

TCNs on the EU labour market

Working paper

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Introduction

In recent years, the labour inspectorates and other social enforcement authorities, and NGOs have signalled a more prominent presence of third-country national migrant labour (hereafter TCNs) on the labour market of the EU Member States. A third-country national labour migrant is a citizen who resides and works in an EU Member State but does not have the nationality of one of the Member States (nor of one of the EFTA-countries). Although it is not an easy task to find representative and precise statistics, the impression, also in the media, is that this presence is increasing.¹

Both the Member States and the European Commission consider attracting (some) third-country national workers to the EU as a method to address labour shortages. For instance, the European Commission's Skills and Talent package aims to increase the effectiveness of the EU legal migration policy in this regard.²

In general terms, the position of TCNs is in many cases extremely vulnerable because their legal residence status is dependent on their employment status. In this working paper an effort is made to describe the position of TCNs on the EU labour market. This position is the result of an interaction between the immigration pathways enshrined in national immigration law regimes and the labour market access and the enforcement of labour standards in the country where TCNs carry out their work.

In the first paragraph, I provide some basic data that are available both with quantitative and qualitative information that can be found in studies and reports. The second paragraph sketches out the regulatory framework of applicable rules and regulation regarding labour standards and social security. The third paragraph looks after the, sometimes problematic, enforcement of the TCNs rights. The resuming part ends with considerations concerning the strengthening of the position of TCNs, starting from a fair recruitment to equal treatment at the workplace. Added is an Annex, with a synthesis of the outcome of a brief survey among labour inspectors, collecting experiences inspection services have with TCNs on the labour market. That synthesis was produced in the frame of the Eurodétachement project 'Posting of workers: strengthening and deepening international cooperation 2023-2024', funded by EU.³

¹ In a summary of the experiences of enforcement authorities and NGOs in 11 Member States (Annex 1), the counselling NGOs in Germany, for instance, reported an important increase of cases with TCNs involved. The Berlin office had in 2022 for the first time more cases with TCNs than with EU workers. The German Employment Agency identified different reasons for the increased arrival of TCNs: such as the 2020 Skilled Worker Immigration Law, influx from crisis-areas and more bilateral contracts with non-EU Eastern European and South-Eastern European countries. In: Cremers J. (2023) Dealing with third-country nationals working in the EU - a summary, unpublished.

² https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5740

³ www.eurodetachement-travail.eu

1. What do we know?

Between 2015 and 2019, the share of migrants in OECD capitals rose by 3.5 percentage points. TCNs often make up a substantial part of key workers in European regions. And most high-income countries of immigration recognise their need for migrant labour from third countries at both the high- and low-skill ends of the labour market.⁴

It is clear from studies and Eurostat-data that work is the most important driver and primary distinctive reason why third-country nationals migrate to the EU and EEA.⁵ Although many TCNs are living and working in the EU, the share of the population and of the labour force they represent varies greatly between countries. According to the most recent data of the OECD, labour migration comprised 21% of all migration in 2022 in the OECD-countries, an increase of 36% since 2021. In most EU Member States, the permanent-type labour migration continued to increase, following a trend since the mid-2010s. Temporary labour migration reached above 2019 levels, after a substantial fall due to the Covid-pandemic. Temporary seasonal workers constitute the main category here. Specifically for the EU countries, the number of permits issued to temporary foreign workers increased in 2022 with 24% year-on-year. Labour migration was in 2022 at a 15-year record level in the OECD-countries.⁶

Entrance to a Member State's labour market from outside the EU is based on the application of national migration legislation. Nationally controlled systems of migration legislation/regulation provide TCNs with legal access to a Member State where they are supposed to reside and work, with a work and residence permit for that Member State. The conditions for entrance are not harmonised and can be based on very diverged schemes and systems. In some countries, simplified arrangements and/or bilateral agreements facilitate this entrance. The role of their future employer (or 'sponsor') is a key condition in most procedures.

The position of TCNs on the labour market is often vulnerable in several respects. They are depending on their employer for their residence, for their employment, as well as for their housing and living. One important consequence of this complete dependency for the involved TCNs is a higher risk of exploitation, as both the intertwined key conditions of residence and work permit depend on the original employer in the country of entrance. In this respect, the right to move freely as fundament for a worker's mobility in the EU does not apply for TCNs. Even in a situation where breaches and abuses occur too often with mobile EU-workers, they enjoy more freedom and mobility rights on the labour market than TCNs.

