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# **The Right of Residence of Posted Third-Country Nationals in the European Union**

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## **Abstract**

Despite the growing number of third-country nationals (TCNs) being posted across the European Union (EU), this form of mobility is still not regulated by one comprehensive legislative document. The lack of harmonisation and rules on posting being scattered across multiple judgements of the Court of Justice of the European Union (CJEU) and different secondary legislative documents results in a lack of clarity and numerous uncertainties. This thesis focuses on the biggest ambiguity of all – the right of residence of posted TCNs. It strives to answer the question whether EU law regulates the rights of residence of posted TCNs, and if not, what are the legal options to complement the right of TCNs to temporary work in the host Member State, with securing their physical presence there. To reflect the multidimensional character of the status of posted TCNs, this study analyses first the general framework regulating the posting of TCNs arising from Article 56 TFEU (freedom to provide services), and then complements the findings with an analysis of the EU legal migration acquis, while searching for solutions that could fill in the gaps and clarify the framework.

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## **Abbreviations**

AG – Advocate General

CISA - Convention Implementing the Schengen Agreement

CJEU – Court of Justice of European Union

ELA – European Labour Authority

EU – European Union

PWD – Posted Workers Directive

RPWD – Revised Posted Workers Directive

TCN – Third-country national

TCNs – Third-country nationals

TEU – Treaty on European Union

TFEU – Treaty of Functioning of the European Union

# 1 Introduction

## 1.1 Description of the problem

Posting of workers derives from the freedom to provide services and constitutes a form of cross-border labour mobility.<sup>1</sup> According to the interpretation of the CJEU, Article 56 TFEU gives service providers the right to post any of their legally and habitually employed workers, including non-EU citizens.<sup>2</sup> Over the years, the number of posted TCNs has grown considerably, with Austria, Belgium, Germany, and the Netherlands being the countries where most of the third-country national (TCN) workers were sent to work, and Spain, Poland and Slovenia being the main sending countries.<sup>3</sup> Posted workers have a special status and are not fully subjected to the labour and social security law of the Member States in which they are (temporarily) performing work.<sup>4</sup> On the one hand, this creates competitive advantages for companies that provide services in Member States other than their place of establishment. On the other hand, it poses a threat of abuse of posted workers and rise of social dumping, due to insufficient monitoring and lack of compliance with the existing rules.<sup>5</sup> Among posted workers, those who are TCNs are especially vulnerable to various forms of abuse, resulting for example, from a lack of knowledge of their rights and insufficient command of the language spoken in the home country of their employer or the host country where they are posted.<sup>6</sup> Additionally, posted TCNs experience precarious housing conditions and great dependence on relations with their employer, as temporary residence permits, allowing them to stay on the EU territory, are conditional upon employment.<sup>7</sup> Dismissal, or even illness, can mean that posted TCNs lose their right of residence and become illegal migrants, in fear of which they are more likely to accept low wages and harsh working conditions, which expose them to economic

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<sup>1</sup> ELA 'Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals' (2023) Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 <https://www.ela.europa.eu/en/media/1653> accessed 12 January 2025, 14.

<sup>2</sup> Steve Peers, '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' (2024) 26(4) European Journal of Migration and Law [https://brill-com.mu.idm.oclc.org/view/journals/emil/26/4/article-p527\\_6.xml](https://brill-com.mu.idm.oclc.org/view/journals/emil/26/4/article-p527_6.xml) accessed 7 January 2025.

<sup>3</sup> ELA (n 1) 91.

<sup>4</sup> Herwig Verschueren, 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (2024) European Labour Law Journal 15(4) <https://journals.sagepub.com/doi/abs/10.1177/20319525241290784?journalCode=ella> accessed 7 January 2025.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> Ecorys, HIVA-KU Leuven, Spark Legal and Policy Consulting, and 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' (2023) Directorate-General for Employment, Social Affairs and Inclusion <https://op.europa.eu/en/publication-detail/-/publication/d06f8af4-02bd-11ef-a251-01aa75ed71a1/language-en> accessed 29 January 2025, 171.

exploitation.<sup>8</sup> The situation is worsened by the lack of uniform rules regulating the posting of TCNs within EU territory. Already in 1994, the CJEU stated in *Vander Elst* that the right of companies established in one of the Member States to send workers to another Member State is not limited by the requirement of EU nationality of the workers.<sup>9</sup> Thirty years have passed since that judgement, but there is still no piece of EU legislation that would specifically address the issue of posting of TCNs.<sup>10</sup> The current rules on posting of TCNs are scattered across different CJEU judgements, through which the Court stated, for example, that Member States cannot require employers to obtain authorisation prior to posting or the workers to obtain work permits in the host Member State.<sup>11</sup> What is however, still much underdeveloped are the rules concerning the right of residence of posted TCNs. This issue is an intersection between freedom to provide services and legal migration, resulting in great complexity. Recently, in *SN and Others*, the Court rejected the theory according to which posted TCNs can derive the right of residence from the freedom to provide services granted to their employer.<sup>12</sup> This constitutes a missed opportunity to ensure the right of residence of posted TCNs in the host Member States, while providing legitimisation of the requirements of residence permits and long-term visas.<sup>13</sup> This not only did not resolve practical issues concerning the posting of TCNs but also did not clarify all ambiguities concerning their status and right to stay on the territory of the host Member States, which is necessary to perform contracted services.<sup>14</sup>

## 1.2 Aims of the research and the methodology

The research at hand aimed to analyse the issue of the right of residence of posted TCNs in the host Member State, by gathering the relevant primary and secondary sources that create the legal framework for the posting of workers and the EU common migration policy. The outcomes of the analysis were later used to establish the gaps in the current legal framework and propose potential solutions that could improve the legal regime and remove the ambiguities.

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<sup>8</sup> Gareth T. Davies and Dion Kramer, 'The Posting of Workers' (2021). Forthcoming in Robert Schütze & Takis Tridimas (eds.) *Oxford Principles of European Union Law Vol 2: The Internal Market*, OUP (2024) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3939196](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939196) accessed 17 August 2025.

<sup>9</sup> Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales (OMI)* [1994] ECR I-3803.

<sup>10</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>11</sup> Peers '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' (n 2).

<sup>12</sup> Case C-540/22 *SN and Others v Staatssecretaris van Justitie en Veiligheid* [2024] ECLI:EU:C:2024:530.

<sup>13</sup> *ibid.*

<sup>14</sup> Peers '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' (n 2).

Therefore, the main research question was as follows: Does EU law provide for a right of residence for posted TCN workers, and if not, what would be the legal options to develop it under EU law?

In order to answer this question, the following sub-questions were addressed:

1. What is the current legal framework regulating the posting of TCNs under European Union Law?

When answering that question, these related questions were dealt with:

- a) What is the legal difference between posted TCN workers and EU citizens posted workers?
  - b) What is the relevance of the division of competencies between the EU and MS on matters related to entry, residence, and work of posted workers?
  - c) What are the gaps in the current legal framework regulating the posting of TCNs under EU law?
2. Based on the description of the legal framework and the identification of the gaps, what are the alternative options to improve the framework regulating the posting of TCNs, including granting them a right of residence under EU law?

To meet the aims of the research and answer the above-stated questions, doctrinal legal research was conducted. The first part of the analysis focused on the development of the general framework for the posting of TCN workers and the protection of their rights. The first step was the analysis of the case law of the CJEU, which in practice established the regime for the posting of TCNs in the EU. Special attention was given to *Rush Portuguesa*<sup>15</sup> and *Vander Elst*<sup>16</sup> to study the origins of posting as a form of mobility and its extension to TCNs. The subsequent judgments were also analysed to consider the requirements for posting set by the CJEU. The next step was an analysis of the PWD as the main legal basis for the posting of workers.<sup>17</sup> The second part of the research focused on the contradictions and ambiguities in the regime regulating the posting of TCNs and their right of residence. For this purpose, the study of the rules regulating the migration of TCNs within the EU was conducted, considering especially the Schengen Borders Code<sup>18</sup> and other EU legal instruments based on Article 79 TFEU<sup>19</sup> and regulating TCNs' right of

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<sup>15</sup> Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417.

<sup>16</sup> *Vander Elst* (n 9).

<sup>17</sup> Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1 (amended by Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16).

<sup>18</sup> Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

<sup>19</sup> Consolidated Version of the Treaty on Functioning of the European Union [2012] OJ C326/47, art 79.

residence. As the field of posting of TCN and their right of residence has not yet been harmonised at the EU level, the research also considered the division of competencies in this field between the Member States and the EU, as well as the limits of the Member States' discretion, established through the jurisprudence of the CJEU. Special attention was also given to the *SN and Others* – a recent judgement of the CJEU, tackling the issue of the right to residence of posted TCNs.<sup>20</sup> To deepen the analysis, further research was conducted, diving into the relevant literature and reports of the experts concerning gaps in the current legal system hindering access to the right of residence of the posted TCNs and other challenges that those workers face. The study was completed by normative research into potential solutions, including proposals for legislative instruments, that could be adopted to remove existing legal uncertainties and improve the legal regime regulating the right of residence of posted TCNs.

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<sup>20</sup> *SN and Others* (n 12).

