itself, sufficient to establish that the arrangement constituted a temporary supply of labour.

¹⁶ This is expressly acknowledged by the Court of Justice: CJEU, *Commission v Federal Republic of Germany*, nt. (6), para. 55.

the categories of residence permits issued to third-country workers, this may give rise – and indeed has given rise – to distortions of the internal market.

Furthermore, a worker may be dismissed during the posting or, where employed under a fixed-term contract, may simply not have his or her contract renewed upon its expiry. In such circumstances, the distinction between *in-employment mobility* and *mobility in search of employment* loses much of its persuasive force, since the worker may no longer return to the Member State of origin once the posting has come to an end.¹⁷ Moreover, the broad interpretation of the concept of a service under Article 56 TFEU, which now encompasses services provided “with a greater or lesser degree of frequency or regularity, even over an extended period” means that the Treaty also covers what may properly be described as long-term services (Opinion of Advocate General, 30.11.2023, Case C-540/22, *SN*, paras. 60 and 64). It is equally possible for posted workers to be reassigned to another cross-border service operation within the same host Member State (para. 64). In such situations, the posting can hardly be regarded as genuinely temporary, and it is therefore open to question whether it remains convincing to maintain that posted workers do not gain access to the labour market of the host Member State.

It should also be noted that the number of posted workers has steadily increased in recent years.¹⁸ Several factors account for this trend. On the one hand, it has been driven by the expansive interpretation of the concept of a service, which, as noted above, has considerably broadened the scope of Article 56 TFEU.¹⁹ On the other hand, the 2004 and 2007 enlargements significantly widened labour-cost differentials between Member States, thereby increasing the competitive advantages that undertakings may derive from the transnational posting of workers.

The increase in the number of posted workers has also involved third-country nationals.²⁰ In particular, a number of migration corridors into the European labour market have been identified, operating through the legal framework governing the posting of workers.²¹ In fact, some Member States, seeking to preserve the comparative advantage deriving from lower labour costs, have begun to issue a substantial number of residence permits for employment purposes.²² Some Member States have also introduced “special” work permits, which are

¹⁷ De Wispelaere F., Rocca M., *Posting of workers and the border of the labour market*, in *European Labour Law Journal*, 2023, 92.

¹⁸ De Wispelaere F., Pacolet J., De Smedt, L., *Posting of workers – Collection of data from the prior declaration tools – Reference year 2020*, Publications Office of the EU, Luxembourg, 2023.

¹⁹ As observed by the Advocate General in *SN*, “no provision of the FEU Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services” (Opinion of Advocate General, Case C-540/22, *SN*, nt. (6), para. 60).

²⁰ Lens D., Mussche N., Marx I., *Europe’s ever expanding mobility patterns posting, third country nationals and the single European labour market*, University of Antwerp, Herman Deleeck Centre for Social Policy, CSB WP 19.08, 2019, 14; European Labour Authority, *Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals*, 2023, 6.

²¹ Lens D., Mussche N., Marx I., *A hole in the wall of fortress Europe: the trans-European posting of third-country labour migrants*, in *International migration*, 60, 2, 2022, 166; European Labour Authority, nt. (20), 8; Cukut Krilić S., Toplak K., Vah Jevšnik M., *Posting of third country nationals. A comparative study*, Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector, Ljubljana, 2020, 27.

²² European Labour Authority, nt. (20), 92-93; De Wispelaere F., De Smedt L., Pacolet, J., *Posted workers in the European Union. Facts and figures*, POSTING.STAT project VS/2020/0499, 2022, 37.

granted under simplified and expedited procedures to nationals of certain third countries.²³ As a result, residence permit regimes have themselves become an object of so-called *law shopping*, a development that calls into question the Court's assumption that the checks carried out in the Member State of establishment are sufficient to prevent both the exploitation of workers and unfair competition between undertakings.

Another phenomenon that has recently been reported in several Member States, particularly in Eastern Europe, is the growing presence of temporary work agencies recruiting third-country nationals for the purpose of assigning them to local undertakings.²⁴ As clarified by the Court of Justice in *Danieli*, in such circumstances the host Member State may not require compliance with its national residence permit legislation.

