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PROTECTED BY ARTICLE 56 TFEU'S DOME? NAVIGATING THE BORDERS OF INTRA-EU POSTING OF THIRD-COUNTRY NATIONALS*

ABSTRACT

This contribution addresses the intra-EU posting of third-country national (TCN) workers who are lawfully residing and employed in a 'sending' Member State of the EU/EEA. It is essential to note that unlike other forms of intra-EU labour mobility, posted workers do not move within the EU in their own capacity, as they are not entitled to any direct right to free movement there. By virtue of this legal mechanism, TCN workers may be posted by posting entrepreneurs within the EU/EEA, despite such workers' inability to personally exercise the right to free movement of workers, which is reserved for Union / EEA citizens. Nonetheless, they benefit from the rights conferred by the Posting of Workers Directives and the Regulations on social security coordination. Moreover, the contribution demonstrates clearly that (TCN) posted workers do not intend to enter the labour market of the host Member States. It also shows that the concept of 'habitual employment' cannot be, so to say 'absolutised'. While analysing the CJEU's recent judgment in C-540/22, I come to the conclusion that the Court ruled (wrongly, in my opinion) against the explicit use of "derived right" of third-country national posted workers, as it turned to the institution of the free movement of workers (persons) instead of the one belonging to free movement of services. One could say that it nevertheless 'inadvertently' upheld such a right in case of postings for a period of under 90 days and such workers should be protected by Art. 56 TFEU's title "dome".

Keywords: *Posting of workers, posted workers, third-country nationals, Court of Justice of the EU, 'derived right' of residence*

1. INTRODUCTION

Jean-Jacques Rousseau once stated that when travelling from Paris to Marseille, you had to change legislation more than you have to change horses. The aim of the European Union's internal market¹ is precisely to eliminate obstacles hindering intra-EU freedom of movement, including within the framework of freedom to provide services.² Obviously, intra-EU movement (as well as movement towards the European Union) today looks in many ways fundamentally different from what the founders of the European project (and let alone Jean-Jacques Rousseau) had imagined. The expectation that European enlargements would bring mass permanent migrations over the course of the past decades, never quite materialized to the extent that some expected or even feared. Indeed, mobility within the framework of the internal market of the European Union has taken shape in a variety of ways. While the history of free mobility of labour within the European Communities (and then the EU) unfolded, the other forms of mobility started developing that were not based on the free movement of workers. These mobility streams add to the mobility landscape, are more circular and short-term, but increasing in volume and importance, and are changing the face of the traditional single European labour market. Thus, this very market has come to consist of various streams of mobility, of which long-term mobility is just one.³ Indeed, in the course of the development of the European Union's internal market, three forms of labour mobility have emerged – migration to another Member State under the provisions of the TFEU⁴ concerning freedom of movement for workers and

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¹ Under Art. 26 para. 2 of the Treaty on the functioning of the European Union, the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

² Jorens, Y., *Cross-border EU Employment and its Enforcement. An Analysis of the Labour and Social Security Law Aspects and Quest for Solutions*, Springer 2022, p. 1.

³ Cf. Lens, D.; Mussche, N.; Marx, I., *Europe's ever expanding mobility patterns - posting, third country nationals and the single European labour market*, CSB WORKING PAPER, no. 19.08, July 2019, p. 2. See also: Kielbasa, M., "Nowy wspólny świat (delegowania pracowników)?", czyli o zasadności (niektórych) zmian w delegowaniu pracowników w Unii Europejskiej słów kilka [in:] *Verba volant, scripta manent : księga jubileuszowa dedykowana profesor Bogusławie Gneli*, Kaźmierczyk, A., Michałowska, K., Szaraniec, M. (eds.), Warszawa 2023.

⁴ Cf. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, OJ C 202, 7.6.2016, p. 1–388.

freedom of establishment (Articles 45 and 49 TFEU), daily or weekly cross-border commuting covered by freedom of movement for workers (Article 45 TFEU) and temporary mobility through posting of workers in the framework of freedom to provide services (Article 56 TFEU).⁵ The latter form has even been described as the case, where the most complex transnational configurations between companies, workers and authorities are to be found.⁶

Herein, I shall focus on the latter form, including especially the so-called 'third-country nationals' ('TCNs'). Indeed, the posting of third-country national workers is a growing phenomenon of labour mobility, which is viewed by some as an alternative to the traditional avenues of migration to and between EU Member States.⁷

Crucially, unlike the other types of intra-EU labour mobility, posting workers means that workers who have been posted are not moving intra-EU in their own capacity, as they are not entitled to any direct free movement right in the EU. Their mobility occurs within their employer's freedom to provide services.⁸ In practice, an employer (i.e. a company) established in one Member State (the sending country) sends its own employees to work temporarily in another Member State (the host country) to provide certain services. The posting activity can take three different forms: posting to perform a contract of services (including subcontracting), intra-group posting (namely, posting to an undertaking owned by the same group in a second Member State), and hiring out through a temporary employment agency (where the agency provides workers to an employer established in a second Member State). Posted workers are entitled to equal

⁵ Cf. Bottero, M., *Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition*, Kluwer Law International, Alphen aan den Rijn 2021, p. 21. The Author rightly notes the misconception that in the public discourse there is a general feeling that identifies any foreign worker coming from a low-wage Member State who performs a working activity (especially in the construction sector) in a high-wage Member State, as a posted worker – which of course is not necessarily the case – see also: Schwarz, S., Kielbasa, M., *Posted or Sent in the Context of the Revision of Social Security Coordination Regulations*, Labour Mobility Initiative Association (ELMI), Krakow 2018, p. 4; Kielbasa, M., *Prawa socjalne w Unii Europejskiej a granice swobód rynku wewnętrznego*, Warszawa 2017, p. 181 et seq.