## 2 Posting of (TCN) workers – Creation of the CJEU

No EU legislation provides a comprehensive set of laws regulating the posting of third-country nationals and their right of residence.<sup>21</sup> The legal basis for posting of TCNs is provided, primarily through the CJEU's case law.<sup>22</sup> Some scholars emphasise that when it comes to the posting of TCNs, the Court created an entirely new legal regime, without relying on any legislation.<sup>23</sup> Therefore, as the starting point of the study on the right of residence of posted TCNs, this chapter will analyse the judgements through which the CJEU constructed the general framework for posting, in order to clarify what is the status of posted TCN workers and what rights does it offer. The discussion will start with the judgement in *Rush Portuguesa*, which forever classified posting as a part of the freedom to provide services rather than the free movement of workers, and will continue with the study of subsequent cases that extended posting to TCNs.<sup>24</sup> Additionally, the chapter will discuss the PWD, which not only codified posting outside of the CJEU's realm but also strived to ensure an adequate level of protection.<sup>25</sup>

### 2.1 *Rush Portuguesa* – starting point and questionable legal basis

Posting of workers, as a new form of cross-border mobility, was de facto created through the case law of the CJEU. In 1989, the Court was hearing a case concerning the right of a Portuguese company, subcontracted to build a railway in western France, to bring its workforce.<sup>26</sup> What is interesting is that despite the current rather rigid distinction between posted EU nationals and posted TCNs, the case that lies at the genesis of posting concerned Portuguese employees, who at that time were treated by French labour authorities as TCNs, due to the recent accession of Portugal to the EU and transitional agreements that were still in place.<sup>27</sup> Due to the lack of compliance with requirements set by French law for employing TCN workers, *Rush Portuguesa* was obliged to pay a special contribution as a form of punishment.<sup>28</sup> The company appealed the decision, claiming that

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<sup>21</sup> Verschuere 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>22</sup> *ibid.*

<sup>23</sup> Ninke Mussche and Dries Lens, 'The ECJ's Construction of an EU Mobility Regime - Judicialization and the Posting of Third-country Nationals' (2019) 57(6) *Journal of Common Market Studies* [https://onlinelibrary.wiley.com/doi/full/10.1111/jcms.12891?casa\\_token=4XoGN1EXUFsAAAAA%3ATfZonnc0RfLgedLLLhyYzIQ5kFWFaCUoJWhOFjwJa-YpE\\_k2Whc-I8yHFIKBOewqhyT\\_Yn8nwPqUWA](https://onlinelibrary.wiley.com/doi/full/10.1111/jcms.12891?casa_token=4XoGN1EXUFsAAAAA%3ATfZonnc0RfLgedLLLhyYzIQ5kFWFaCUoJWhOFjwJa-YpE_k2Whc-I8yHFIKBOewqhyT_Yn8nwPqUWA) accessed 11 January 2025.

<sup>24</sup> *Rush Portuguesa* (n 15).

<sup>25</sup> Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1.

<sup>26</sup> *Rush Portuguesa* (n 15) para 2.

<sup>27</sup> Teun Jaspers, Frans Pennings and Saskia Peters, *European Labour Law* (2<sup>nd</sup> ed, Intersentia 2024) 193.

<sup>28</sup> *Rush Portuguesa* (n 15) para 3.

such an application of national labour law is limiting its freedom to provide services.<sup>29</sup> This claim was contested by French authorities, according to whom the freedom to provide services did not extend to all the workers of the undertaking, and the movement of workers from Portugal should be regulated by transitional provisions laid down in the Act of Accession.<sup>30</sup> The Court emphasised first that the freedom to provide services includes the right of undertaking from one Member State to temporarily provide services in another Member State under the same conditions that are imposed by that State on its nationals.<sup>31</sup> The uniform conditions in question should include the right to move on the territory of the Member State of provision of the service with all the staff, without placing additional obligations such as the requirement of obtaining work permits for the workers.<sup>32</sup> Further, the Court set its (in)famous distinction between movement of workers and posting of workers by stating that “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”.<sup>33</sup>

Judgment in *Rush Portuguesa* was groundbreaking not only because it manufactured the posting as a new form of labour mobility but also due to the choice of legal basis for this construction. Instead of relying on Article 45 TFEU (Article 48 EEC Treaty), ensuring the free movement of workers, the CJEU chose Article 56 TFEU (Article 59 EEC Treaty), treating posted workers as part of the service rather than as migrants.<sup>34</sup> The Article 56 TFEU states that “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”<sup>35</sup> As stated above, the practical application of this freedom often means companies bringing their workforce to complete certain tasks on the territory of other Member States.<sup>36</sup> But one may still ask why rely on a provision ensuring freedom of the employer, while the movement of employees was the real core of the disagreement? The Court's choice seems to be even more questionable when taking into account the Opinion of Advocate General (AG) van Gerven, stating that the exclusion the posted workers from the scope of Article 45 TFEU (Article 48 EEC Treaty),

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<sup>29</sup> *Rush Portuguesa* (n 15) para 4.

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid* para 11.

<sup>32</sup> *ibid* para 12.

<sup>33</sup> *ibid* para 15.

<sup>34</sup> Sacha Garben, ‘Posted Workers Are Persons Too! Posting and the Constitutional Democratic Question of Fair Mobility in the European Union’ in: *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* Niamh Nic Shuibhne (eds.) (1<sup>st</sup> ed, Oxford University Press 2023) 45.

<sup>35</sup> Consolidated Version of the Treaty on Functioning of the European Union [2012] OJ C326/47, art 56.

<sup>36</sup> Catherine Barnard and Steve Peers (eds.), *European Union Law* (4<sup>th</sup> ed, Oxford University Press 2023) 447.

as suggested by *Rush Portuguesa*, would be against the broad nature of the Community concept of the 'worker'.<sup>37</sup> Given the above-stated background of the case, it seems that the choice of legal basis by the CJEU was resulting from the aim of circumventing the limitations of the transitional agreement, rather than from careful consideration of Treaty provisions on workers and on services.<sup>38</sup> Based on the agreement, the application of free movement of workers was delayed, while the applicability of freedom to provide services was intact.<sup>39</sup> Therefore, to ensure that *Rush Portuguesa* is able to exercise its freedoms and perform services in France, the CJEU had to make sure that Portuguese workers are excluded from the scope of Article 45 TFEU.<sup>40</sup> However, the Court's reasoning, which was based on the temporary character of posting and was originally closely linked to the specific rationale of the derogation in the Act of Accession, was confirmed by subsequent judgments and gave rise to the limitation of the EU concept of 'worker'.<sup>41</sup>

As mentioned above, in the *Rush Portuguesa*, the Court focused on the fact that provision of services includes only *temporary* movement of workers, therefore the aim of delaying the application of free movement of workers by transitional agreement was still met, as temporary workers could not overflow or disturb the French labour market.<sup>42</sup> This rather strange construction, based on a narrow interpretation of transitional limitations, allowed the CJEU to protect the freedom to provide services while not completely deserting the labour market protective provisions of the transitional agreement.<sup>43</sup> However, it also gave rise to the infamous legal fiction that allowed for treating posted workers separately from workers who exercise their freedom of movement, and which, 35 years later, still lies at the heart of the regime regulating the posting of workers.<sup>44</sup> The lasting assumption that posted workers do not enter the labour market of the host Member States resulted in disconnecting the fact of physical crossing of the border of another Member State from the

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<sup>37</sup> Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417, Opinion AG Van Gerven, paras 13-14.

<sup>38</sup> Garben (n 34) 47.

<sup>39</sup> Kimberly Marshall, 'European Economic Community - Free Movement of Workers - European Court of Justice Determines That in a Case of Temporary Movement of Workers Member States in Whose Territory the Work Is to Be Carried out May Not Impose Conditions Related to the Recruitment of Man-Power or Procurement of Work Permits' (1991) 21 Ga. J. Int'l & Comp. L. 557 [https://heinonline.org/HOL/Page?handle=hein.journals/gjicl21&div=31&g\\_sent=1&casa\\_token=cI2VWwbu7P0AAAAA:-JVXozPwyuTHuaPR5fMNOcXgwaC7YAD1PixohCveCOmUwUsNcO2k3dw8DdIfcWjhM07269aQeA&collaction=journals](https://heinonline.org/HOL/Page?handle=hein.journals/gjicl21&div=31&g_sent=1&casa_token=cI2VWwbu7P0AAAAA:-JVXozPwyuTHuaPR5fMNOcXgwaC7YAD1PixohCveCOmUwUsNcO2k3dw8DdIfcWjhM07269aQeA&collaction=journals) accessed 12 April 2025.

<sup>40</sup> Garben (n 34) 48-49.

<sup>41</sup> *ibid* 49, 52; Case C-49/98 *Finalarte* [2001] EU:C:2001:564, para 23.

<sup>42</sup> Marshall (n 39).

<sup>43</sup> Marshall (n 39).

<sup>44</sup> Frederic De Wispelaere and Marco Rocca, 'Posting of workers and the border of the labour market' (2023) 14(I) European Labour Law Journal <https://journals-sagepub-com.mu.idm.oclc.org/doi/10.1177/20319525221127715> accessed 12 April 2025.

legal consequences of such movement.<sup>45</sup> However, empirical research into the practical implications of posting workers is calling into question the correctness of this assumption.<sup>46</sup>

The interpretation of freedom to provide services adopted by the CJEU in this case *de facto* established a new form of mobility of workers. However, as a result of this and subsequent judgements, posted workers were not only removed from the scope of Article 45 TFEU, but also denied the right to equal treatment, as it could constitute a *prima facie* restriction of the freedom to provide services.<sup>47</sup> The choice of legal basis made by the CJEU created an in-built inequality between posted workers and permanent migrant workers, stripping them of most protections offered by labour law of the host Member State.<sup>48</sup> On the positive side, the Court's ruling created a possibility for workers from newly joined EU Member States to derive from their employers' freedom to provide services, the passive right to move and work without a work permit in another Member State.<sup>49</sup> In its subsequent judgments (described below), the CJEU stretched the EU mobility mechanisms to ensure that TCNs can be posted to work in another Member State, even though they cannot benefit from Article 45 TFEU.

## 2.2 Broadening the scope of posting and inclusion of TCNs

### 2.2.1 *Vander Elst*

After establishing the posting as a new form of mobility in *Rush Portuguesa*, the Court confirmed in its landmark judgement in *Vander Elst* that it is not limited to workers who are EU nationals.<sup>50</sup> The dispute concerned the performance of demolition services in France by permanent employees of a Belgian company, four of whom were Moroccans.<sup>51</sup> Despite the four workers being non-EU nationals, they not only held necessary permits to legally reside and work in Belgium, but they also have been paid and covered by social security in that country.<sup>52</sup> Prior to the service, Vander Elst obtained the short-term visas for their non-EU workers, but did not apply for work permits in France.<sup>53</sup> The French social inspectorate found this to be a violation of the French labour migration legislation and

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<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*

<sup>47</sup> Garben (n 34) 45.

<sup>48</sup> Marta Lasek-Markey, 'Posted work in the European Union: Towards a highly competitive social market economy?' (2025) <https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.70000> 31 (I-II) European Law Journal accessed 2 August 2025.