Finally, it should be observed that the Member States which issue residence permits under relatively accessible conditions to third-country nationals who are subsequently posted are often those in which nationalist, identitarian and xenophobic rhetoric is most widespread. This provides further evidence of the convergence between neoliberal economic policies and identity-based political narratives that the legal framework governing the posting of third-country nationals tends to reinforce. As already noted, these workers are often reluctant to report the numerous violations of their rights for fear of falling from the status of a lawfully resident migrant into that of an irregular migrant. The exploitation of third-country nationals therefore provides a competitive advantage to undertakings established in Member States where labour costs are comparatively low, without requiring those States to bear the political and social costs associated with the integration of migrant workers. Moreover, since these workers spend most of their time posted abroad, they remain largely invisible to the citizens of the Member States that issued their residence permits.

In its report on the implementation of the rules governing the posting of workers, the European Commission highlighted the particular vulnerability of third-country nationals posted in the context of a transnational provision of services, “due to their potential dependency on their employer for the renewal of work and/or residence permits”.²⁵ In addition to the difficulties inherently associated with posting,²⁶ these workers face further challenges arising from the fact that they perform their work in a Member State in which

²³ Chudžíková A.H., Bargerová Z., *Victims of labour exploitation or “illegal” migrants? Ukrainian workers’ labour rights protection in Slovakia*, STRONGLAB project, 2018; Kall K., Brzozowska A., Lillie N., Matuszczyk K., Salamońska J., *Regional Case study. From Ukraine to Finland and Estonia via Poland: Migration and posting of third country nationals*, Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector, 2020, 43; European Labour Authority, nt. (20), 81.

²⁴ In Poland, in 2015, there were 6081 temporary work agencies; by 2017, this number had risen to 8646. Many of these agencies also maintain branches in Ukraine. See Keryk M., *Working in Poland: violations of the labour rights of Ukrainian migrants in the construction and services sectors*, STRONGLAB Project, 2018).

²⁵ European Commission, *Report on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, COM(2024)320, 12; Cukut Krilić S., Toplak K., Vah Jevšnik M., nt. (21), 27 and 6.

²⁶ Posted workers rarely become integrated into the host Member State, where they frequently depend on their employer not only for work but also for transport, accommodation and meals. This makes trade union organisation particularly difficult. Moreover, posted workers often lack knowledge of the language of the host Member State and are insufficiently informed about their legal rights. In lengthy and complex subcontracting chains, they may not even know who their actual employer is. Consequently, they are often reluctant to report the violations to which they are subjected (Van Hoek A.A.H., nt. (3), 480).

they do not hold a work permit. Consequently, in cases of unlawful posting they risk finding themselves in an irregular situation because they lack the work authorisation required under the legislation of the host State. At the same time, they may also lose their work authorisation in the Member State of establishment, since such authorisation may be tied to a particular employer, linked to the posting arrangement, or restricted to employment in a specific sector. For these reasons, posted third-country nationals are more likely to tolerate infringements of their rights, are considerably less likely to seek assistance from trade unions and are even less likely to report such infringements to the competent authorities.²⁷

Despite the shortcomings of the current legal framework on the posting of workers, the Commission has not considered it necessary to propose any substantive legislative reform. In its view, it would be sufficient to facilitate “access to information” and to support “Member States by enhancing transnational cooperation between national enforcement bodies” through the European Labour Authority.²⁸

A further issue overlooked by the Court of Justice in its case law concerns the practical difficulties associated with *ex post* enforcement. On the one hand, the complexity of subcontracting chains, particularly in cross-border situations, makes inspections exceptionally burdensome.²⁹ The increasing difficulty of enforcement is compounded by the structural shortage of labour inspectors resulting from reductions in public expenditure. On the other hand, the authorities of the Member State of establishment do not always cooperate effectively with those of the host Member State – a problem that the European Labour Authority was expected to address but has not been provided with adequate powers to resolve effectively.³⁰ Moreover, posted workers often have little incentive to report the infringements of which they are victims because wages in the host Member State generally exceed those available in their Member State of origin. In the case of third-country nationals, they also have a strong interest in retaining the employment on which, in many cases, their residence status depends.³¹ Finally, it should be recalled that *ex post* inspections, like any other national control measure, must comply with the limits imposed by EU law and may therefore not go beyond what is necessary to attain the legitimate objectives pursued.³²