⁶ Cf. Schramm, Ch., *Mobility within the European Union: Capturing its complexity to guide policy*, [in:] *Temporary labour migration: Towards social justice?* Kuptsch, Ch., Mieres, F. (eds.), Geneva: International Labour Office, 2025, p. 65.

⁷ Cf. European Labour Authority, *Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals. Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2*, February 2023, s. 6.

⁸ Cf. OECD, *Mobility and Integrated Labour Markets for Third-country Nationals in Greater Copenhagen*, OECD Reviews on Local Job Creation, OECD Publishing, Paris, 2025, <https://doi.org/10.1787/ba2a4777-en>, p. 141.

treatment with nationals of the host Member State in regard to a series of employment conditions. These include, among others, remuneration, accommodation, and allowances. When the effective duration of the posting exceeds 12 months (or 18 months in case of motivated notification by the posting company), (even) more protective employment standards of the host Member State apply.⁹

Some scholars argue that the overlap of migration and employment regimes as well as the cross-border provision of services might contribute to creating additional vulnerabilities for TCNs. Posted TCNs are reportedly undemanding in respect of their labour and social rights when posted from their sending EU countries to other EU countries.¹⁰

Until a few years ago, the number of third-country nationals posted within the EEA was rather limited, but in recent years the number of posted third-country nationals has increased sharply.

A recent report with figures from 2021 shows that third-country nationals are mainly posted to other Member States from Slovenia, Poland, Spain and Lithuania. From Slovenia, 60% of the posted workers are third-country nationals, mainly from van Bosnia and Herzegovina. From Poland, 17% of the posted workers are third-country nationals, mainly from Ukraine.¹¹

When it comes to the data on posting TCNs from Poland, based on PDs A1¹² issued in our country, they show e.g. that in 2021 a grand total of 115,240 PDs A1 were

⁹ *Ibidem*, pp. 141-142. See also: Verschueren, H., *Posting of Third Country Nationals (TCN). Note on the case law of the CJEU on posting of third-country nationals*, European Labour Authority, Posting360 Programme, July 2024, p. 1-2. Cf. Posting Directives described further in subchapter 2.2. hereof

¹⁰ Cf. Danaj, S.; Vah Jevšnik, M.; Kielbasa, M.; Szaraniec, M., *There and gone again? Migration to and posting of third-country nationals from Slovenia and Poland*, European Labour Law Journal 2023, pp. 4-5.

¹¹ Cf. Verschueren, H., *Posting of third-country nationals in the EEA: need for clarification of the conditions in a legislative initiative*, European Labour Law Journal 2024, Vol. 15:4, op. cit., p. 877-878. See also: Danaj, S.; Vah Jevšnik, M.; Kielbasa, M.; Szaraniec, M., *There and gone again?*, op. cit., pp. 4-5, as well as Kielbasa, M.; Szaraniec, M.; Mędrala, M.; Benio, M., *Posted workers from and to Poland. Facts and Figures*, 2022, Leuven: POSTING.STAT project VS/2020/0499.

¹² Portable Document A1 (PD A1) (previously the E101 certificate) establishes the presumption that the holder is affiliated to the social security system of the Member State which has issued the certificate and confirms that the person concerned has no obligations to pay social security contributions in another Member State – cf. De Wispelaere, F.; De Smedt, L.; Pacolet, J., *Posting of workers. Report on A1 Portable Documents issued in 2023*, Luxembourg: Publications Office of the European Union, 2025, p. 10.

issued in Poland under both Art. 12 and Art. 13 of the Basic Regulation¹³ to third-country nationals, constituting 17.2% of all such attestations issued by the Polish authorities under those two legal bases; 13.8% of all PDs A1 issued under the two above legal bases were issued to Ukrainians.¹⁴

The latest available data demonstrate that the Polish Social Insurance Institution (ZUS) issued 840 578 PDs A1 under Art. 12 and 13 Regulation 883/2004 – of which so much as 23.4 % - 197 461 were issued to third-country nationals¹⁵ - of note is a major increase of more than 6 percentage points in just three years (!).

2. THIRD-COUNTRY NATIONALS AS POSTED WORKERS

2.1. TCN posted workers – what's in a name?

The starting point of the present reflections is that one of the fundamental features of labour migration policy in Europe is the divide between free labour mobility by EU citizens on the one hand and nationally controlled labour migration by third-country nationals on the other.¹⁶ The principles governing free movement of persons (workers)¹⁷ and free movement of services respectively enable EU workers to reside and work in any Member State of their choosing and/ or to be posted to any other Member State for delivering a service job. While the regulation

¹³ Cf. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–123 (hereinafter: Regulation 883/2004 or Basic Regulation).

¹⁴ Cf. Kielbasa, M.; Szaraniec, M.; Mędrala, M.; Benio, M., *Posted workers from and to Poland*, op. cit., p. 102.

¹⁵ See Szybkie, A.; Delert-Urban, K., *Delegowanie obywateli państw trzecich z perspektywy praktyki Zakładu Ubezpieczeń Społecznych*, Presentation delivered during the 8th European Labour Mobility Congress, Krakow, 18 Feb 2025, slide 8.

¹⁶ Cf. Paul, R., *Strategic contextualisation: free movement, labour migration policies and the governance of foreign workers in Europe*, Policy Studies 2013, 34(2), p. 122–141.