<sup>49</sup> Jasper, Pennings and Peters (n 27) 194.

<sup>50</sup> *Vander Elst* (n 9).

<sup>51</sup> *Vander Elst* (n 9).

<sup>52</sup> Vassilis Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) Common Market Law Review 37(1) <https://kluwerlawonline-com.mu.idm.oclc.org/journalarticle/Common%20Market%20Law%20Review/37.1/252877> accessed 12 January 2025.

<sup>53</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

imposed a special penalty on the company.<sup>54</sup> Vander Elst challenged this decision, which gave rise to the court proceedings and subsequently directing the preliminary questions to the CJEU.<sup>55</sup> In its judgement, the Court emphasised that Member States are prohibited from making performance of services on their territory, subject to such conditions that would deprive the provisions protecting the free movement of services of their effectiveness.<sup>56</sup> In light of that, the Court stated that imposing an obligation on posted TCNs to obtain a work permit interferes with exercising the freedom protected under Article 56 TFEU.<sup>57</sup> Such a limitation can only be justified by overriding reasons of general interest and only if proven that such interest is not protected in the Member State from where the workers are being posted.<sup>58</sup> The Court emphasised that posted workers were legally residing and working in a sending Member State (Belgium).<sup>59</sup> The CJEU also repeated the assumption that posted workers had no intention of entering the labour market of the host Member State, and they will return to the country of their employment after completion of the performed task.<sup>60</sup> This case not only broadened the concept of posting to include TCNs, but also set the first precondition of such posting – the requirement of lawful and habitual residence of TCNs in the Member State of their employer’s establishment.<sup>61</sup> However, the Court did not define further those concepts, as the situation of workers posted by Vander Elst was rather clear.<sup>62</sup>

### **2.2.2 *Commission v Luxembourg & Commission v Germany***

As a consequence of *Vander Elst*, the Commission started infringement proceedings against countries that adopted measures restricting the posting of TCNs, which gave rise to two similar judgments in cases against Luxembourg and Germany.<sup>63</sup> Those judgements did not consider directly the right of residence of posted TCNs but rather brought new developments when it comes to what obligations and limitations can Member States impose on entities posting workers to their territory.

Just like France before *Vander Elst*, Luxembourg required posted TCNs to obtain work permits.<sup>64</sup> Obtaining collective work permits by employers was available only for

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<sup>54</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>55</sup> *Vander Elst* (n 9).

<sup>56</sup> *ibid* para 17.

<sup>57</sup> *ibid* para 26.

<sup>58</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>59</sup> *Vander Elst* (n 9) para 18.

<sup>60</sup> *ibid* para 21.

<sup>61</sup> ELA (n 1) 17.

<sup>62</sup> *ibid*.

<sup>63</sup> Case C-445/03 *Commission of the European Communities v Grand Duchy of Luxembourg* [2004] ECR I-10191; Case C-244/04 *Commission of the European Communities v Federal Republic of Germany* [2006] ECR I-885.

<sup>64</sup> Case C-445/03 *Commission of the European Communities v Grand Duchy of Luxembourg* [2004] ECR I-10191.

workers who had an indefinite employment contract, for more than six months before the posting.<sup>65</sup> Similarly, German migration law required a minimum employment duration of one year prior to posting TCNs to work in Germany.<sup>66</sup> The CJEU rejected connecting the requirement of 'the lawful and habitual employment' with the specific duration of the employment contract.<sup>67</sup> In the Court's view, the requirement of long-term prior employment would make the ad-hoc posting impossible and would constitute a particularly harsh restriction on the operation of service providers in sectors that frequently rely on short-term and task-specific contracts.<sup>68</sup> The Court found in both cases, the requirements adopted by Luxembourg and Germany were disproportionate limitations of the freedom to provide services, despite recognising public interests that they aimed to protect (protection against social dumping, prevention of abuse of the freedom to provide services and ensuing legal certainty for the posted TCNs).<sup>69</sup> In addition, the Court emphasised that Member States can justify limitation of the right of economic entities to post their workers by protection of public interest, only in a situation when such interest is not sufficiently safeguarded in the sending Member State.<sup>70</sup> Moreover, despite recognising in *Commission v Luxembourg*, that the employer can be obliged to demonstrate the lawful character of the situation of the posted TCNs (concerning matters such as residence permit, work permit, social security coverage) and that the sending Member State is the primary location of the main activity of the worker, the CJEU found detailed prior checks adopted by Germany to be disproportionate.<sup>71</sup> Instead, the Court proposed that employers may be required to issue a simple declaration prior to posting, including information necessary to ensure the lawfulness of the situation of TCNs, and to provide documents necessary to prove the truthfulness of the information.<sup>72</sup> Such a declaration was found to be a less restrictive and more effective way of ensuring that employers are sending TCNs to the other Member State solely for the reason of the provision of services.<sup>73</sup>

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<sup>65</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>66</sup> *ibid.*

<sup>67</sup> Case C-244/04 *Commission of the European Communities v Federal Republic of Germany* [2006] ECR I-885, paras 55 and 63.

<sup>68</sup> *Commission v Germany* (n 67) para 53; Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>69</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>70</sup> *Commission v Luxembourg* (n 64) para 21; *Commission v Germany* (n 67) para 48.

<sup>71</sup> *Commission v Luxembourg* (n 64) para 46; *Commission v Germany* (n 67) para 51.

<sup>72</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>73</sup> ELA (n 1) 18.

### 2.2.3 *Commission v Austria*

The object of the infringement proceedings against Austria was the requirement to obtain an 'EC posting confirmation' before posting TCNs to this country.<sup>74</sup> Obtaining such a confirmation was conditional on the worker being employed for an indefinite contract or for at least one year.<sup>75</sup> Additionally, employers were obliged to respect Austrian wage, employment, and social security rules, as well as to obtain a residence visa for their TCN workers.<sup>76</sup> Austria claimed that those measures were justified based on the public interests in relation to the protection of workers and ensuring the stability of the labour market.<sup>77</sup> The CJEU found the posting confirmation to create an obstacle to the freedom to provide services due to it serving as an authorisation (rather than declaration) and the length of the proceedings (up to six weeks).<sup>78</sup> It also found that the requirement to adopt Austrian wage and employment conditions, despite the protection of workers against exploitation being recognised as public interest, was not an appropriate measure, as it ignored the protection that the workers enjoy under the regulations of a Member State where their employer is established.<sup>79</sup> Similarly, adoption of the EU Confirmation Procedure could not be accepted as an appropriate measure to ensure stability of the labour market, because, as stated by the Court on numerous occasions, posted workers do not enter the labour market of the host Member State.<sup>80</sup> Mirroring its decisions in the cases against Luxembourg and Germany, the Court also found the requirement of a certain duration of employment before posting to be incompatible with EU law.<sup>81</sup>

In addition, the infringement procedure against Austria addressed to some extent the issue of the right of residence of posted TCNs. The CJEU also assessed Austrian law according to which posted TCNs should be automatically refused a residence permit if they entered Austria without a valid visa.<sup>82</sup> The Commission argued that issuing a residence permit to lawfully posted TCNs is a purely declaratory act, and Member States have no right to refuse to issue such a permit and expel workers from their territory.<sup>83</sup> What is interesting is that to support its position, the Commission relied on the judgment issues in *MRAX* and on the analogy to the family members of EU nationals, who have a derived right

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<sup>74</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> Case C-168/04 *Commission of the European Communities v Republic of Austria* [2006] ECR I-9041, para 45.

<sup>78</sup> *ibid* paras 41-42.

<sup>79</sup> *ibid* para 49.

<sup>80</sup> *ibid* para 58.

<sup>81</sup> *Commission v Austria* (n 77), para 50.

<sup>82</sup> *ibid* para 61.

<sup>83</sup> *ibid* para 19.

of residence.<sup>84</sup> The Court found that such a law undermines the freedom of services as it results in a situation where a worker might be excluded from Austrian territory, which would make providing services impossible.<sup>85</sup> The Austrian government justified this requirement with the aim of protecting public policy and public security; however, the Court rejected this justification by stating that it can be relied on only in situations of a genuine and sufficiently serious threat to society.<sup>86</sup> In his opinion, AG Léger emphasised that the lack of possibility to regularise the situation of posted TCNs if they enter the territory of Austria without a visa places them at risk of being expelled, which can make the provision of services impossible.<sup>87</sup> Based on this opinion, the Court found automatic refusal of a residence permit to be disproportionate to the gravity of the offence, as the posted TCNs were in a lawful situation in the sending Member State, and were not able to cause a genuine threat to the public security of Austria.<sup>88</sup> Despite ruling in favour of posted TCNs, the Court did not go as far in this judgement as to confirm the analogy between posted TCNs and family members of EU citizens, and did not state that posted TCN enjoy the derived right of residence. However, this argumentation was not completely forgotten and it resurfaced nearly 20 years later in *SN and Others* (see section 3.4.).

### **2.3 Attempts to ensure fairness of posting – PWD and its revision**

The most important piece of EU legislation when it comes to posting workers, both EU nationals and TCNs, is undeniably the PWD, adopted in 1996 and revised in 2018 by Directive 2018/957.<sup>89</sup> The PWD codified posting as a form of cross-border movement and established still-applicable definition of a posted worker, as someone who, for a limited period of time, carries out their work on the territory of a Member State different than the one that they normally work.<sup>90</sup> Additionally, it provided the minimum requirements concerning the terms and conditions of employment of posted workers and resolved the fundamental issue of the applicable law.<sup>91</sup> The PWD states that while in principle the workers remain subject to the labour law of the Member State where they are employed,

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<sup>84</sup> Case C-168/04 *Commission of the European Communities v Republic of Austria* [2006] ECR I-9041, Opinion of AG Léger, para 97; Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] ECR I-6591, para 74.

<sup>85</sup> *Commission v Austria* (n 77) para 61.

<sup>86</sup> *ibid* paras 63-64.

<sup>87</sup> Case C-168/04 *Commission of the European Communities v Republic of Austria* [2006] ECR I-9041, Opinion of AG Léger, para 104.

<sup>88</sup> *Commission v Austria* (n 77) paras 66-67.

<sup>89</sup> Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1; Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16.

<sup>90</sup> *Lasek-Markey* (n 48); Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1, art 2(1).