Based on several studies, there is evidence of a weaker economic position and a lack of equal treatment on the labour market. Nationals of a non-EU country do not enjoy equal access to the labour market and social support as nationals. This will not be treated extensively in this paper. We just restrict ourselves to some findings listed in a series of documents, published by the OECD and the European Commission with indicators of immigrant integration. Close to one in five third-country nationals EU-wide felt belonging to a group that was discriminated against on the grounds of ethnicity, nationality or race. EU-wide, around two in five tertiary educated TCNs are overqualified for their job, compared with roughly only one in five nationals. TCN women experience a particularly high overqualification rate of 44%. Even with host-country degree TCNs remained more likely to be overqualified than nationals everywhere. They had a lower annual disposable household income and more risk to be hit by poverty than nationals in virtually every EU country. In the Benelux, Spain and Sweden, their income was less than 60% of nationals' median income.⁷

Posting of TCNs generally does not happen directly from outside the EU. However, once hosted in an EU Member State and in the possession of a work permit, TCNs can be temporary posted by their employer. Based on the free movement of services, it is allowed to post TCNs across the EU. Case-law of the European

⁴ OECD (2022) The contribution of migration to regional development, Policy Highlights.

⁵ Bogoeski V., Rasnača Z. (eds.) (2023) Interaction between labour law and immigration regimes.

⁶ OECD (2023) International Migration Outlook 2023

⁷ The last publication in this series was: OECD/European Commission (2023), Indicators of Immigrant Integration 2023: Settling In, OECD Publishing, Paris.

Court of Justice has confirmed that TCNs with a valid work and residence permit in one Member State are not exclusively tied to that country and can be posted to any other EU Member State. Over the years, the number of posted TCNs has increased, with an overrepresentation from Slovenia, Poland, Spain and Lithuania as the first countries of entrance. On the other side, Belgium, Austria, the Netherlands, Luxembourg and France are important receiving countries of posted TCNs. Relevant sectors are the road transport, storage and distribution, construction and agriculture.⁸

There is some evidence that posted TCN workers belong to the category low- and medium-skilled/paid that normally would have difficulties as TCNs to enter and obtain a work and residence permit from a receiving Member State. The regulation of their labour migration from outside the EU thus goes beyond the control of such a receiving country.⁹ As a consequence, the supposed execution of a service contract in another Member State, on behalf of an employer in the Member State of entrance, easily degenerates into a non-intended new form of a migration industry that can resort to lenient recruitment procedures for TCNs. This questions the national control and restrictions over the entry and residence of TCNs, often based on labour market tests, point systems and other conditions. It also shows the contradictions between nation-state formulated migration objectives and the often employer sponsorship dominated policy of TCN-recruitment necessary for the national labour market. A good example in this respect is Hungary that has a very antagonistic policy against the entrance of third-country nationals, whilst employers with a strategic partnership agreement with the Government relatively easy can employ TCNs from a country neighbouring Hungary in professions provided for in a communication by the Ministry of National Economy of for investment projects of preferential status for national economy considerations.¹⁰

In several studies, the phenomenon of a 'business model' that is applied with posted TCNs has come to the forefront. Some Member States are criticised because they act as the country of entrance, whilst the involved TCNs are immediately posted to another Member State, without having any working tradition in the country of first entrance. In such situations, the relatively easy entrance through national quota or bilateral arrangements, combined with the freedom of establishment and the free service provision, opens doors for the recruitment of cheap labour.¹¹

⁸ De Wispelaere F., De Smedt L., Pacolet J. (2022), Posted workers in the European Union. Facts and figures. Leuven: POSTING.STAT project VS/2020/0499.

⁹ Lens D., Mussche N., Marx I. (2021) A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants, *International Migration*, Vol 60.2.

¹⁰ <http://oif.gov.hu/images/formanyomtatvanyok-teljes/ENG/pdf/FOGALOMMAGYARAZAT%20EN.pdf>

¹¹ See for instance: Cremers J. (2014) Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping, ETUI, Brussels. Lens D., Mussche N. & Marx I. (2022) The different faces of international posting: Why do companies use posting of workers?