¹⁷ Free movement of workers became part of the European Economic Community (EEC) project when Italy introduced the concept during the negotiations in the 1950s. Italy regarded the free movement of workers as an appealing tool to export its surplus labour. Right from the start, when the regulation of free movement of workers was negotiated at the beginning of the 1960s, fears existed that Germany and France would face a wave of Italian workers. Similarly, at the occasion of some other EU enlargements, the free movement of workers came into the political attention of the Member States, as fears existed that opening the labour market would result in mass-movements and a destabilisation of the labour market. This was the case for Greece joining in 1981, and Spain and Portugal in 1986, as well as other newly acceding Member States, especially from Central and Eastern Europe. The fears resulted in transition periods during which old Member States were allowed to keep their labour markets closed to the new members – cf. Lens, D.; Mussche, N.; Marx, I., *Europe's ever expanding mobility patterns*, op. cit., p. 3-4.

of these principles happens at the EU level, labour migration from outside the EU, in contrast, is largely governed (controlled) by the EU Member States that sovereignly decide on the conditions as well as on the number of TCN labour migrants they admit to their labour market.¹⁸

Moreover, for a long time, the expectation regarding a single European labour market was that labour migration was something that would take place mainly within Europe, not from the outside into Europe (or involving persons who are not EU citizens). Indeed, the belief was that a larger, more fluid and flexible European labour market would reduce the need for workers from far away. In reality, an increasing number of third-country nationals (TCNs) are mobile within Europe as posted workers.¹⁹

On the basis of jurisprudence of the Court of Justice of the EU,²⁰ regardless of the fact that third-country nationals cannot personally exercise the right to free movement of workers²¹ (which is limited to nationals of the Member States), TCNs who hold a valid work and residence permit in one Member State may be posted within the EU²² (or, actually, within the European Economic Area²³). Arguably, the first of such judgments was issued in the *Vander Elst*²⁴ case. In that judgment the CJEU confirmed that the possibility of employers established in one

¹⁸ Por. Lens, D.; Mussche, N.; Marx, I., *A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants*, International Migration 2022; 60, p. 160 i n.

¹⁹ Cf. Lens, D.; Mussche, N.; Marx, I., *Europe's ever expanding mobility patterns*, op. cit., p. 2.

²⁰ By the way, the Court's activism has been challenged over the decades by academics as much as by politicians and the media. Already in the 1980s, there were voices accusing the Court of Justice of transgressing its mandate and engaging in judicial policy-making beyond its political mandate - cf. Mussche N.; Lens, D.; *The ECJ's Construction of an EU Mobility Regime – Judicialization and the Posting of Third-Country Nationals*, Journal of Common Market Studies 2019, Vol. 57, no. 6, p. 1252. See also: Kielbasa, M., *Zasada "równa płaca za tę samą pracę w tym samym miejscu" zgodna z prawem Unii Europejskiej - glosa do wyroków Trybunału Sprawiedliwości z 8.12.2020 r., C-626/18, Polska przeciwko Parlamentowi i Radzie oraz C-620/18, Węgry przeciwko Parlamentowi i Radzie*, Europejski Przegląd Sądowy, no. 6 (189) 2021, p. 38 et seq.

²¹ Cf. Lens, D.; Mussche N.; Marx, I., *A hole in the wall of fortress Europe*, op. cit., s. 173.

²² Cf. Verschuere, H., *Posting of Third Country Nationals (TCN). Note on the case law of the CJEU on posting of third-country nationals*, European Labour Authority, Posting360 Programme, July 2024, p. 3.

²³ The European Economic Area, abbreviated as EEA, consists of the Member States of the European Union (EU) and three countries of the European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway; excluding Switzerland) – European Commission, Statistics Explained, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:European_Economic_Area_\(EEA\)](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:European_Economic_Area_(EEA)).

²⁴ Cf. the CJEU judgement in C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803.

Member State to send their employees to perform economic activities in another Member State also applies where the posted workers are third-country nationals, if they are lawfully and habitually employed²⁵ in the Member State where their employer is based. The Court of Justice also ruled that third-country nationals enjoying such status, who are posted to another EU Member State, do not require work permits in the EU Member State where they are posted (host Member State).²⁶

²⁵ It is important to add that the concept of 'habitual employment' from that well-known judgment cannot be, so to say 'absolutised'. The CJEU points out to that in judgment C-244/04 *Commission v Germany*, indicating that '(...) Germany cannot, in that regard, rely on the formula used by the Court in paragraph 26 of the judgment in *Vander Elst*, by arguing that such a requirement of prior employment enables it to verify that a posted worker who is a national of a non-member State has lawful and habitual employment in his employer's Member State of establishment. As the Advocate General noted in point 38 of his Opinion, it is important to put that formula in the context of the question referred by the national court in the case which gave rise to the judgment in *Vander Elst*. In that regard, it must be observed that the Court did not couple the concept of 'lawful and habitual employment' with a requirement of residence or employment for a certain period in the State of establishment of the service provider.' (para. 55).