<sup>91</sup> *ELA* (n 1) 17.

some of the provisions of the law of the host Member State must apply.<sup>92</sup> When the PWD was adopted, this constituted a step further from allowing Member States to adopt some of their labour law provisions to posted workers, as stated in *Rush Portuguesa*.<sup>93</sup> According to PWD, Member States should ensure application of a range of labour standards provided by their national law, which, according to Article 3(1), includes for example, the minimum rates of pay, health and safety regulations or maximum work periods and minimum rest periods.<sup>94</sup> This constitutes the fundamental difference between posted workers and migrant workers, which can be traced back to the *Rush Portuguesa*, where equal treatment of the former is limited to the listed hardcore provisions.<sup>95</sup> When adopted, the PWD had a social character, aiming at the prevention of social dumping, through minimum harmonisation and ensuring the floor of protection of the labour law of the host Member State.<sup>96</sup> However, this aim was not necessarily reflected by its legal basis, which, following the CJEU's case law, was Article 56 TFEU and other treaty provisions establishing the freedom to provide services.<sup>97</sup> Additionally, the subsequent CJEU's judgements provided an interpretation according to which the discretion of the Member States when applying their laws to the workers posted to their territory was limited, indicating that the floor of protection provided by PWD is also the ceiling.<sup>98</sup>

The critics of the CJEU's case law, even despite subsequent, more pro-workers judgments, fuelled the political concern about social dumping enabled by ambiguities surrounding the framework regulating posting.<sup>99</sup> Those issues were not resolved despite the adoption in 2014 of the Posting of Workers Enforcement Directive.<sup>100</sup> To address the issue of unequal labour standards, in 2018, the Revised Posting of Workers Directive (RPWD) was adopted.<sup>101</sup> The core changes that were introduced by RPWD aimed at ensuring equal pay for equal work, which can be seen in replacing 'minimum rates of pay' by 'remuneration' in the hardcore provisions list included in Article 3(1) RPWD.<sup>102</sup> Additionally, RPWD aimed also at clarifying the issue of the temporary character of posting, by stating that after the maximum duration of posting (12 or 18 months), the entirety of the rules regulating employment in the host Member State are applicable.<sup>103</sup>

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<sup>92</sup> Barnard and Peers (n 32) 641.

<sup>93</sup> Garben (n 34) 56; *Rush Portuguesa* (n 15) para 18.

<sup>94</sup> Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1, art 3(1).

<sup>95</sup> Lasek-Markey (n 48).

<sup>96</sup> Garben (n 34) 57.

<sup>97</sup> Jaspers, Pennings and Peters (n 27) 196.

<sup>98</sup> Garben (n 34) 55, 59-60; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] EU:C:2007:809, para 80.

<sup>99</sup> Garben (n 34) 65.

<sup>100</sup> Jaspers (n 27) 201.

<sup>101</sup> *ibid* 201-203.

<sup>102</sup> Garben (n 34) 65-66.

<sup>103</sup> Lasek-Markey (n 48).

The RPWD does not include provisions specific to the posting of TCNs.<sup>104</sup> Only Recital 20 briefly mentions TCNs, by stating that RPWD applies without prejudice to national laws regulating the entry, residence and access to employment of third-country nationals.<sup>105</sup> Therefore, even though most of the provisions of RPWD apply to posted TCNs, as the text of the Directive does not include nationality requirements, it does not guarantee posted TCNs the right of residence in the host Member State.<sup>106</sup>

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<sup>104</sup> ELA (n 1) 17.

<sup>105</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4)

<sup>106</sup> *ibid*; *SN and Others* (n 12) para 61.

### **3 The right to work without the right to reside – complications and contradictions in the legal framework regulating the posting of TCNs**

The status of the posted TCNs is multidimensional. They are not only posted workers, treated as an element of the service provided by their employer (since *Rush Portuguesa*, see above), but they also remain labour migrants, who entered the EU based on the decision of the sending Member State. Therefore, the posting of TCNs and regulation of their right of residence constitute an intersection between the rules concerning the freedom to provide services and legal migration. The framework regulating the posting of TCNs is based on an interplay of various EU and national laws, and is full of ambiguities and contradictions.<sup>107</sup> To unfold this complex system, this chapter will complement the analysis of the framework derived from Article 56 TFEU with a study of the rules regulating the right of residence of posted workers from the perspective of EU common migration policy, before moving to the analysis of the (limited) intra-EU mobility rights that posted TCNs enjoy under the Schengen rules. Given the lack of harmonisation of the issue of right of residence of posted TCNs, the subsequent section will consider the varying rules and procedures adopted under national laws. This chapter will be concluded with an analysis of the *SN and Other*, where, as if in a lens, all the issues and contradictions of the current framework regulating the posting of TCNs are concentrated.

#### **3.1 Limited applicability of the Common EU migration policy and labour market directives**

The Treaty basis for the common migration policy is Article 79 TFEU, which calls EU to develop a joint policy, aiming among others at ensuring efficient management of migration flows and fair treatment of TCNs residing in the EU.<sup>108</sup> Despite many years of negotiations, EU Member States failed to agree on a general set of rules regulating labour migration.<sup>109</sup> Instead of adopting one document, Article 79 TFEU became a legal basis for the adoption of a number of directives, concerning aspects such as admission criteria, procedures of application for residence and work permits (including rules for renewal,

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<sup>107</sup> Mijke Houwerzijl and Imke van Gardingen, 'Strengthening the rights of posted third-country nationals in their EU Member State of residence and employment' (2025) *I Transfer: European Review of Labour and Research* <https://journals.sagepub.com/doi/10.1177/10242589251324658> accessed 26 June 2025.

<sup>108</sup> Consolidated Version of the Treaty on Functioning of the European Union [2012] OJ C326/47, art 79(1).

<sup>109</sup> Steve Peers 'Migration for labour purposes: the EU's piecemeal approach' in *Research handbook on EU migration and asylum law* Evangelia (Lilian) Tsourdi and Philippe de Bruycker (eds.) (1<sup>st</sup> ed, Edward Elgar Publishing, Inc. 2022) 327.

rejection or withdrawal of residence and work permits).<sup>110</sup> Those directives not only set out minimum criteria and relevant timeframes but also established the rights of special groups of migrants.<sup>111</sup> The list includes, for example, the Intra-Corporate Transfer Directive<sup>112</sup>, regulating entry conditions and right of residence of workers who are employed by a company established outside of the EU and who are sent to work for an entity of that company located on the EU territory, but also the Blue Card Directive<sup>113</sup>, regulating the entry conditions and the right to reside of highly skilled migrants and their family members on the territory of one Member State for a period longer than 90 days. The directives provide for a minimum harmonisation, which allows Member States to adopt more specific rules on the national level, aiming mostly to attract highly skilled TCN workers and limiting the entry of low-skilled migrants.<sup>114</sup>

The applicability of the EU *acquis* on legal migration is limited to the residence of the workers in the sending Member State.<sup>115</sup> Together with the national laws (see section 3.3.) it regulates the access of the TCNs to the EU territory and the lawfulness of their situation for the purpose of posting.<sup>116</sup> Even though the Intra-Corporate Transfer Directive created a pioneer system of intra-EU mobility for the relevant group of TCNs, giving them the right to move and work in another Member State without being obliged to apply for a residence permit there, the directive explicitly excludes posted workers from its scope of application.<sup>117</sup> Similarly, the Blue Card Directive<sup>118</sup> or the Long-Term Residence Directive<sup>119</sup>, which offer much more limited intra-EU mobility rights to relevant groups of

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<sup>110</sup> ELA (n 1) 19-20.

<sup>111</sup> ELA (n 1); Tesseltje de Lange and Zvezda Vankova, 'The Recast EU Blue Card Directive: Towards a Level Playing Field to Attract Highly Qualified Migrant Talent to Work in the EU?' (2022) 24 *European Journal of Migration and Law* [https://brill.com/view/journals/emil/24/4/article-p489\\_2.xml](https://brill.com/view/journals/emil/24/4/article-p489_2.xml) accessed 28 January 2025.

<sup>112</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1.

<sup>113</sup> Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1.

<sup>114</sup> Houwerzijl and van Gardingen (n 107).

<sup>115</sup> ELA (n 1) 19.

<sup>116</sup> *ibid.*

<sup>117</sup> Herwig Verschueren, 'The Labyrinth of Employment and Social Rights in the EU Intra-Corporate Transfer Directive' (2020) 12(3) *European Labour Law Journal* [https://journals.sagepub.com/doi/abs/10.1177/2031952520967362?casa\\_token=MjRcnSSybLAAA%3AI2gUuLZb1hB9iqQYSerOmzNUGozCpmWGUjNjvdLNT\\_r42PbYA3dzTyfaQiqjp6EtrsJoY-zf9A1PQw](https://journals.sagepub.com/doi/abs/10.1177/2031952520967362?casa_token=MjRcnSSybLAAA%3AI2gUuLZb1hB9iqQYSerOmzNUGozCpmWGUjNjvdLNT_r42PbYA3dzTyfaQiqjp6EtrsJoY-zf9A1PQw) accessed 26 August 2025; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1, art 2(c).

<sup>118</sup> Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1, art 3(2)(g).

<sup>119</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16, art 3(2)(e).

TCNs, do not apply to posted workers.<sup>120</sup> Despite those examples, there is still no legislative document under the EU common migration policy that would provide a comprehensive set of rules on posting TCNs, regulating their right of residence.