2. The regulatory framework

The entrance of TCNs to the labour market is, as said beyond, a national competence based on policies formulated by an individual Member State. Unlike the free movement of EU-citizens, the recruitment of TCNs falls under immigration right, a legal area that is almost exclusively assigned to the Member States. Member States decide on this entrance, based on points systems or national quota, 'sponsorship' by companies, on (bilateral) agreements with preferred and dedicated countries or national schemes aimed at high-skilled workers in parallel with the EU blue card scheme. This EU-wide admission scheme (the blue card directive) that aims to attract and retain highly qualified workers, particularly in sectors facing skills shortages, was revised in 2021.¹²

Rights that can be derived from a labour relationship.

In a 2023 study, I listed the rights that workers carrying out their work in the EU can derive from being in a labour relationship, independent from their juridical status. These rights, with high relevance for TCNs, are enshrined in sources of international rights and sources of European or EU-rights. In the frame of this working paper, I will only summarise and highlight these rights, and complete the summary with some remarks in relation to the social security.¹³

At international level, the core of eight ILO-standards is an important reference. The standards provide, inter alia, for the right of association and collective bargaining, prohibition of forced and child labour and discrimination in work and employment. An additional protocol prescribes prevention, protection, and compensation. For instance, all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, shall have access to appropriate and effective remedies, such as compensation (Protocol 2014).

At the level of the Council of Europe, the European Convention on Human Rights sets forth several similar fundamental rights and freedoms (such as the prohibition of slavery and forced labour, the right to form or join trade unions, right to an effective remedy, prohibition of discrimination). Individuals can bring complaints against any of the forty-six member states to the European Court of Human Rights after they have used up every possible chance of appeal at the national level.

At EU-level, the Treaty of the functioning of the EU and the EU Charter of Fundamental Rights refer to the international standards treated beyond. The EU-Charter lists several basic provisions, such as the prohibition of slavery, trafficking and forced labour (article 5), respect for private life (article 7), the freedom of association (article 12), the right to education (article 14), the equality between women and men, including in employment, work and pay (article 23) and equality before the law (article 20). Relevant in this context is the right to engage in work, the freedom to seek employment in any Member State and the entitlement to working conditions equivalent for all workers that are authorised to work in the EU territory (enshrined in article 15 of the Charter). Workers and their representatives have the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action (article 28). Moreover, protection against unjustified dismissal (article 30), the right to fair and just working conditions (article 31), and the entitlement to social security benefits of everyone residing and moving legally within the European Union and to social and housing assistance in order to ensure a decent existence (article 34) are laid down in the Charter.

Regulation (EU) No 492/2011 on free movement of workers within the EU prescribes that the prescribed workers' rights should be enjoyed without discrimination by permanent, seasonal and frontier workers and

¹² <https://www.consilium.europa.eu/en/press/press-releases/2021/10/07/legal-migration-council-adopts-blue-card-directive-to-attract-highly-qualified-workers/>

¹³ Cremers j. (2023) Supporting mobile migrant labour – the role of the trade union movement.

by those who pursue their activities for the purpose of providing services. The Regulation does not formulate access to justice as such but touches upon aspects of equal treatment and representation.

The European Pillar of Social Rights, adopted in 2017, sets out 20 principles to support fair and well-functioning labour markets as well as social protection and inclusion, including housing. Moreover, several EU Directives set minimum standards and aim to improve overall working conditions, with a protection targeting all workers. Some protect migrant workers more specifically. Relevant for migrant labour are also legal frameworks governing, for instance, corporate responsibility or public procurement that can include specific obligations regarding labour rights or liability for companies and employers (along supply and sub-contracting chains), and sanction and complaint mechanisms in case of violations¹⁴.

In Member States with labour legislation related to working time, sickness pay, mandatory minimum wages and holiday pay and/or generally binding collective agreements, all workers, whether organised or not, can derive rights from these provisions. In some Member States, the case law goes further and provides rights related to dismissal, liability, wage claims and compensation.

In addition, the Court of Justice of the EU (CJEU) limited Member States' discretion to define who is a 'worker' under national law and expanded the protective scope of EU employment legislation. The CJEU held, for instance, that employment law applies to third-country nationals who do not hold a regular residence permit. This decision clarified that migrant workers are 'workers', regardless of their status, and that they can derive rights employment law and connected labour standards. In other cases, the equal treatment of workers was, irrespective of the legal status, confirmed for parental leave.