This was put even more emphatically by Advocate General L.A. Geelhoed in his Opinion in this case (of 15.09.2025). Namely, he indicated that 'on reading *Vander Elst* more closely the question is whether it can be said that the Court did indeed lay down a specific criterion in this judgment and, if it did, what this criterion must be deemed to be. As was pointed out by the Commission, by determining in the operative part of its judgment that the nationals of non-member countries are 'lawfully and habitually' employed by the service provider, the Court merely repeated the wording of the preliminary question put to it by the referring national court. This could be regarded as an indication that the Court did not intend to set a distinct standard in this regard (para. 38). Furthermore, according to the Advocate General Geelhoed, "[i]t would thus appear to me that the Court was emphasising the need to ensure that only workers from third countries who are legally resident in the Member State of establishment of the service provider and are legally employed by that service provider in that Member State should be able to be posted for the provision of services in other Member States without further restrictions being imposed by the host Member State in respect of these two subjects. The Court, significantly, did not make the fulfilment of either criterion subject to a given duration of residence or employment. This means that it did not accord the aspect of being 'habitually' employed in the Member State of origin the significance which has been attached to it by Luxembourg, the Federal Republic of Germany and even *Committee K.4*'. (para. 40). As rightly commented in the legal doctrine, the Court emphasised that it had only ruled in the context of the specific circumstances of the case, but had in no way intended to make this an additional condition for the posting of third-country nationals – see Verschuere, H., *Posting of third-country nationals in the EEA*, *op. cit.*, p. 880.

²⁶ Cf. the CJEU judgement in C-43/93, para. 26.

2.2. TCN posted workers – relevant legal framework

When it comes to the legal framework to be relied on, the Posting of Workers Directive 96/71/EC²⁷ (along with Directive 2018/57²⁸ amending it, as well as Directive 2014/67²⁹) also applies even if a posted worker is not a Union citizen. Indeed, no nationality requirements have been stipulated in this Directive³⁰ (nor in the other two posting Directives). At the same time, recital 20 of Directive 96/71 explicitly states that the Directive is without prejudice to national laws relating to the entry, residence and access to employment of third-country nationals³¹ and that issues influences posting of TCN workers heavily, as it will be demonstrated below.

Moreover, also the social security coordination rules in the European Union, set out in the Regulation 883/2004³² and Regulation 987/2009³³ extend to third-country workers posted within the EU (and more broadly – the European Economic Area (EEA)). The personal scope of these Regulations was expanded by Regulation 1231/2010³⁴ to encompass all third-country nationals legally residing in a Member State. Furthermore, the CJEU has interpreted the condition of legal residence broadly, including third-country nationals temporarily residing in a Member State under a temporary visa. Such individuals may transfer to another Member State, provided their presence is in accordance with its laws

²⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1–6 (hereinafter: Directive 67/71 or Basic Directive).

²⁸ 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, PE/18/2018/REV/1 OJ L 173, 9.7.2018, p. 16–24 (hereinafter: Directive 2018/957 or Revision Directive).

²⁹ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28.5.2014, p. 11–31 (hereinafter: Directive 2014/67 or Enforcement Directive).

³⁰ Cf. Verschueren, H., *Posting of third-country nationals in the EEA*, op. cit., p. 877.

³¹ Cf. Verschueren, H., *Posting of Third Country Nationals (TCN). Note on the case law of the CJEU*, op. cit., p. 3.

³² Cf. Regulation 883/2004 mentioned above.

³³ Cf. Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1–42 (hereinafter: Regulation 987/2009 or Implementing Regulation).

³⁴ Cf. Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality OJ L 344, 29.12.2010, p. 1–3 (hereinafter: Regulation 1231/2010).

governing entry and stay. This was confirmed especially in the Balandin ruling of the Court,³⁵ where the Court clarified the notion of 'legal residence' under Regulation (EU) No 1231/2010. The CJEU noted the different purposes of the notions of (i) '*residence*', clarified by Regulation 883/2004, and (ii) 'legally resident' in Regulation 1231/2010. It clarified that the objective of Regulation 883/2004 was to ensure that people benefit from social security coverage while ensuring they are subject only to the social security scheme of one Member State. In this context, 'residence' intends to determine the Member State to which the person concerned is more closely connected, in light of their habitual centre of interests.³⁶ By contrast, the CJEU highlighted that Regulation 1231/2010 aims to extend the personal scope of Regulations 883/2004 and 987/2009 to third-country nationals not already covered, solely on the grounds of their nationality. With recourse to this Regulation's preparatory works and also to the interpretation of Directive 2011/08, the CJEU concluded that neither the duration of the presence of the third-country nationals in the territory of a Member State, nor their centres of interest are relevant to establish if they are legally residing in a Member State. As such, '*third-country nationals [...] who temporarily reside and work in different Member States in the service of an employer established in a Member State, may rely on the coordination rules laid down by Regulations No 883/2004 and 987/2009 in order to determine the social security legislation to which they are subject, provided that they are legally staying and working in the territory of the Member States*' (par. 44).³⁷

Thus, already in the context of the above-described principles, mostly formulated by the Court of Justice of the EU, there has been an assumption that third-country nationals, provided that they are legally staying and working in the territory of the Member States.³⁸ are, in a situation of posting abroad, as if they were, 'under the protective dome' of the Art. 56 TFEU, made use of by the posting entrepreneur (an idea I develop in the following sections).

The idea that these workers are just under such a 'dome' is accompanied by the issues that they do not need a work permit and that they are not seeking access to the labour market of the host Member State. I elaborate on this in subsequent units of the text.

³⁵ Cf. the CJEU judgment in C-477/17 Raad van bestuur van de Sociale verzekeringsbank v D. Balandin and Others, EU:C:2019:60.

³⁶ Cf. European Labour Authority, *Report on the cooperation practices, possibilities and challenges between Member States*, op. cit., p. 27.

³⁷ *Ibidem*, p. 27.

³⁸ Cf. the CJEU judgment in C-477/17, para. 48.