However, as a aftermath of the full-scale Russian invasion, the temporary protection based on Directive 2001/55/EC was activated for the Ukrainian citizens.<sup>121</sup> The directive established the system of immediate and temporary protection designed to accommodate a mass influx of persons who are displaced and unable to return to their home countries.<sup>122</sup> Based on the Council Implementing Decision, the Ukrainians gained the right to move and reside freely on the EU territory similar to EU citizens.<sup>123</sup> Thanks to the fast procedures for granting the work permit for TCNs who obtained temporary protection status, they can be posted nearly immediately on the same conditions as EU citizens.<sup>124</sup>

### 3.2 Intra-EU mobility of TCNs

The intra-EU mobility of workers (connected with the free movement of persons or services) and migration of individuals from outside the EU constitute two separate regimes.<sup>125</sup> Despite the free movement of people through the internal borders in the European Union being one of the core EU principles protected under Article 3(2) of the Treaty on European Union (TEU)<sup>126</sup>, this right is not extended to TCNs residing legally in one of the EU Member States.<sup>127</sup> In principle, the TCNs' work and residence permits are valid only in the Member State of issuance, despite a uniform format based on Regulation

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<sup>120</sup> Iris Goldner Lang, 'Freedom of movement of EU citizens and mobility rights of third-country nationals: where EU free movement and migration policies intersect or disconnect?' in *Research handbook on EU migration and asylum law* Evangelia (Lilian) Tsourdi and Philippe de Bruycker (eds.) (1<sup>st</sup> ed, Edward Elgar Publishing, Inc. 2022) 107, 109.

<sup>121</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

<sup>122</sup> ELA (n 1) 20.

<sup>123</sup> Vasyl M. Andriyiv et al., 'Challenges and practical aspects of obtaining temporary protection in EU countries and the impact of obtaining protection on the right to work' (2003) 61(5) [https://onlinelibrary.wiley.com/doi/full/10.1111/imig.13120?casa\\_token=R85yJOfbHK4AAAAA%3AhKkKOK6nKPYMHR2wvO8etNeJHMLA98ZS2XEUSFD-5ozaHvdmCoEVarFF6RtK1-vVDWJCSjEqSwNOkwc](https://onlinelibrary.wiley.com/doi/full/10.1111/imig.13120?casa_token=R85yJOfbHK4AAAAA%3AhKkKOK6nKPYMHR2wvO8etNeJHMLA98ZS2XEUSFD-5ozaHvdmCoEVarFF6RtK1-vVDWJCSjEqSwNOkwc) accessed 27 January 2025.

<sup>124</sup> ELA (n 1) 20.

<sup>125</sup> Dries Lens, Ninke Mussche and Ive Marx, 'A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants' (2021) 60(2) *International Migration* <https://onlinelibrary.wiley.com/doi/abs/10.1111/imig.12867> accessed 29 January 2025.

<sup>126</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 3(2).

<sup>127</sup> Petra Weingerl and Matjaž Tratnik, 'Climbing the Wall around EU Citizenship: Has the Time Come to Align Third-Country Nationals with Intra-EU Migrants?' (2022) 33(1) *European Journal of International Law* <https://academic-oup.com.mu.idm.oclc.org/ejil/article/33/1/15/6583471?searchresult=1> accessed 23 January 2025.

1030/2002.<sup>128</sup> This aims to secure the right of the Member States to decide on the volume of admission of TCNs for employment purposes.<sup>129</sup> Given the lack of harmonisation and strong competences of the Member States, protected under Article 79(5) TFEU<sup>130</sup>, TCNs instead of participating in the free movement rights, enjoy only very limited rights to intra-EU mobility, established through Schengen rules.<sup>131</sup>

Convention Implementing the Schengen Agreement (CISA) provided the legal basis for the implementation of the Agreement and abolition of the control on the common borders of participating member states.<sup>132</sup> Even though most of the Convention is no longer in force and many of its provisions have already been incorporated into EU legislation, Article 21 still provides the legal basis for the movement of TCNs within EU borders.<sup>133</sup> Article 21(1) CISA states: 'Aliens who hold valid residence permits issued by one of the Member States may, based on that permit and a valid travel document, move freely for up to 90 days in any 180-day period within the territories of the other Member States, provided that they fulfil the entry conditions (...) and are not on the national list of alerts of the Member State concerned'.<sup>134</sup>

Additionally, Article 6 of the Schengen Borders Code confirms that TCNs can legally stay on the territory of one Member State for no more than 90 days in any 180-day period.<sup>135</sup> Requirements that TCNs must meet include, among others, valid travel documents, justification of purpose and conditions of their stay, sufficient means to provide for themselves and return to their country of origin after the end of the stay.<sup>136</sup> Article 6 Schengen Borders Codes also provides a basis to prohibit the entrance and stay of the TCNs who cause a threat to public policy, internal security, public health or the international relations of any of the Member States, especially if an alert concerning them was issued.<sup>137</sup>

Based on Schengen rules, TCNs who are genuinely posted (among others hold a valid residence permit in the sending Member State) can move to another Member State within the Schengen area and stay on its territory for up to 90 days, without being required to obtain an additional residence permit. These limited mobility rights were recently

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<sup>128</sup> Houwerzijl and van Gardingen (n 107); Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157, art 1(2).

<sup>129</sup> Houwerzijl and van Gardingen (n 107).

<sup>130</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 79(5).

<sup>131</sup> Goldner Lang (n 120) 98, 105.

<sup>132</sup> Gerrit Huybrechts, 'The Schengen Convention and the Schengen acquis: 25 years of evolution' (2015) 16 ERA Forum <https://link.springer.com/article/10.1007/s12027-015-0402-3> accessed 23 January 2025.

<sup>133</sup> *ibid*; *SN and Others* (n 12) para 65.

<sup>134</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239, art 21(1).

<sup>135</sup> Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1, art 6.

<sup>136</sup> *ibid* art 6(a)(c).

<sup>137</sup> *ibid* art 6(d).

confirmed by the CJEU in *SN and Others* (see section 3.4.).<sup>138</sup> However, beyond that period, their residence permit issued by the sending Member State does not guarantee them the right to reside in the host Member State.

### **3.3 Varying interpretations and lack of harmonisation – law of the Member States**

Even though the case law of the CJEU (discussed in Chapter 2) states clearly that TCNs who hold valid work and residence permits can simply be posted to another Member State, the lack of legislative harmonisation of this issue leaves many questions unanswered and results in varying national laws and procedures regulating the posting of TCNs.<sup>139</sup> This creates many uncertainties concerning the requirements of genuine posting of TCNs, including lawful residence, which is the precondition for lawful employment in the sending Member State.<sup>140</sup> Legal migration is a shared competence, therefore, outside of the issues harmonised through common migration policy, it is the national law of the sending Member State that governs the criteria of admission of TCNs to their territory, including issuance, renewal and withdrawal of residence permits for posted TCN workers.<sup>141</sup> Therefore, in practice, the right of residence of posted TCNs has to be verified twice – first by the sending Member State upon entry of the worker on the EU territory and second time by the host Member State upon posting.<sup>142</sup> This causes many difficulties for the authorities in the host Member State, because when assessing the legality of posting, they have to navigate foreign national provisions regulating the right to stay of TCNs, which differ considerably across the EU.<sup>143</sup> Additionally, based on the CJEU's case law, the host Member State cannot require a posted TCN to acquire a new work permit, however, it can still set certain residency requirements.<sup>144</sup> In fact, most of the Member makes entry and stay of the posted TCNs conditional upon application for a temporary residence permit or a visa, with some of them making no exception for posting shorter than 90 days and falling under Schengen mobility rules.<sup>145</sup> This can be exemplified by the rules adopted by Germany, which require

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<sup>138</sup> *SN and Others* (n 12) para 65; Peers, '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' (n 2).

<sup>139</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>140</sup> ELA (n 1) 31, 36.

<sup>141</sup> *ibid* 21.

<sup>142</sup> *ibid* 36.

<sup>143</sup> *ibid* 80.

<sup>144</sup> Houwerzijl and Gardingen (n 107).

<sup>145</sup> ELA (n 1) 57: The countries that require a visa/residence permit despite duration of the posting not exceeding 90 days include Germany (when the worker has no long-term residence permit in the sending Member State), France, Ireland, Italy, Malta and Romania. The countries that apply such requirements to posting longer than 90 days include Belgium, Czechia, Denmark, Germany (when the worker has a long-term residence permit in the sending Member State), Estonia, Finland, France, Greece, Croatia, Luxembourg, Latvia, the Netherlands, Poland, Slovenia and Slovakia). Contrary, the countries that do not impose requirements to apply for additional residence permit regardless of the duration of the posting include Austria, Cyprus, Hungary, Spain and Portugal.

posted TCNs (except for those who hold a long-term residence status) to obtain so-called 'Vander Elst visa'.<sup>146</sup> What is interesting is that even though posting by the definition can take place based on the freedom of the employer, the German law places the burden of compliance with posting rules on the worker, by requiring them to obtain a visa in person, which is possible only in specific diplomatic establishments.<sup>147</sup> The application for the Vander Elst visa must be supported by a number of documents, including a proof of legal residence in the sending Member State, a work permit issued there and a service contract.<sup>148</sup>

The regulation of the right of residence by national law means for posted TCNs that the renewal of their residence permit must be issued in the country where their employer is established and where they are primarily employed.<sup>149</sup> This might in practice mean being obliged to apply for such a permit in the sending country, in accordance with its national procedures, while temporarily working in another Member State.<sup>150</sup> Similarly, the decision to withdraw the residence and work permit, for example, in connection with a lack of compliance with social security requirements by the employer, might be issued in the sending Member State concerning a worker who is at that time posted to another Member State.<sup>151</sup>

Additionally, Member States differ in the interpretation of the criteria of a posted worker having their main activity in the sending Member State.<sup>152</sup> The CJEU's case law does not provide clear guidance on how to show the necessary continuity of the activity of a genuinely posted worker in the sending Member State, but only excludes the possibility that this could be done through the requirement of a certain period of employment prior to posting, finding it an unjustified restriction to the freedom to provide services.<sup>153</sup> This results in different procedures adopted by sending Member states to ensure the lawfulness of posting. For example, the Slovenian law provides for strict rules on formalities, monitoring and sanctions for unlawful posting.<sup>154</sup> The issuance of an A1 certificate (the

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<sup>146</sup> Sonila Danaj et al, 'There and gone again? Migration to and posting of third-country nationals from Slovenia and Poland' (2023) 14(3) European Labour Law Journal <https://journals.sagepub.com/doi/full/10.1177/20319525231165851> accessed 15 April 2025.