This brief analysis of the appropriate international, national, European and EU labour standards reveals that several work-related general rights can be derived for all workers, including TCNs. This includes the right to engage in work, to an entitlement to working conditions and equivalent pay for all workers, and the right to protection against unjustified treatment. TCNs working in the EU should, in principle, be treated fair and on an equal footing in comparison with local workers. However, a worker will not often refer to the general standards, let alone bring breaches before court. The quoted standards can nevertheless function as the (legal) background for support action in addressing victimisation or engaging in judicial and/or administrative procedure on behalf or in support TCNs.

Specific rules and limitations for TCNs.

In parts of the *acquis* TCNs are sometimes explicitly included, sometimes excluded. Some EU-Directives limit the equal treatment referred to in the above-mentioned Regulation 492 to EU citizens. Directive 2004/38/EC can illustrate the exclusion as the prescribed equal treatment with the nationals of a Member State applies only to all Union citizens residing in the territory of the host Member State (Directive 2004/38/EC of the European Parliament and of the Council, 29 April 2004, article 24). On the other hand, special legal arrangements were concluded in the last decades for TCNs.

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (hereafter the Seasonal Work Directive) aims to provide measures in the fields of asylum, immigration and protection of the rights of third-country nationals.¹⁵ The objective is to contribute to the efficient management of migration flows and fair treatment of third-country nationals staying legally in Member States.

To a certain extent, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-

¹⁴ Keith, L (2022) Guide to Undocumented Workers' Rights at Work under International and EU Law <https://picum.org/wp-content/uploads/2023/08/Guide-to-undocumented-workers-rights-EN.pdf>

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0036&from=EN>

country nationals (hereafter the Sanctions Directive), follows the same reasoning. Its objectives are regulating and preventing illegal immigration.

The Single Permit Directive and Long-Term Residence Directive complement the instruments applying to third-country national workers legally residing in an EU Member State. They set out a series of rights and grant equal treatment with nationals of the EU Member State in which they reside in relation to working conditions, access to employment as well as freedom of association and membership of trade unions.¹⁶ TCNs can, for instance, cumulate residence periods of up to two years in other Member States in order to meet the requirements of a five-year residence period, necessary for a more permanent resident status. However, so far, the European Council has decided to accept only certain types of legal residence permits, such as holders of EU Blue Cards or residence permits issued for the purpose of highly qualified employment. Applicants must provide evidence of stable and regular resources that are sufficient to maintain themselves and their family members. EU long-term resident status grants status holders the possibility to move and reside in other EU countries, for instance for work or studies. A long-term resident status can be withdrawn in certain cases, for instance when a person has not had the main residence in the EU for a certain period.

After a long process of negotiations, the European Council and the European Parliament reached by the end of 2023 an agreement on the renewal of the Single Permit Directive. In the draft of the text that must be approved by both legislators, one of the amendments is that Single permit holders will have the possibility to change employer, subject to a notification to the competent authorities.¹⁷

The application of social security rights

The issue of social security will be touched upon only briefly here; it is a theme that requires more extensive treatment that goes beyond the aim of this paper. In general terms, the main objective of the EU-regulations of social security is to guarantee equal treatment. This equal treatment should thus also contribute to the integration of third-country nationals into a host country. And employers who employ TCNs are supposed to pay social security contributions as they do for regularly hired local workers. Member States may not make this right conditionally, for instance depending on a certain level of integration in a country. Verschueren, however, sees a growing tendency in the EU, justified by Member States' discretion in immigration law, to introduce conditions relating to the right to social benefits that are mostly disadvantageous to TCNs. These conditions are at risk of conflicting with provisions on the right to equal treatment with the nationals in a host country, as set down in the EU migration directives. In this respect, he also refers to a broad interpretation of these provisions as provided by the Court of Justice of the European Union.¹⁸

As a result, although every worker in the EU is and should, in principle, be covered by social security, notably TCNs are subject to uncertainties and gaps in the application of such coverage. TCNs who work temporary in the EU often are excluded or only partially covered. An analysis of various jurisdictions revealed that the general rule - coverage by social security - is subject to a range of exceptions and restrictions. This varies from exclusions from social security coverage to non-coverage for certain risks. The authors of a comparative study of the national application of social security to third country nationals conclude that, while social security regimes have been seen as a source of solidarity and insurance systems cushion (un)employment related risks, in the case of short-term migrant workers, social security frameworks in combination with different migration schemes have often resulted in systematic exclusion of workers and groups of workers.¹⁹

¹⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0098>
<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003L0109>

¹⁷ <https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/legal-migration-council-and-parliament-reach-deal-on-a-single-permit-directive/>

¹⁸ Verschueren H. (2023) Equal treatment as an instrument of integration. The CJEU's case law on social rights for third-country nationals under the EU migration directives.