2.3. Posted TCNs remain affiliated to the sending Member State

It was already in the seminal case of *Rush Portuguesa*, that the Court of Justice held that posted 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*".³⁹ Then, in its judgement in C-43/93 *Vander Elst*, the Court stated that "*workers employed by an undertaking established in one Member State who are temporarily sent to another Member State to provide services do not in any way seek access to the labour market in that second State, if they return to their country of origin or residence after completion of their work*".⁴⁰ This was then reiterated a number of times already – e.g. in the Court's judgment in *Commission v Luxembourg*⁴¹ (where the Court emphasised the return of such workers to their country of origin / residence upon the completion of their posting mission), *Commission v Germany*,⁴² *Commission v Austria*,⁴³ *Danieli*⁴⁴ most recently – in *SN* and others.⁴⁵

Of note in this regard is especially the judgement in C-244/04 *Commission v Germany*, as it concerned (*inter alia*) a particularly burdensome practice of the German authorities, requiring posted workers, who are third-country nationals with lawful situation in the sending MS, to obtain a national visa issued '*according to Vander Elst*' (in reference to the judgment in C-43/93) before entering Germany, also for a short-term stay, and providing automatic expulsion in the event of entry without this visa. The Court thoroughly analysed this issue in its case law and it found that any administrative procedure which is not declaratory in nature constitutes a disproportionate restriction on the freedom to provide services. It therefore ruled that interpreting German law as requiring such TCN posted workers to obtain a visa before entering Germany and as providing for automatic expulsion in the event of entry without a visa, is in breach of the obligations under Article 56 TFEU.

Irrespective of the above, German case law violates the principle of autonomy of concepts in EU law, which requires that concepts used in EU law and in national law should be interpreted independently, by assuming that the notion "paid

³⁹ Cf. the CJEU judgment in C-113/89 *Rush Portuguesa Lda v Office national d'immigration*.

⁴⁰ Cf. the CJEU judgment in C-43/93, para. 21.

⁴¹ Cf. the CJEU judgment in C-445/03 *Commission v Luxembourg*, para. 38.

⁴² Cf. the CJEU judgement in C-244/04 *Commission v Germany*, para 59.

⁴³ Cf. the CJEU judgement in C-244/04 *Commission v Germany*, para. 51.

⁴⁴ Cf. the CJEU judgement in C-18/17 *Danieli & C. Officine Meccaniche and Others*, para. 48.

⁴⁵ Cf. the CJEU judgement in C-540/22 *SN and others v Staatssecretaris van Justitie en Veiligheid*, para. 80.

activity" used in the Regulation (EU) 2018/1806 includes posted workers, while this does not arise from any existing EU regulation or case law. For that reason, German courts are obliged not to refuse requests for a preliminary ruling procedure to determine a binding interpretation of EU law concerning this notion.⁴⁶

Moreover, the Court while confirming its various positions contained in the judgment against Luxembourg, emphasized "*that a Member State may check that an undertaking established in another Member State, which deploys on the territory of the first-mentioned Member State workers who are nationals of a non-member State, is not availing itself of the freedom to provide services for a purpose other than the accomplishment of the service concerned*" (para. 40). It further indicated that a requirement that the service provider furnishes a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social security cover in the Member State where that provider employs them⁴⁷, would give the national authorities, in a less restrictive but as effective a manner as checks in advance of posting, a guarantee that those workers' situation is lawful and that they are carrying on their main activity in the Member State where the service provider is established. Such a requirement would enable the national authorities to check that information subsequently and to take the necessary measures if those workers' situation was not regular. Such a requirement could in addition take the form of a succinct communication of the documents required.⁴⁸

Yet, despite that ruling, the issue of an administrative visa called '*Vander Elst visa*' constitutes a restriction on the freedom to provide services (further confirmed by the Court in similar cases concerning Austria and Belgium), especially given that the country continues to require it. As the main receiving country of posted workers in the EU, Germany's disregard for the CJEU's judgment combined with the added bureaucracy and the prolonged processing times for the issuing of the Vander Elst visa indicates the country's efforts to manage, to some degree, the incoming posting of third-country nationals. These barriers might have had a relatively deterring or slowing down effect on the posting of third-country nationals, especially from Poland to Germany.⁴⁹

⁴⁶ For more, see Schwarz S.; Kielbasa M., *Cases of deportation of Ukrainian citizens duly posted to Germany. Legal analysis*, retrievable at: <https://labourinstitute.eu/en/knowledge/opinions-and-positions/>

⁴⁷ Cf. Verschueren, H., *Posting of Third Country Nationals (TCN). Note on the case law of the CJEU*, op. cit, p. 5.

⁴⁸ Therein, para. 41.

⁴⁹ Cf. Danaj, S.; Vah Jevšnik, M.; Kielbasa, M.; Szaraniec, M., *There and gone again?*, op.cit., p. 29-30.

3. POSTING OF THIRD-COUNTRY NATIONALS - 'DERIVED' RIGHT OF RESIDENCE IN THE HOST MEMBER STATE?

3.1. Setting the scene

What prompted a thorough examination of the existence of a "derived right of residence" for third-country nationals posted from another EU/EEA Member State in the host Member State was one of the most recent questions for a preliminary ruling - in the Dutch-Slovak case of C-540/22.⁵⁰

The referring Dutch court noted that in its judgment in *Commission v Austria*, the Court held that the area of entry into a Member State and residence there of nationals of non-Member State in connection with a posting by a service provider established in another Member State is not harmonised at Community level, but that the control exercised by a Member State so far as that legislation is concerned cannot affect the freedom to provide services of the undertaking which employs those nationals.⁵¹

It was in the above-mentioned judgment in C-168/04 *Commission v Austria* that the European Commission submitted that, within the framework of freedom to provide services, each service provider transfers to his employees the 'derived right' to receive a residence permit for the period needed for the provision of services.⁵² According to the European Commission, the decision concerning the right of residence is purely formal in character and should be recognised automatically.⁵³ Therefore, this raised the question of whether the right of freedom to provide services, as laid down in Articles 56 and 57 TFEU, does not also entail a derived right for workers posted in the context of the cross-border provision of services? The Dutch referring court first observed that it could have been inferred from paragraph 59 of the judgment in *Commission v Austria* that this was not the case, since the regulation of the entry and residence of third-country nationals has not yet been harmonised. Nevertheless, it further stated that it could be argued that the obligation arising from Article 56 TFEU to remove all obstacles to the free movement of services means that the deployment, within the framework of that

⁵⁰ Cf. the CJEU judgment in C-540/22.