<sup>147</sup> Piotr Kapusta, 'Wymóg uzyskiwania wizy Vander Elst dla pracowników delegowanych do Niemiec będących obywatelami państw trzecich jako przykład naruszenia swobody świadczenia usług' (2023) 1 Dyskurs Prawniczy I Administracyjny <http://www.dyskurs.inp.uz.zgora.pl/index.php/DPiA/article/view/316> accessed 22 April 2025; Deutsche Vertretungen Polen 'Visa for the provision of a temporary service („Vander Elst")' <https://polen.diplo.de/pl-de/03-service/03-02-visainfo-eng/2572016-2572016> accessed 22 April 2025.

<sup>148</sup> *ibid.*

<sup>149</sup> ELA (n 1) 21.

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

<sup>152</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>153</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>154</sup> Danaj (n 146).

document proving that the worker is registered at the social security system of the issuing country) is conditional upon showing that the posting undertaking usually carries out services in Slovenia and obeys the labour law concerning workers' rights.<sup>155</sup> In comparison, the Polish law sets fewer bureaucratic requirements and allows for swifter posting of TCNs by Polish companies, but nevertheless still treats the lawfulness of residence of a posted TCN as a precondition to issuance of the A1 certificate.<sup>156</sup>

### 3.4 SN and Others

While the previous cases described in chapter 2 provided more general rules on posting of third-country nationals, where the issue of right of residence was arising rather in the context of residence in the Member State where the sending employer is established and had to be proved for lawfulness of posting, only in the recent case, *SN and Others*, the Court focused on the right of residence in the *host* Member State.<sup>157</sup> This might be surprising, as the physical presence of the workers in that Member State is crucial for the performance of services based on the freedom provided by Article 56 TFEU.

The case concerned Ukrainian citizens posted on the territory of the Netherlands by a Slovak company. What is important is that the posting took place before Ukrainians were granted the status of temporary protection (see section 3.1.).<sup>158</sup> The applicants of the case were holding residence permits issued by Slovakia, but as the planned activity exceeded the 90-days, the employer applied for an ordinary fixed-term residence permit on behalf of each of the posted workers.<sup>159</sup> This was connected with paying fees between EUR 290 and 320, depending on the situation of each worker.<sup>160</sup> The permits issued were valid only until the end date of the residence permit in Slovakia, which was shorter than requested and shorter than the duration of the planned activities.<sup>161</sup> When this procedure was challenged before Dutch courts, the Hague District Court referred three preliminary questions to the CJEU: 1) whether Article 56 TFEU gives posted TCNs the derived right of residence; 2) whether Article 56 TFEU precludes requiring each worker to apply for residence permit if the posting exceeds three months; 3) whether Article 56 TFEU precludes the national law that limits the period of validity of residence permit to two years and/or the duration of residence permit issued by the sending Member State, and settles the amount of fee five times higher than the fees applicable EU citizens applying for proof of lawful residence?.<sup>162</sup>

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<sup>155</sup> *ibid.*

<sup>156</sup> *Danaj* (n 146).

<sup>157</sup> *SN and Others* (n 12).

<sup>158</sup> *ELA* (n 1) 20.

<sup>159</sup> *SN and Others* (n 12) paras 33, 35.

<sup>160</sup> *SN and Others* (n 12) para 35.

<sup>161</sup> *ibid* para 36.

<sup>162</sup> *ibid* para 47.

CJEU first focused on the existence of a derived right of residence of posted TCNs, making the analogy to non-EU family members of EU citizens.<sup>163</sup> The Court recalled that the Commission relied on this analogy in the *Commission v Austria*.<sup>164</sup> However, the two cases are not completely analogous, because in *Commission v Austria* the core issue was automatic refusal of residence permit to TCNs who illegally entered Austrian territory, but also the Court did not go so far in the previous judgement, to establish the derived right of residence.<sup>165</sup> In the case at hand, following the reasoning of AG Rantos, the Court made a distinction between posted workers and family members, stating that by recognising the derived right of the latter, the Court is protecting the right of EU citizens to move and reside freely in other Member States.<sup>166</sup> If the EU workers could not bring their family members, they would be discouraged from exercising their freedom of movement.<sup>167</sup> However, undertakings do not enjoy this right, as they can exercise only freedom of establishment and freedom to provide services.<sup>168</sup> The CJEU supported this distinction by stating that there is no comparison between family relations, protected for example by the right to private and family life under Article 7 of the Charter of Fundamental Rights of the European Union, and the relation between worker and their employer.<sup>169</sup> However, this reasoning is not convincing, as for undertakings employing TCNs, the lack of ability to bring their workers to another Member State does not have a deterring effect, like in the case of EU citizens not being able to bring their family, but is directly preventing them from exercising their freedom to provide services.<sup>170</sup> It also constitutes a missed opportunity to resolve the problem of contradiction arising in the current legal framework, which seems to allow TCNs to work in the host Member State but does not secure their physical presence there.<sup>171</sup>

Turning to the issue of the requirement of obtaining residence permits for workers who are posted for more than three months, the Court restated that the freedom to provide services under Article 56 TFEU does not ensure an individual right to a specific posted TCN to stay in the receiving Member State.<sup>172</sup> Therefore, the Court examined the second question solely from the perspective of the freedom to provide services, stating that the

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<sup>163</sup> Peers, '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' (n 2).

<sup>164</sup> *SN and Others* (n 12) para 49.

<sup>165</sup> Pauline Melin and Nikos Parthenopoulos, 'Overview of Recent Cases Before the Court of Justice of the European Union (January–June 2024)' (2024) 26(3) *European Journal of Social Security* <https://journals.sagepub.com/doi/full/10.1177/13882627241297159> accessed 26 August 2025; *SN and Others* (n 12) para 50.

<sup>166</sup> *SN and Others* (n 12) para 51.

<sup>167</sup> *ibid* para 52.

<sup>168</sup> *ibid* para 53.

<sup>169</sup> *SN and Others* (n 12) para 54.

<sup>170</sup> Peers, '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' (n 2).

<sup>171</sup> Melin and Parthenopoulos (n 165).

<sup>172</sup> *SN and Others* (n 12) para 57.

issue of the right of residence of posted TCNs is not harmonised on the EU level.<sup>173</sup> It dismissed one by one the importance of documents such as the PWD<sup>174</sup>, Services Directive<sup>175</sup>, Regulation 1030/2002<sup>176</sup>, the Long-Term Residence Directive<sup>177</sup>, and the Schengen rules.<sup>178</sup> Therefore, the Court assessed the Dutch law only in the light of Article 56 TFEU and found that the obligation to apply for a residence permit for TCNs employed to provide services on the territory of the Netherlands establishes a restriction on the exercise of the freedom to provide services.<sup>179</sup> When considering possible justifications for this restriction, the Court analysed four grounds of protection of the general public interest: 1) protection of access to the national labour market; 2) ensuring that the service provider established in another Member State is using the freedom to provide services only for a purpose of supplying services; 3) protection of legal certainty of the posted workers, by granting to those workers document proving that they do not stay illegally on the territory of the host Member State; 4) ensuring that the posted worker does not represent a threat to public policy.<sup>180</sup> CJEU rejected the first and second grounds, as the measures adopted did not pursue those objectives, and the obligation of issuing a declaration by the posting employer was already enough protection against the abuse.<sup>181</sup>

Especially important for the right of residence of posted TCNs was the Court's reasoning that led to the acceptance of the ground of increasing legal certainty among posted TCNs. Stating that based on the EU law, the residence permit issued back in Slovakia was valid only in that Member State, the Court emphasised that the host Member State 'cannot be criticised' for requiring posted TCN to obtain a residence permit issued by its administration.<sup>182</sup> In the Court's view, the fact that the worker has the necessary permits to reside and work in one Member State does not mean that they have the right to stay in another Member State, even if they were posted to perform services in that country.<sup>183</sup> Therefore, Member States may make residence on their territory conditional upon additional requirements, as long as they pursue the general public interest and are

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<sup>173</sup> *ibid* paras 59, 66.

<sup>174</sup> Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1.

<sup>175</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376.

<sup>176</sup> Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L 157.

<sup>177</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16.

<sup>178</sup> *SN and Others* (n 12) paras 60-65; Peers, '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' (n 2).

<sup>179</sup> *SN and Others* (n 12) paras 66, 73.

<sup>180</sup> *SN and Others* (n 12) para 77.

<sup>181</sup> Peers, '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' (n 2).

<sup>182</sup> *SN and Others* (n 12) para 88.

<sup>183</sup> *ibid*.

proportional.<sup>184</sup> Based on that, the Court stated that restrictions adopted by the Netherlands did not go beyond what is necessary to ensure legal certainty for the workers, as it merely required service providers, who want to post TCNs for more than three months, to ensure that the worker in question holds a valid residence and work permits.<sup>185</sup> Although a residence permit issued in one Member State is not valid outside of it, the Court seemed to recognise in its reasoning that employers have the right to post their TCN workers to another Member State for up to 90 days without being obliged to obtain a residence permit on their behalf.<sup>186</sup>

When it comes to the fourth ground, the Court again ruled in favour of the restrictions established by Dutch law.<sup>187</sup> It found the requirement placed on the employer to obtain a residence permit for each TCN worker, posted for more than three months, to be a proportionate and appropriate measure, to ensure that the worker does not pose a threat to the public policy.<sup>188</sup> Such requirements can be adopted in addition to the requirement placed on the employer to send a prior declaration, including the expected duration of the service in question, as well as the residence and work permits issued for the posted TCNs in the sending Member State.<sup>189</sup> The court supported this interpretation by pointing out that even though such a check already took place in the Member State where the TCN is employed, the interpretation of a 'threat to public policy' may differ between Member States; therefore the host Member State should be able to run its own assessment.<sup>190</sup> This appears to be contrary to the judgment in *Commission v Austria* (see section 2.2.3.), where the Court suggested that information provided through a declaration sent by the employer should be sufficient to rule out the threat to the public policy.<sup>191</sup> Additionally, it shows inconsistency in the Court's reasoning, as the information provided by the employer in the declaration prior to posting appears to be sufficient to prove that there is no abuse (as the second ground was rejected), but it is not sufficient to prove that the posted TCN does not cause a threat.<sup>192</sup> Despite fitting the broader context concerning the regulation of the movement of TCNs within the EU, the justification for the limitation of posting without further requirements to 90 days appears to be illogical, as it seems to expect the worker to start causing a threat to public interest straight after this time has elapsed.<sup>193</sup>

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<sup>184</sup> *ibid.*

<sup>185</sup> *ibid* para 89.