²⁷ European Commission, *Commission Staff Working Document accompanying the document Report from the Commission on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, SWD(2024)320, 33; Ecorys, Hiva-KU Leuven, Spark Legal and Policy Consulting, wmp consult, *Study supporting the Monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU. The situation of temporary cross-border mobile workers and workers in subcontracting chains*, Directorate-General for Employment, Social Affairs and Inclusion, Publications Office of the EU, Luxembourg, 2024, 251; European Labour Authority, nt. (20), 67.

²⁸ European Commission, nt. (25), 14.

²⁹ Borelli S., *Subcontracting: Exploitation by Design. Tackling the Business Model for Social Dumping*, The Left – European Parliamentary Group, Brussels, 2022.

³⁰ Muller F., *Les inspections communes et concertées, des tigres de papier?*, in Borelli S., Morsa M., Allamprese A. (eds.), *L'autorité européenne du travail*, Bruylant, Brussels, 2020, 100.

³¹ Danaj S., Geyer L., Cukut Krilić S., Toplak K., Vah Jevšnik M., *Regional Case Study. From Bosnia and Herzegovina to Austria via Slovenia: migration and posting of third country nationals in the EU*, Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector, 2020, 36.

³² CJEU, *Essent Energie Productie*, nt. (6), para. 53.

4. The 2024 Court of Justice's new approach.

Given the many issues left unresolved by the Court of Justice's case law, one might have expected the change in approach adopted in 2024 to be justified by the need to prevent distortions of the labour market and to ensure the effective protection of workers. Instead, the judgment in which the Court held that the Dutch legislation requiring third-country nationals posted for more than three months to obtain a residence permit is compatible with Article 56 TFEU is primarily based on the need to safeguard public policy (CJEU, 20.6.2024, Case C-540/22, *SN*).

The Court observed that this matter is not expressly governed by any provision of EU secondary legislation. In particular, the Convention implementing the Schengen Agreement, which entitles third-country nationals holding a valid residence permit issued by a Schengen State to move freely within the territory of the other Schengen States for a period not exceeding three months (Article 21), is not applicable. Consequently, periods of residence exceeding ninety days "fall solely within the competence of the Member States" (CJEU, 20.6.2024, Case C-540/22, *SN*, para. 65).

In exercising that competence Member States remain bound to comply with Article 56 TFEU. The Court therefore concluded that the Dutch legislation constitutes a restriction on the freedom to provide services; that such a restriction may nevertheless be justified where it pursues an overriding reason in the public interest; and that such justification is available only if the interest protected by the Dutch legislation is not already safeguarded by the legal framework applicable to the service provider in the Member State of establishment, and provided that the national measure is suitable for attaining the objective pursued and does not go beyond what is necessary to achieve it (paras. 73-76).

According to the Court, the Dutch residence permit pursues four objectives of general interest: safeguarding access to the national labour market; verifying whether a service provider is relying on the freedom to provide services for purposes other than the provision of the service concerned; ensuring legal certainty for posted workers; and enabling the authorities to ascertain whether a posted third-country national poses a threat to public policy (para. 77).

As discussed above, the first two objectives had already been examined repeatedly in the Court's previous case law on the posting of third-country workers, in which the national measures adopted by the Member States had consistently been found to be disproportionate. The Court reached the same conclusion in *SN*. In rejecting the argument that the Dutch legislation could be justified by the need to prevent disturbances to the national labour market, the Court once again relied on the distinction between *in-employment mobility* and *mobility in search of employment* (para. 80). Similarly, the objective of verifying whether the undertaking is invoking the freedom to provide services for purposes other than the genuine provision of services was considered incapable of justifying the residence permit requirement, since that objective was already adequately achieved through the prior notification obligation imposed by Dutch legislation on cross-border service providers.