⁵¹ Cf. the CJEU judgment in C-168/04 *Commission v Austria*, EU:C:2006:595, para. 60, with reference to: the judgment of 3 February 1982, *Seco and Desquenue & Giral*, 62/81 and 63/81, EU:C:1982:34, para. 12 – contained in the *Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice in case C-540/22*, para. 15.

⁵² Cf. CJEU judgment in C-168/04, para. 31 and 32.

⁵³ Cf. *Summary of the request for a preliminary ruling in C-540/22*, op. cit., para. 16.

movement of services, of workers from a third country who are employed by a service provider established in another Member State should not be made subject to the possession of an individual residence permit because that obligation would make the provision of services by means of the posting of workers from a third country unnecessarily difficult.⁵⁴ This was precisely the narrative concerning 'the dome' of Art. 56 TFEU protecting such workers (and by definition – also the posting entrepreneur) and it prompted me to research the issue further. In its judgment, the Court agreed with the view of Advocate General Rantos, and ruled that Articles 56 and 57 TFEU must be interpreted as meaning that third-country workers who are posted to a Member State by a service provider established in another Member State must not automatically be recognised as having a 'derived right of residence', either in the Member State where they are employed or in the Member State to which they are posted.⁵⁵ The rejection of a 'derived right of residence' was already rightly dubbed in literature as 'very unconvincing'. Indeed, if a service provider has a non-EU workforce (even partially, as it was the case of Mr Vander Elst) and wishes to provide services that entail the movement of persons into another Member State, it cannot do this effectively if it cannot send its employees there. This is not the same as the deterrent effect as regards non-EU family members returning to the original Member State: it is stronger, because it directly prevents the initial exercise of the free movement right in question.⁵⁶ Therefore, the rejection in question actually goes to the very core of that freedom. It appears that the position of the Advocate General (and the Court) was based on two grounds. First, in seeking an interpretation (and examples of its application) of the notion of the '*derived right*' of a third-country national (legally residing and employed in one Member State) posted to another Member State, the AG Rantos used an analogy - but one derived from another EU internal market freedom (therefore - not from the scope of freedom to provide services).

Secondly, the Advocate General pointed out that the Commission had already invoked the existence of a '*derived right of residence*' for third-country national workers posted to a Member State in the case which ended in the already-cited judgment in C-168/04 *Commission v Austria*, yet he assumed that the very position had not been upheld by the Court in that judgment. Indeed, in the view of Advocate Rantos, the CJEU's reasoning was to examine whether the national legislation at issue was compatible with Article 56 TFEU in the light of its established case law in the area of restrictions on the freedom to provide services, without mentioning the existence of a derived right of residence (sic!).

⁵⁴ Ibidem, para. 17.

⁵⁵ Cf. the CJEU judgment of in C-540/22, para. 55.

⁵⁶ Cf. Peers, S., *Free Movement of Services and Non-EU Citizen Staff – a U-turn from the CJEU? Comments on Case C-540/22, SN, ECLI:EU:C:2024:530*, *European Journal of Migration and Law* 26 (2024), p. 531.

However, I reckon that the Advocate General's position on both grounds was wrong. When it comes to the second ground (I shall explain the first one later on below) - the Commission in C-168/04 argued that "*within the framework of freedom to provide services, each service provider transfers to his employees the 'derived right' to receive a residence permit for the period needed for the provision. In so far as the posted workers do not in any way seek to access the labour market of the State in which they are posted, the ground for automatic refusal laid down in Paragraph 10(1)(3) of the FrG [Austrian provisions – MK] is disproportionate in relation to the objective of safeguarding public policy and public security.*"⁵⁷

It would appear that the Commission's statement above regarding the transfer of a 'derived right' to workers posted by a service provider should be considered solely in the context of a measure serving the purpose of their posting - that is, the performance of a service previously contracted to the service provider. Relevant in this respect is the second sentence of para. 31 of the Court's judgment in C-168/04, pointing to the essence of posting (in the context of its comparison with the migration of workers) - i.e. the above-mentioned fact that posted workers do not in any way seek to access the labour market of the host Member State. And it is to this extent that the Austrian regulation proved, in the CJEU's view (accurately – in my opinion), to be incompatible with the internal market rules as the CJEU stated both in para. 31 *in fine*, as well as in paras. 67-68 of the judgment, summarising the issue at stake.

Thus, the CJEU in its judgment against Austria failed, so to say 'to dot the i's' and cross the t's' by not indicating directly that such a 'derived right of residence' exists (failing to refer directly to the content of para. 31 and the Commission's submissions therein), but it instead indicated that Austria failed to fulfil its obligations under freedom to provide services, arising precisely from the failure to recognise such a 'derived right of residence'. Therefore, it actually acknowledged 'the derived right of residence' transferred by a service provider to its posted workers, although indirectly, without using that formulation. In my opinion, both the AG Rantos and the Court failed to take stock of that.