<sup>186</sup> Peers, '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' (n 2).

<sup>187</sup> *ibid.*

<sup>188</sup> *SN and Others* (n 12) para 96.

<sup>189</sup> *SN and Others* (n 12) para 103.

<sup>190</sup> *ibid* para 98.

<sup>191</sup> Peers, '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' (n 2).

<sup>192</sup> *ibid.*

<sup>193</sup> *ibid.*

Finally, when assessing the third preliminary question, the Court found that the limit to the validity of the residence permit issued for the posted TCNs can be justified by the temporary character of the posting.<sup>194</sup> The time for which the permit is granted can be shorter than the duration of the service for the provision of which the workers were posted, especially if the planned service is longer than the permit granted in the sending Member State.<sup>195</sup> However, the measures adopted by the Member States cannot be discriminatory towards undertakings established in other Member States, the duration of the permit granted cannot be manifestly too short, and the renewal of the permit cannot be conditional upon fulfilling excessive formalities.<sup>196</sup> The Court created here an artificial division between the provision of services and the physical presence of workers in the country where the services are provided. By stating that granting of a residence permit shorter than is needed for the specific tasks does not influence the free movement of services, it ignored the economic reality and simple logic that if the employer has workers who are not EU citizens, they cannot perform services effectively in another Member State, if they are unable to send their workers there.<sup>197</sup> Additionally, by failing to provide any further clarification on what duration of validity of residence permit is not 'manifestly too short', the Court only added to the ambiguities in the framework regulating posting of TCNs.<sup>198</sup>

Lastly, the Court found that there can be no breach of Article 56 TFEU solely based on the fact that the fees connected to obtaining residence permits by TCNs are considerably higher than the same fees paid by EU citizens.<sup>199</sup> However national court can assess whether the amount is disproportionate to the cost of administrative tasks that must be completed to grant a TCN a residence permit.<sup>200</sup> Despite this assessment being in favour of the Member States, it at least opened the possibility to challenge both the decisions concerning issuing a residence permit and the amount of fees payable.<sup>201</sup>

The decision in *SN and Others* constitutes a setback when it comes to the rights of posted TCNs, as the Court stated that they cannot derive the right of residence in the host Member State from their employer's freedom to provide services.<sup>202</sup> Even though not confirmed in previous cases, such a correlation was suggested by the Commission in

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<sup>194</sup> *SN and Others* (n 12) para 113.

<sup>195</sup> *SN and Others* (n 12) para 115.

<sup>196</sup> *ibid* para 116.

<sup>197</sup> Peers, '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' (n 2).

<sup>198</sup> *Melin and Parthenopoulos* (n 165).

<sup>199</sup> *SN and Others* (n 12) para 121.

<sup>200</sup> *ibid* para 121.

<sup>201</sup> Peers, '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' (n 2).

<sup>202</sup> *SN and Others* (n 12) para 54.

*Commission v Austria*.<sup>203</sup> If the Court had accepted it, it would have resolved the persistent problem of TCNs being able to work in other Member States based on posting but not being automatically authorised to lawfully reside there.

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<sup>203</sup> Case C-168/04 *Commission of the European Communities v Republic of Austria* [2006] ECR I-09041, Opinion of AG Léger, para 97.

## 4 Solutions

### 4.1 A (long-overdue) new directive

The sections above clearly explained that there is no comprehensive legal instrument that would tackle all the issues connected with the posting of TCNs. The framework applicable is very fragmented, with the rules coming from case law and different secondary sources, which creates a lot of contradictions and ambiguities.<sup>204</sup> Therefore, adoption of a single secondary legislation seems to be the most natural solution for the current issues.<sup>205</sup> Calls for a new directive can also be justified by significant differences between the laws of Member States regulating the posting of TCNs, and frequent examples of labour and social exploitation of workers within this group.<sup>206</sup> Such legislation would have to not only codify the case law of the CJEU concerning posting of TCNs, but also fill in the gaps, especially when it comes to the right of residence of posted TCNs.

The adoption of a Directive on the posting of TCNs is, however, not a novel idea. Already in 1999, the European Commission presented the proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services.<sup>207</sup> Even though the proposal was withdrawn in 2004, after endless, yet unsuccessful negotiations, it is a good starting point when considering the possibility of adoption of a new directive.<sup>208</sup> One of the most novel elements proposed by the Directive was the introduction of the 'EC service provision card', issued by the Member State where the posting employer was established.<sup>209</sup> The card was aiming at providing proof that the posted TCN is lawfully residing in the territory of the sending Member State and is covered by necessary social security protections.<sup>210</sup> The period of the card's validity should match the period of actual employment, but should not be longer than 12 months.<sup>211</sup> Recital 7 of the Directive further specified that the cardholder

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<sup>204</sup> Houwerzijl and van Gardingen (n 107).

<sup>205</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>206</sup> Enrico Letta, 'Much More Than a Market' (2024) <https://european-research-area.ec.europa.eu/documents/letta-report-much-more-market-april-2024> accessed 17 August 2025, 104.

<sup>207</sup> Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services [1999] OJ 1999/C 67/09.

<sup>208</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>209</sup> *ibid.*

<sup>210</sup> Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services [1999] OJ 1999/C 67/09, art 2(1).

<sup>211</sup> *ibid* art 2(2).

should have their place of main activity in the issuing Member State.<sup>212</sup> The Directive was also aiming at protecting the future of the employee after posting, stating that the Member State issuing the service card could not refuse to admit the worker back to its territory.<sup>213</sup> The proposed Directive also addressed the issue of the right of residence of posted TCNs by obliging, in Article 3, the host Member State to allow entry and stay of workers who were holders of the Card.<sup>214</sup> Posting was meant to take place based on a simple prior notification, with the host Member State not being able to require any additional documents such as residence permits, work permits or visas.<sup>215</sup> If the posting was taking longer than 12 months, the host Member State would have to issue a temporary residence permit to authorise the longer stay of the worker.<sup>216</sup> The Directive was also obliging Member States to designate authorities ensuring effective implementation of the Directive and to simplify all the procedures at the national level.<sup>217</sup> Despite great potential to resolve many persistent uncertainties surrounding the posting of TCNs, the proposal did not reach the necessary support during several years of negotiations between the European Parliament and the Council of Ministers.<sup>218</sup> The most problematic turned out to be the proposed maximum duration of the validity of the card, the lack of clear requirements concerning the nature and duration of the prior residence and employment of posted TCNs in the sending Member States, the possibility to rely on the Directive by temporary employment agencies or the obligation of the sending Member State to readmit the workers after posting.<sup>219</sup>

However, twenty-one years later, the need for a new legal document regulating the posting of TCNs remains clear. In February of this year, the Netherlands, Belgium, Denmark, Germany, Italy, Latvia and Luxembourg adopted a position paper calling European Commission to present a new proposal.<sup>220</sup> The Member States emphasised that the posting of TCNs constitutes a growing phenomenon, which, while contributing

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<sup>212</sup> Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services [1999] OJ 1999/C 67/09, recital 7.

<sup>213</sup> *ibid* art 2(5).

<sup>214</sup> *ibid* art 3.

<sup>215</sup> *ibid* art 3(3).

<sup>216</sup> Verschuere 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>217</sup> Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services [1999] OJ 1999/C 67/09, art 5.

<sup>218</sup> Verschuere 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>219</sup> *ibid*.

<sup>220</sup> Position paper From The Netherlands, Belgium, Denmark, Germany, Italy, Latvia and Luxembourg EU policy priorities for the Commission period 2024-2029 Foster genuine and fair posting of third country nationals (TCNs) <https://www.rijksoverheid.nl/documenten/kamerstukken/2025/02/14/bijlage-1-position-paper-posting-of-third-country-nationals> accessed 29 June 2025.

positively to the economy, is simultaneously creating many dangers for the workers.<sup>221</sup> They also reminded that in the reality of a lack of legislation specifically regulating the issue of posting of TCNs, the case law, which provides de facto the only basis for this mobility, is interpreted very differently in various Member States.<sup>222</sup> This results in varying conditions for posting, which expose posted TCNs to social dumping, labour exploitation and poor social security coverage.<sup>223</sup> The Member States also recognised the problematic character of the right of residence of posted TCNs, whose stay in the Union is often dependent on the continuity of posting.<sup>224</sup> Therefore, the Member States are calling for a new directive, specifically regulating the issue of posting of TCNs.<sup>225</sup> Such a directive should ensure legal certainty on requirements for lawful posting, through codification and clarification of concepts established by the CJEU's case law.<sup>226</sup> Additionally, the directive should strengthen enforcement measures by providing tools for effective assessment of the genuine character of posting.<sup>227</sup> At the same time, it should further develop the protection of the rights of the workers and their ability to enforce them.<sup>228</sup>

The Position Paper is an indication of growing recognition of the need for a new directive on the posting of TCNs. One of the most important issues that such a document should tackle is the right of residence of posted TCNs, because, as demonstrated above, it constitutes the greatest gap in the current legal framework. First, in line with the emphasis on the temporary character of posting, TCNs must be able to return to their home EU Member State after posting is completed.<sup>229</sup> This could be tackled by the requirement set in Article 2(5) of the Proposal for the Posted TCNs Directive, according to which the sending Member State could not refuse readmission of the posted worker after the provision of service is done.<sup>230</sup> Based on that, the directive should prevent a situation where the posting is longer than the residence permit issued by the sending Member State.<sup>231</sup> However, simultaneously, the receiving Member State should recognise the permit issued by the sending Member State and allow the entry of the TCN workers to its

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<sup>221</sup> Position paper From The Netherlands, Belgium, Denmark, Germany, Italy, Latvia and Luxembourg EU policy priorities for the Commission period 2024-2029 Foster genuine and fair posting of third country nationals (TCNs) <https://www.rijksoverheid.nl/documenten/kamerstukken/2025/02/14/bijlage-1-position-paper-posting-of-third-country-nationals> accessed 29 June 2025.

<sup>222</sup> *ibid.*

<sup>223</sup> *ibid.*

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*

<sup>226</sup> *ibid.*

<sup>227</sup> *ibid.*

<sup>228</sup> *ibid.*

<sup>229</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>230</sup> Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services [1999] OJ 1999/C 67/09, art 2(5).