¹⁹ Bogoeski V. and Rasnača Z. (eds.) (2023) Report on the social security rights of short-term third-country national migrant workers

Especially the intertwined relationship with national migration regimes, interferes with the type of social security benefits that short-term third-country national workers will be entitled to. The social security application for these workers is the result of a combination of the national migration policy, the relevant EU social security legislation (as enshrined in regulations and directives), and national welfare schemes and social security regulation in the Member States. In combination with the fact that TCNs are often carrying out work in precarious or casual work, this contributes to their vulnerability on the labour market. Or as the authors of the comparative study resume, there are three reasons why the social security issue – or more concretely, lack of access to certain social security components – contributes to put short-term third-country national migrant workers in a vulnerable or precarious position in host societies. First, the exclusion from immediate social security support upon the termination of employment. Second, limited access to health and pension insurance for some categories of short-term migrant workers yields both short-term and long-term precariousness and vulnerability. Third, issues with transferability of benefits and entitlements exacerbate the previous two.²⁰

3. The enforcement of workers' rights and labour standards

What to enforce

In the Directives that specifically deal with TCNs, such as the Seasonal Work Directive or the Sanctions Directive, explicit rules on enforcement are formulated. These rules apply, next to the ordinary rules that regulate the posting of workers or the workers' rights, which were mentioned in paragraph 2, that can be derived from a labour relationship (independent from the juridical status).

The Seasonal Work Directive obliges the Member States that issue third-country nationals with an authorisation for the purpose of seasonal work, to also provide them with information in writing about their rights and obligations under the Directive, including complaint procedures. It is a Directive that prescribes that the workers' accommodation must be adequate. Sanctions against employers and liability to pay compensation apply to non-respect of any outstanding obligations. This also applies to activities with subcontracting chains. Article 23 on equal treatment underlines several trade union related aspects, such as the right to strike and take industrial action, in accordance with the host Member State's national law and practice, freedom of association and affiliation and membership of an organisation representing workers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, i.e., the right to negotiate and conclude collective agreements, without prejudice to the national provisions on public policy and public security. Furthermore, Article 24 that settles the monitoring of rights, where provided for under national law for national workers, gives organisations representing workers' interests access to the workplace and, with the agreement of the workers, to their accommodation. Moreover, Article 25 states that seasonal workers may lodge complaints against their employers directly or through third parties, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with the Directive. These third parties may engage either on behalf of or in support of a seasonal worker, with his or her approval, in any administrative or civil proceedings, excluding procedures or decisions concerning short-stay visas. Research on challenges of mobility in the EU reveal, however, a severe lack of access to information regarding the working conditions and employment rights of seasonal workers, and the way to claim these rights. Even more, so far, no information is available on cases brought before the courts on behalf of seasonal workers.

The Sanctions Directive includes liability beyond the direct employer and compensation to workers of any outstanding obligations. Third-country nationals have, according to Article 13 of this Directive, the rights to lodge complaints directly or through third parties, such as trade unions or other associations. Third parties

²⁰ Ibid., 10-11.

which have, in accordance with the criteria laid down in their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of an illegally employed third-country national, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing the Directive. Designated third parties should be protected against sanctions, when helping to lodge complaints. In a 2021 Communication on the application of Sanction Directive, the European Commission explicitly accentuates that

the Employers Sanctions Directive requires the establishment of specific mechanisms through which irregular migrants can file a complaint to competent authorities either directly or through third parties (e.g., trade unions, employees' associations and non-governmental organisations) including when they are no longer present in the Member State'.²¹