What ultimately persuaded the Court that the Dutch legislation was compatible with Article 56 TFEU were the objectives of ensuring legal certainty and addressing potential

threats to public policy. The Court held that the requirement for posted third-country nationals to hold a residence permit “constitutes a measure appropriate for attaining the objectives of increasing legal certainty for posted workers”. Such a permit, the Court observed, ensures “recognition by the public authorities of the right of a foreign national who has attained the age of majority to reside in the national territory” (para. 86), thereby facilitating the work of the national authorities responsible for carrying out inspections. Moreover, the Dutch legislation was considered proportionate because the conditions governing the issue of residence permits are relatively straightforward. It is sufficient that the undertaking has previously submitted the notification containing the information relating to the provision of services – as permitted under Article 9 of Directive 2014/67/EU – and has provided the Dutch authorities with copies of the residence permits held by the workers in the Member State of establishment, together with their employment contracts, thereby enabling those authorities to verify that the posting takes place lawfully (para. 90).

As regards the objective of verifying that posted workers do not constitute a threat to public policy, the Court acknowledged that third-country nationals are already subject to such checks in the Member State in which the posting undertaking is established. Nevertheless, it emphasised that “the assessment of the threat which a person may represent for public policy may vary from one country to another and from one moment to another” (para. 98).

The Court further held that “the residence permit procedure, inasmuch as it requires the person concerned to report to the premises of a competent authority in person, may enable the identity of that person to be verified in detail, which, in the sphere of combating risks of threats to public policy, is of particular importance” (para. 101). It is, however, for the national court to determine whether such verification could have been carried out, in a reliable manner, on the basis of the information that the Member State of establishment requires, or could have required, to be provided under the prior notification procedure (para. 102).

The security rationale underlying the Court’s decision undoubtedly reflects the approach that has long characterised migration policies within the European Union. The Court does not, however, explain why the public policy considerations justifying the checks carried out by the Dutch authorities in the context of issuing a residence permit arise only after a posting has exceeded ninety days.

Having recognised the compatibility with Article 56 TFEU of a residence permit requirement for third-country nationals posted for more than three months, the Court dealt briefly with the remaining two questions referred by the national court. First, it held that the fact that a Member State limits the period of validity of residence permits to the duration of the work permits held by the workers in the Member State in which their employer is established does not constitute a restriction on the freedom to provide services, since a service provider may rely on that freedom only in so far as the workers concerned are lawfully employed in accordance with the legislation of the Member State of establishment (para. 119).

The Court further observed that “a national measure the purpose of which is not to regulate the conditions concerning the provision of services by the undertakings concerned and any restrictive effects of which on the freedom to provide services are too uncertain and

indirect for it to be regarded as being capable of hindering that freedom” does not fall within the prohibition laid down in Article 56 TFEU (para. 115). According to the Court, a rule providing that the period of validity of the residence permit issued by the host Member State may not exceed a specified duration is not intended to regulate the conditions under which the freedom to provide services is exercised, nor does it prohibit, impede or render the exercise of that freedom less attractive “in a way that is sufficiently certain and direct unless that initial period of validity is manifestly too short to meet the needs of the majority of service providers or, in any event, it is not possible to renew that period of validity without meeting excessive formal requirements” (para. 116).

This is a significant development, as it affects the allocation of the burden of proof. Henceforth, parties alleging the existence of a restriction contrary to Article 56 TFEU will bear the burden of demonstrating that the contested national measure affects the freedom to provide services “in a way that is sufficiently certain and direct”. At the same time, this formulation enables the Court to leave the final assessment of the restrictive nature of the measure to the national court. It is for that court, having regard to all the circumstances of the case, to determine whether the initial period of validity of the residence permit is manifestly too short to meet the needs of the vast majority of service providers and whether renewal may be obtained without compliance with excessive administrative formalities (para. 122). Likewise, it is for the national court to determine whether the fee charged for the issue of the residence permit is excessive, taking into account both the administrative tasks involved in issuing the permit and the production costs of the residence permit, in order to ascertain whether those costs are equivalent to those incurred in issuing residence certificates to Union citizens (para. 121).