<sup>231</sup> Houwerzijl and van Gardingen (n 107).

territory to provide the service, similarly to the operation of the intra-EU mobility system established based on the Intra-Corporate Transfer Directive.<sup>232</sup> To facilitate such mutual trust between Member States, a similar document to the EC service provision card could be introduced, with the new directive incorporating the rules included in Article 3(2) of the Proposal for the Directive on posting of TCNs, precluding the host Member State from requiring additional visas and residence permits.<sup>233</sup>

Additionally, the new directive should tackle another important issue - ensuring the genuine character of posting.<sup>234</sup> Addressing this problem would help to prevent abuse of posting, which not only circumvents the migration law of the host Member States but also creates many dangers for the workers themselves.<sup>235</sup> There are two important indicators that the posting of TCNs is genuine, which could be codified in the new directive.<sup>236</sup> From the perspective of the employer, the sending company must have the real economic activity in the home Member State, to ensure that access to the market granted through a work permit issued by the sending Member State is connected to a real work performed primarily on its territory.<sup>237</sup> Therefore, the new directive should state clear conditions that the employer must meet to prove that it is not just a letterbox company.<sup>238</sup> Complementary, the directive should state clear conditions that workers must meet to prove that they are genuinely posted, including the obligation to hold a valid immigration status in the sending Member State, for a period wider than the time of posting.<sup>239</sup> Additionally, the directive should lay out rules on what types of employment make workers eligible for posting, excluding, for example, temporary employment solely to be posted to the other Member State.<sup>240</sup> The new directive could also establish a rule that the employment contract of posted TCNs must exceed the period of posting.<sup>241</sup> To comply with

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<sup>232</sup> Goldner Lang (n 120) 111.

<sup>233</sup> Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services [1999] OJ 1999/C 67/09, art 3(2).

<sup>234</sup> Position paper From The Netherlands, Belgium, Denmark, Germany, Italy, Latvia and Luxembourg EU policy priorities for the Commission period 2024-2029 Foster genuine and fair posting of third country nationals (TCNs) <https://www.rijksoverheid.nl/documenten/kamerstukken/2025/02/14/bijlage-1-position-paper-posting-of-third-country-nationals> accessed 29 June 2025.

<sup>235</sup> *ibid.*

<sup>236</sup> Houwerzijl and van Gardingen (n 107).

<sup>237</sup> *ibid.*

<sup>238</sup> Position paper From The Netherlands, Belgium, Denmark, Germany, Italy, Latvia and Luxembourg EU policy priorities for the Commission period 2024-2029 Foster genuine and fair posting of third country nationals (TCNs) <https://www.rijksoverheid.nl/documenten/kamerstukken/2025/02/14/bijlage-1-position-paper-posting-of-third-country-nationals> accessed 29 June 2025.

<sup>239</sup> Houwerzijl and van Gardingen (n 107).

<sup>240</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>241</sup> Position paper From The Netherlands, Belgium, Denmark, Germany, Italy, Latvia and Luxembourg EU policy priorities for the Commission period 2024-2029 Foster genuine and fair posting of third country nationals (TCNs)

the principle that posting is temporary, the new directive should also state the maximum periods of posting for various types of activities.<sup>242</sup>

## 4.2 Enforcement initiatives and extending existing protections

Separately from the adoption of a new legislative document, which potentially would be a very lengthy process requiring a lot of political will, the legal framework regulating the posting of TCNs and their right of residence could also be improved by reviewing and amending the scopes of already existing documents to include posted TCNs.<sup>243</sup> Such amendments could include the Single Permit Directive, which was adopted to establish a common application procedure for residence permits for TCNs who intend to work in a territory of a Member State, to simplify the procedures for their admission, and to facilitate the control of their status.<sup>244</sup> The Directive was recently amended by Directive (EU) 2024/1233.<sup>245</sup> However, neither the original nor the amended versions do not influence the procedures of obtaining residence permits by posted TCNs, as Article 3(2) of Directive (EU) 2024/1233 excludes this group from its scope of application.<sup>246</sup> The official reason for that is the legal fiction according to which posted workers do not enter the labour market of the host Member State, tracing back to the judgement in *Rush Portuguesa* (see section 2.1.).<sup>247</sup> However, this justification does not recognise that the issues connected with the right of residence in the host Member State are specific to posted TCNs, as EU citizens enjoy broader free movement rights and are never obliged to apply for a resident permit in the Member State where they are posted.<sup>248</sup> Therefore, amendment of the Single Permit Directive constitutes yet another missed chance to harmonise the rules on residence of the posted TCNs.<sup>249</sup> Additionally, if in practice applicable to posted TCNs, the Recast Single Permit Directive could allow them to benefit from the right to change their employer, while retaining their residence status for up to three months while

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<https://www.rijksoverheid.nl/documenten/kamerstukken/2025/02/14/bijlage-1-position-paper-posting-of-third-country-nationals> accessed 29 June 2025.

<sup>242</sup> Verschueren 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>243</sup> Houwerzijl and van Gardingen (n 107).

<sup>244</sup> Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1.

<sup>245</sup> Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) [2024] OJ L 2024/1233.

<sup>246</sup> *ibid* art 3(2).

<sup>247</sup> Pauline Melin, 'The Recast Single Permit Directive: an assessment of its changes for the rights of third-country nationals' (2025) 25 ERA Forum <https://link.springer.com/article/10.1007/s12027-025-00823-1#citeas> accessed 27 August 2025.

<sup>248</sup> Melin (n 254).

<sup>249</sup> *ibid*.

searching for new employment in the EU.<sup>250</sup> This could diminish the dependency on the employer and enhance protection against subjecting posted TCNs to exploitative working conditions.<sup>251</sup>

Another possible way to improve the situation of the posted TCNs is to strengthen the enforcement initiatives. The enforcement actions should be built on the right to legal certainty of the posted TCNs, as acknowledged in *SN and Others*.<sup>252</sup> The labour authorities from both the sending and host Member States, preferably with the support of the European Labour Authority (ELA), should tackle in their enforcement actions unlawful posting situations.<sup>253</sup> To ensure that enforcement is not indifferent to the situation of the TCNs, it should create an opportunity to extend their residence and work permits in the sending Member State, to prevent a situation where detection of fraudulent posting results in workers losing their right to stay in the EU.<sup>254</sup> This would be in line with PWD, stating in Article 5, that workers should benefit from the detection of the unlawful posting, when their employer 'improperly or fraudulently' made the impression that the worker's situation was covered by the PWD.<sup>255</sup> Additionally, enforcement cannot be based solely on the obligation of the sending Member State to check whether posting conditions are met.<sup>256</sup> Therefore, the documents issued by the sending Member State should clearly show that the situation of the posted TCN is lawful, including holding necessary residence and work permits, and having a necessary social security coverage.<sup>257</sup>

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<sup>250</sup> Houwerzijl and van Gardingen (n 107).

<sup>251</sup> *ibid.*

<sup>252</sup> *ibid.*

<sup>253</sup> *ibid.*

<sup>254</sup> *ibid.*

<sup>255</sup> Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16, art 5.

<sup>256</sup> Verschueren, 'Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative' (n 4).

<sup>257</sup> *ibid.*

## 5 Conclusion

Despite the growing importance of the posting of TCNs and recognising widely that this group faces a higher risk of exploitation, there is no legal document that would comprehensively tackle all the issues connected to this specific type of posting. The applicable rules arise from an interplay of various EU and national laws, creating an unclear and complex system. The current framework can be traced back to the creation of the posting through the CJEU's case law as a form of labour mobility based on Article 56 TFEU rather than Article 45 TFEU, which had even further-reaching consequences for posted TCNs than EU citizens. On the one hand, in *Rush Portuguesa* and *Vander Elst*, the Court opened a new way for TCNs, who do not enjoy the same free movement rights as EU citizens, to move and work in another Member State. On the other hand, the choice of legal basis resulted in the creation of in-built inequality between posted workers and those who exercise labour mobility rights, opening doors for the abuse of the posted TCNs, who are forced to accept lower remuneration and worse working conditions, to secure their right to stay in the EU. Additionally, the creation of posting through case law rather than the ordinary legislative process, gave rise to a framework that is fragmented and incomplete to this day. The biggest ambiguity of this system is offering the TCNs the possibility to work in another Member State without securing their physical presence there. Despite clarifications of some conditions for posting, such as the requirement of lawful and habitual employment in the sending Member State, or limiting the rights of Member States to adopt additional obstacles to the posting, such as the requirement of prior permanent employment or detailed checks, the subsequent cases of the CJEU failed to fill in this gap. Similarly, even though the adoption and revision of PWD improved the situation of posted TCNs, by ensuring the minimum level of protection of the labour law of the host Member State, the issues connected to the residence of posted TCNs are explicitly excluded from the scope of application of the directives. The right of residence of posted TCNs constitutes an intersection between the rules concerning the freedom to provide services and legal migration; however, neither fill in the persisting gap. The applicability of the EU migration policy is limited to the rights of the TCNs in the sending Member State and even the few documents that establish the intra-EU mobility systems, exclude posted TCNs from their scope of application. The Schengen rules constitute an exception; however, they provide only for a short-term mobility, allowing TCNs to stay on the territory of another Member State up to 90 days. As it was evident in the recent *SN and Others* case, this period is often too short for the provision of planned services. Despite having an opportunity in that case to grant the posted TCNs the right to reside on the territory of the host Member State, by recognising the presence of posted TCNs on the territory of the host Member State as an essential element of exercising the freedom to provide services by their employers, the Court rejected the argument of TCNs having a derived right of residence and left the

yawning gap in the legal framework as it was. The lack of harmonisation of this issue on the EU level and varying laws of the Member States results not only in a restriction of the right to provide services for employers employing workers from outside of the EU. It also increases the dependency of the posted TCNs on their employers, by diminishing the stability of the lawfulness of their stay in the EU. Therefore, an effective solution to this issue, a new legal instrument specifically addressing the posted TCNs, is long overdue. Such a directive should clarify the framework for posting of TCNs and regulate their right of residence in the host Member State, through creating an intra-EU mobility system specific to this group.

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