When it comes to the first ground, there is, in my view, no legal justification for referring *per analogiam* to another freedom (freedom of movement of persons / workers) in order to explain the 'derived right' in relation to the posting of workers, which belongs to freedom to provide service after all. Indeed, reference should have been made to the interpretation of this concept within the case law on the freedom to provide services - i.e. the '*parent*' freedom (including – a reference to

⁵⁷ See therein, para. 31.

its legal nature), the most authoritative for the interpretation of the Court's judgment at hand. The 'derived right' - in the context in question - has only appeared twice in the case law of the CJEU - in the judgment C-168/04 *Commission v Austria* and in the *Vander Elst* case. And it is to the latter case that the Court should refer - as the correct interpretation of this concept is contained there.

The Advocate General G. Tesauro in his Opinion in that case observed that *'examination of the French legislation at issue reveals no real difference between the situation of the Portuguese workers involved in the Rush Portuguesa case and that of the Moroccan workers involved in these proceedings: with regard to the application of the contested legislation in particular, the requirement that foreign workers should be recruited through the OMI and the prohibition on engaging staff without work permits each group is in fact in the same position. The Portuguese workers were subject to a transitional scheme which deprived them of the rights given to other Community workers by Articles 1 to 6 of Regulation (EEC) No 1612/68 (...) in particular, those workers did not receive equal treatment as regards the right to take up employment (as provided for by Article 1 of the regulation) and could therefore be subjected to "special recruitment procedures for foreign nationals" (...); on the other hand, those workers enjoyed full equality of treatment in the pursuit of employment (specifically, conditions relating to pay, dismissal, re-employment, social and tax advantages and so on) as provided for by Article 7 et seq. of the regulation. Precisely because they did not fall within the rules set out in Articles 1 to 6 of the regulation, the workers in question were not able to claim any original right not to have applied to them the provisions of the French Labour Code concerning the obligation to recruit through the OMI and to obtain work permits; however, they were able to claim a derived right in those terms, provided that they were employed by an undertaking established in another Member State, as was the case in the circumstances before the Court.'*⁵⁸

Similarly, the Moroccan workers employed by Vander Elst have no right to equal treatment vis-à-vis Community nationals, as far as the conditions and procedures relating to taking up employment [italics used in the original text of the Opinion by the AG Tesauro – MK] are concerned. They are entitled to equal treatment only as far as conditions of work or remuneration and social security arrangements are concerned, as provided for in Articles 40 and 41 of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco. (...) From the point of view of the application of the French legislation on the right of aliens to take up employment, the status of the Moroccans employed by Vander Elst would therefore appear to be just the same as that of the Portuguese nationals

⁵⁸ Cf. the Opinion of the Advocate General G. Tesauro in C-43/93 *Vander Elst*, para. 20.

*employed by Rush Portuguesa. In both cases it was perfectly compatible with the status of such workers for the French authorities to control and limit their access to employment; (on the French labour market – MK) in both cases, however, the application of the national legislation was capable of conflicting with Article 59 et seq. of the Treaty, in so far as those workers were temporarily posted to France to provide services by undertakings established in other Member States.*⁵⁹

What appears from the above seems to be the right of the host Member States' authorities to control and limit access of TCN posted workers to employment (meant as making use of the freedom enshrined in Art. 45 et seq. TFEU) in the host Member States. Should such authorities try to extend their reach to TCN workers posted to their territory (and therefore – to another, different freedom of the internal market) – this should be viewed as the infringement of that very freedom - to provide services under Art. 56 TFEU.

3.2. Legal certainty over 'derived rights'?

What is more, the Court correctly conducted a proportionality test examining whether the requirement to obtain residence permits for posted TCNs, which are subject to high fees and are often issued for shorter periods than requested, constitutes an unlawful restriction on the freedom to provide services. The test showed that... such a national law requirement is indeed, without any doubt, an impermissible restriction on the freedom to provide services.

However, then, the Court ruled that *'ensuring that posted workers have legal certainty by enabling them more easily to establish that they are posted lawfully in the territory of the Member State in which the service is being provided and, accordingly, that they are staying there legally, it must be conceded that such an objective constitutes an overriding reason in the public interest (see, to that effect, judgment of 19 January 2006, Commission v Germany, C-244/04, EU:C:2006:49, paragraphs 47 to 49)'*.⁶⁰ In the eyes of the Court, *'it should also be noted, regarding the proportionality of such a measure, that obliging service providers established in a Member State other than that in which they supply their services to apply for a residence permit for each third-country worker that those service providers intend to post, in order that those workers may physically have a secure document, constitutes a measure appropriate for attaining the objectives of increasing legal certainty for posted workers (sic!). That permit, which must be drawn up, pursuant to Article 1(1) and Article 2(1) of Regulation No 1030/2002, (...), ensures*

⁵⁹ *Ibidem*, para. 20.

⁶⁰ See the CJEU judgement in C-540/22, para. 85.