5. The lack of protection for third-country nationals in cases of unlawful posting.

As noted above, in *SN* the Court of Justice’s judgment is primarily driven by considerations of public policy. By contrast, it does not address the need to prevent distortions of the labour market and the protection of third-country nationals. In cases of unlawful posting, third-country nationals risk moving from the status of lawfully resident migrants in the Member State of establishment to that of irregular migrants in the host Member State. This occurs whenever the host Member State is entitled to require compliance with its own residence permit legislation. Where the criteria laid down in Article 4 of Directive 2014/67/EU for a lawful posting are not satisfied, the law governing the employment relationship continues to be determined in accordance with the Rome I Regulation. Consequently, where the worker’s habitual place of work is located in the host Member State, that State’s residence permit legislation becomes applicable pursuant to Article 8 of the Regulation. Moreover, the host Member State may require compliance with its residence permit rules as overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation.

Whenever the host Member State is entitled to enforce its residence permit legislation, the third-country national posted to its territory becomes an irregular migrant. In such

circumstances, Directive 2009/52/EC applies. That Directive requires Member States to provide for the possibility of granting residence permits, but only where the employment of an irregular migrant has been accompanied by particularly exploitative working conditions (Article 13(4)).³³ Where the worker is a victim of trafficking in human beings,³⁴ he or she is also entitled to free legal assistance and to “standards of living capable of ensuring their subsistence” (Article 7 of Directive 2004/81/EC), which includes, at a minimum, adequate and safe accommodation, material assistance, necessary medical treatment, psychological support, counselling and information, as well as translation and interpretation services (Article 11 of Directive 2011/36/EU).³⁵

The shortcomings of the protection afforded to irregular migrants under Directive 2009/52/EC, widely criticised in the academic literature,³⁶ become even more visible in the context of the unlawful posting of third-country nationals. Indeed, where such workers report that they have performed their work predominantly – or even exclusively – in the host Member State, they are likely to lose their employment. It is difficult to imagine that an employer established in another Member State, where residence permits can be obtained relatively easily, would undertake the administrative procedures necessary to secure a residence permit in the host Member State for a worker who has reported the employer’s unlawful conduct. Moreover, Directive 2009/52/EC expressly prohibits the employment of irregular migrants (Article 3).

Nor is it clear what happens to the worker’s residence permit in the Member State of establishment once the unlawful posting has been brought to light. Under Article 1(2) of Directive 2011/98/EU and Article 1(2) of Directive 2024/1233/EU, each Member State retains the power to determine the conditions governing both the granting and the withdrawal of residence permits. The revised Single Permit Directive requires Member States to allow the holder of a single permit to change employer during the period of validity of the permit (Article 11(2) of Directive (EU) 2024/1233). Although Member States may require the holder of a single permit to remain employed by the first employer for a minimum period of up to six months (Article 11(3)(c)), that requirement does not apply where the employer has committed “a serious breach by the employer of the terms and conditions of the employment relationship” (Article 11(3)). Accordingly, where a posting proves to be

³³ These are working conditions “where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers’ health and safety, and which offends against human dignity” (Article 2(i) of Directive 2009/52/EC). See also European Union Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, Publications Office of the EU, Luxembourg, 2015, 46.

³⁴ The offence of trafficking in human beings is defined in Article 2 of Directive 2011/36/EU. Victims of trafficking are also entitled to a specific residence permit, although only where they cooperate with the competent judicial authorities (Article 8 of Directive 2004/81/EC).

³⁵ Directive 2012/29/EU also guarantees access to accommodation for victims requiring a safe place because of an imminent risk of secondary or repeat victimisation, intimidation or retaliation (Article 9). The rights conferred by Directive 2012/29/EU must be applied “in a non-discriminatory manner, including with respect to their residence status” (Article 1(1)).