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 and proves that posted workers have a right of residence in the host Member State'.⁶¹

3.3. Carrying out services for less than free months entails 'derived rights'?

According to the Court, *'the other Member States cannot be criticised for requiring a posted third-country worker to obtain a secure document issued by their own services. Moreover, the fact that a third-country worker has a residence permit and permission to work in one Member State does not necessarily mean that that worker may stay in another Member State, even though he has been posted there for the purposes of a supply of services, as that other Member State may make that posting subject to meeting certain requirements, so long as the conditions recalled in paragraphs 74 to 76 of the present judgment are satisfied.⁶²* Then, the Court conceded that *'it is true that, according to settled case-law, grounds of public policy may not be relied on against a person unless there is a genuine and sufficiently serious threat to a fundamental interest of society and, moreover, those grounds must not serve purely economic ends (see, by analogy, judgment of 2 March 2023, PrivatBank and Others, C-78/21, EU:C:2023:137, paragraph 62). However, the fact remains that it must be possible for Member States to carry out such checks'*. Here, the CJEU did not offer any justification. It only added that *'[a]ccordingly, the objective consisting in the need to check that the worker concerned does not represent a threat to public policy must be regarded as capable of justifying a restriction on the freedom to provide services'*.

This analysis let the CJEU to state that *'[a]s regards whether a measure consisting of obliging an undertaking established in another Member State to apply for and obtain a residence permit for each third-country worker that it intends to post to the host Member State for the purpose of carrying out a supply of services the duration of which is longer than three months is consistent with the principle of proportionality, not only does such an obligation appear appropriate for attaining that objective, it cannot be regarded as going beyond what is necessary for that purpose, provided that it entails refusing residence only to persons who represent a genuine and sufficiently serious threat to one of the fundamental interests of society.⁶³*

⁶¹ *Ibidem*, para. 86.

⁶² *Ibidem*, para. 88.

⁶³ *Ibidem*, paras. 94-96. See, also, to that effect, judgments of 21 January 2010, Commission v Germany, C-546/07, EU:C:2010:25, paragraph 49, and of 14 February 2019, Milivojević, C-630/17, EU:C:2019:123, paragraph 67.

The problem lies in the fact that, according to the judgment in C-168/04 *Commission v. Austria* - a finding by the sending state that a posted TCN is not a threat to public order by issuing him a residence permit in the sending state precludes the receiving state from examining the same again. The Court correctly cited this judgment, but only to then cancel it by invoking another judgment.... of 1977 (sic!) according to which *'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 (...),⁶⁴ the fact that such a check exists cannot render irrelevant the carrying out, by the Member State in which the supply of services is to be carried out, of a check that the stay of the person concerned in its territory does not give rise to a risk of a threat to its own public policy, even though, pursuant to Article 21(1) of the CISA, such a check takes place only after a three-month period.⁶⁵*

Finally, in response to a further question from the Dutch court, the CJEU concluded that the Dutch provision stating that while it is true that *'Article 9(1) of Directive 2014/67 provides that Member States may require service providers established in another Member State to declare the supply of services to the national authorities and, at that time, to declare the identity of the workers they intend to post, as well as the nature and duration of the activity* (accordingly, that provision offers those authorities, at the time of that declaration, the possibility of assessing the tasks to be performed during that posting and the time needed to complete them), *even where a Member State has availed itself of that possibility, the fact of providing that the period of validity of the residence permits granted may not, in any event, exceed a certain duration, which is determined by the piece of national legislation in question, does not in itself appear to be contrary to EU law, even if that period may thus be shorter than the period needed to carry out the service for which those workers are posted. Indeed, it is settled case-law 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 contravene the prohibition laid down in Article 56 TFEU'.⁶⁶*

And, while the CJEU's jurisprudence to date has been pretty much unanimous in recognising that even giving the impression that there may be difficulties in completing the assignment for which the workers have been posted – constituted a breach of Art. 56, in its judgment in C-540/22 the Court considers that the

⁶⁴ See, to that effect, judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, para. 34.

⁶⁵ Cf. the CJEU judgement in C-540/22, para. 98.

⁶⁶ *Ibidem*, para. 114-115.

expulsion of posted workers from the territory of the host Member State before the period necessary to carry out the work *'does not appear to infringe EU law'* because... *'the potential restrictive effects that [such a provision] may have on the freedom to provide services are simply, in the eyes of the Court - 'too uncertain and too indirect to be regarded as a measure likely to infringe that freedom' (sic!)*.

4. CONCLUSION

In the light of the considerations raised in the article, one may say that, when navigating the intra-EU posting of TCNs' environment, the following borders (and features) could be envisaged. Firstly, the third-country national posted workers enjoy the rights arising from the posting Directives and from social security coordination Regulations (in the latter case – when they are legally staying and working in the territory of the Member States.

Secondly – (TCN) posted workers do not intend to enter the labour market of the host Member State as, having completed their duties, they return to their country of origin or residence.

Thirdly, the Court of Justice in its recent judgment in C-540/22 ruled (wrongly, in my opinion) against the explicit use of *"derived right"* of third-country national posted workers, as it failed to refer directly to that legal institution, while at the same time actually upholding it (!) (using another formulation) in C-168/04. What is more, the Court turned to free movement of workers (persons) instead of the one belonging to free movement of services when interpreting the notion of 'derived rights'. One could say that it nevertheless upheld such a right in case of postings for a period of under 90 days. Such postings of TCNs were actually not the subject of the judgment, but the Court seems to have *'inadvertently'* stated that only stays of third-country nationals of more than 3 months were within the competence of the Member States, which means that stays of less than 3 months are not within that competence. Therefore, it may be said that the judgment actually reinforces the argument that, for stays of less than 3 months, Member States cannot insist on residence permits for posted third-country nationals, which is a positive *'side effect'* of the judgment in C-540/22.

A question remains of how this sits with the German Vander Elst visa mentioned herein? (or for that matter – with any domestic measures which infringe upon the freedom to provide services and are not justified. Well, it should result in Germany (and other EU Member States) adjusting its law and practice to enable a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social

security cover in the Member State where that provider employs them, as suggested by the Court.

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