³⁶ See Costello C., *EU Migration and Asylum Law: A Labour Law Perspective*, in Bogg A., Costello C., Davies A.C.L. (eds), *Research Handbook in EU Labour Law*, Edward Elgar Publishing, Cheltenham, 2016, 299; Daugareilh I., *La pénalisation du travail irrégulier en droit européen*, in Dubin L. (ed.), *La légalité de la lutte contre l’immigration irrégulière par l’Union européenne*, Bruylant, Brussels, 2012, 265.

unlawful, the single permit issued by the Member State in which the service provider is established should remain valid, enabling the worker to seek alternative employment in that Member State.³⁷ The Member State of establishment could nevertheless decide to withdraw the residence permit on the ground that it had been obtained abusively for the purpose of carrying out work in another Member State.

Consequently, where third-country nationals decide to report breaches of the rules governing the posting of workers, they may find themselves deprived of their employment, as well as of the accommodation and subsistence provided by their employer, and ultimately compelled to leave the territory of the European Union. Having been transformed from lawfully resident migrants into irregular migrants, they also lose the rights that EU law confers upon third-country nationals lawfully residing in a Member State in the fields of social security (Regulation No 1231/2010) and working conditions (Article 12 of Directive 2011/98/EU and Article 12 of Directive 2024/1233/EU; CJEU, 24.1.2019, Case C-477/17, *Balandin and Lukachenko*).

It is therefore unsurprising that such workers often prefer to remain silent about the exploitative conditions to which they are subjected, thereby preserving their status as lawfully resident migrants and retaining the possibility of finding better employment in the future.

6. The Italian legal framework governing unlawful posting.

The Italian case clearly illustrates the contradictions generated by the European legal framework governing the posting of third-country nationals. In transposing Directive 2014/67/EU, the Italian legislator chose to sanction non-genuine postings to undertakings established in Italy by deeming the employment relationship to exist with the user undertaking (Article 3(4) of Legislative Decree No 136/2016). The shortcomings of this provision have already been highlighted in the literature.³⁸ First, where an A1 certificate has been issued by another Member State, the Italian social security legislation is inapplicable. Secondly, the sanction operates by reallocating the employment relationship to the user undertaking even where the latter has not exercised any managerial or supervisory authority over the worker – for example, where the worker has habitually carried out his or her activities in Italy while employed by the posting undertaking.

This sanction entirely disregards the position of third-country nationals. Where a non-genuine posting is reported, posted workers are deemed to be employed by the user undertaking established in Italy while, at the same time, lacking the residence permit required under Italian immigration law. In such circumstances, the special residence permit issued to posted third-country nationals should be withdrawn (Article 27(1)(i) of Legislative Decree

³⁷ The revised Single Permit Directive, like Directive 2011/98/EU, does not apply to posted third country nationals “as long as they are posted” (Article 3(2)(c)). Those Directives therefore become applicable upon completion of the posting or where the posting is found to be unlawful.

³⁸ Allamprese A., Orlandini G., *Decreto legislativo n. 136/2016 recante attuazione della direttiva n. 2014/67 di attuazione della direttiva n. 96/71 sul distacco transnazionale di lavoratori. Un primo commento*, 2016, 4, available at https://www.europeanrights.eu/public/commenti/Bronzini2-Nota_CGIL_decreto_legislativo_136-2016_x_def.pdf.

No 286/1998).³⁹ Where the worker is a victim of the criminal offence of labour exploitation (Article 603-bis of the Italian Criminal Code) and “contributes effectively to the disclosure of the facts and the identification of those responsible”, he or she may obtain the residence permit provided for in Article 18-ter of Legislative Decree No 286/1998.⁴⁰ Where the offences of slavery (Article 600 of the Criminal Code) or trafficking in human beings (Article 601 of the Criminal Code) have been committed, the worker may obtain a residence permit on grounds of social protection and benefit from the assistance and social integration programme provided for in Article 18(3-bis) of Legislative Decree No 286/1998.⁴¹ In all other cases, the worker may be charged with the offence of irregular stay and is liable to expulsion (Article 10-bis of Legislative Decree No 286/1998). An employment contract concluded by an irregular migrant is void (Article 22(12) of Legislative Decree No 286/1998). The undertaking deemed to be the employer pursuant to Article 3(4) of Legislative Decree No 136/2016 cannot apply for a residence permit on behalf of unlawfully posted workers, since it has itself committed the offence of unlawfully employing foreign nationals (Article 22(5-bis) of Legislative Decree No 286/1998).

Accordingly, in cases involving the posting of third-country nationals, the Italian legal framework appears incompatible with the right to an effective remedy (Article 47 of the Charter of Fundamental Rights of the European Union) and with the requirement to provide effective mechanisms for the enforcement of workers’ rights (Article 11 of Directive 2014/67/EU; Article 5 of Directive 96/71/EC; Article 14 of Directive 2024/1233/EU). It should also be noted that the Italian legislator has failed to transpose Article 11(3) of Directive 2014/67/EU, thereby depriving trade unions of the possibility of bringing proceedings on behalf of, or in support of, posted workers.

The domestic enforcement regime also appears deficient from the perspective of sanctions. The user undertaking alone may be prosecuted for the offence of unlawfully employing foreign nationals (Article 22 of Legislative Decree No 286/1998) and is solely liable for the corresponding administrative penalties (Article 22(12-ter) of Legislative Decree No 286/1998 and Article 3(3-quater) of Decree-Law No 12/2002). By contrast, the posting undertaking is subject only to the administrative penalty laid down in Article 3(5) of Legislative Decree No 136/2016 and could be held liable for more serious criminal offences, such as the offence of labour exploitation under Article 603-bis of the Criminal Code, if its involvement in the crime is proven.

³⁹ This procedure appears compatible with Article 56 TFEU, since the requirements governing the issue of the residence permit are substantially equivalent to those laid down under Dutch law. For further information, see Borelli S., *Il distacco di lavoratori migranti*, in Chiaromonte W., Ferrara M.D., Ranieri M. (eds), *Migranti e lavoro*, Il Mulino, Bologna, 2020, 311.

⁴⁰ This provision transposes Article 13(4) of Directive 2009/52/EC, which provides Member States with the possibility – but not the obligation – of granting a residence permit in cases of particularly exploitative working conditions.

⁴¹ This provision transposes Articles 7 of Directive 2004/81/EC and 11 of Directive 2011/36/EU.

7. If this is a Europe...

The exploitation of third-country nationals posted in the context of the cross-border provision of services is a direct consequence of the manner in which EU law has constructed the internal market. On the one hand, EU law enables service providers to deploy workers recruited in the Member State of establishment while continuing to apply the legal framework of that State – including its residence permit regime – thereby fostering regulatory competition among the Member States. On the other hand, it leaves Member States free to determine the conditions governing both the granting and the withdrawal of residence permits, even in cases of unlawful posting, subject only to the application of Directive 2009/52/EC and the rules protecting victims of trafficking in human beings.

As a result, Member States are able to attract undertakings by offering access to low-cost labour together with relatively accessible residence permit regimes, without bearing the social costs associated with the integration of migrant workers. Likewise, undertakings are able to rely on a (virtually) continuous supply of silent and invisible workers, knowing that breaches of the obligations incumbent upon them as employers or user undertakings are unlikely to be reported or effectively challenged. Indeed, the possibility of third-country nationals to assert their rights depends upon the guarantee that they will retain their residence permit in the Member State of establishment, obtain recognition of their right to reside in the host Member State, and have access to adequate accommodation, subsistence, and effective legal remedies.⁴² Protections that currently EU law denies. As argued above, the Court of Justice's judgment in *SN* does not modify this situation, since its sole purpose is to ensure that the host Member State is able to monitor the presence of third-country nationals within its territory.

The current rules governing the internal market therefore contribute to the exploitation of third-country nationals, a result that appears difficult to reconcile with the fundamental values of the European Union.

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⁴² As Advocate General Maduro observed in his Opinion of 19 February 2004 in Case C-327/02, *Panayotova*, para. 47, “the judicial protection of fundamental rights is particularly important with regard to the treatment accorded to third country nationals, since the latter constitute ‘discrete and insular minorities’. These are often particularly vulnerable groups that are deprived of other means, in particular political means to influence legislation and the political process, for the protection of their rights. Aliens, by the very nature of a political community, cannot benefit from all the rights granted to the citizens of that political community, but it is precisely for the same reason that they deserve added judicial protection where rights granted to them are affected by decisions of the same political community”.

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