Interaction with migration law

One of the most sensitive issues for TCNs is the fact that the enforcement and the tackling of bogus practices can significantly interact with migration law and illegality. Migrants' fear of seeking help and, as a result, being left vulnerable to immigration enforcement action is often manifest. Given their mandate and competences, the immigration offices and/or the border police will probably give more weight to immigration issues than to investigating labour market related abuses and safeguarding victims. This can lead to situations in which migrants are unable to differentiate between agencies that aim at enforcing immigration policy, and those whose primary objective is to support them. If authorities prioritise their immigration status over the harm they experience, the consequence can be mistrust from the side of migrants or the fear to be penalised for reporting abuse and exploitation. Especially in cases other TCNs are arrested, detained or deported, the message to other migrants is that they may face the same consequences if they report. This strengthens the level of vulnerability and the dependency from their perpetrators and allows them to continue abusing and exploiting.

A report of the European Union Agency for Fundamental Rights (FRA), clearly states:

Migrant workers in an irregular situation feel they cannot complain, they cannot confront their employer and they cannot report the exploitation to the police for fear of losing the job and of being returned to their country of origin. The fear of being reported to authorities is actively used by employers to threaten the workers and to exert control.

According to the report, the most common reason for not reporting abuses to the police is being afraid or scared of, for example, losing the job, of being arrested and returned to the country of origin, or of generally getting into trouble. The second most frequent reason for not reporting to the police was a belief that the police would or could not help.²²

The question is thus how to secure reporting mechanisms that prioritise the well-being and safeguarding of TCNs over potential immigration offences. Some Member States have developed policies to ensure that workers are not penalised for reporting abusive or exploitative conditions, at home, at work and beyond. They have introduced mechanism to encourage 'safe reporting'. One of the used principles is the concept of professional secrecy. This can guarantee confidentiality, if a worker approaches a labour inspector to report labour abuses and breaches. Moreover, it can remove the inspector's duty to report TCNs who might be undocumented to immigration authorities. Another mechanism is the regularisation. However, administrative requirements to regularise the worker bear the risk of increasing workers' dependence on the employer, and the risk of exploitation. It can lead to situations where TCNs stay with an exploitative employer because of the fear of losing their right to remain. In the FRA-report, practices are signalled with work without pay, only in exchange for a work contract, so that one can apply to the immigration authorities for a residence permit.

²¹ https://home-affairs.ec.europa.eu/system/files/2021-09/COM-2021-592_en_0.pdf

²² FRA (2019) Protecting migrant workers from exploitation in the EU: workers' perspectives

4. Resuming

The aim of this working paper was to briefly describe the position of third-country national migrant labour (or TCNs) on the EU labour market. As set out, this position is the result of an interaction between the immigration pathways enshrined in national immigration law regimes and the labour market access and the enforcement of labour standards in the country where TCNs carry out their work. As also signalled by the European Labour Authority, their dependency on the employer for the renewal of the work and residence permits make TCNs to a higher degree vulnerable. Given this particular vulnerability, it looks as if they are more open to exploitation, breaches of labour rights and terms and conditions of employment, to abusive practices and fake posting, and the irregular payment of social contribution in comparison with EU citizens who use the right of free movement of workers or with posted EU workers. The dependency leads to fear for the loss of their job and income and, as a consequence, their housing and residence rights. TCNs are reticent to complain or to seek assistance from the authorities.

TCNs who are recruited, based on business models that apply their posting abroad, directly after their entrance, are 'like soft wax, very malleable'. They have no clue where they are going to, what their rights are in that constituency, often they don't know who their employer is and how long the posting will take. They probably also do not know what posting is or to whom address in case of breaches. This can only be avoided if, at the very beginning of the recruitment process, strict conditions related to fairness are obligatory. Or like stated in the ILO Fair Recruitment Initiative, recruitment practices that are nationally and across borders grounded in labour standards, that are transparent and effectively regulated, monitored, and enforced, that protect all workers' rights, including fundamental principles and rights at work, and prevent human trafficking and forced labour, and that efficiently inform and respond to employment policies and labour market needs, including for recovery and resilience.²³

Third-country nationals who enter the EU labour market as a labour migrant are motivated to work. Their labour market participation is high and, in general terms, their arrival leads to a rejuvenation of the labour force. Notwithstanding this high labour market participation, the position of TCNs is weak compared to the position of nationals. This is reflected in discrimination, a mismatch between education and work to be carried out and income. They are often invisible and unrepresented. This should lead to a much heavier responsibility from the side of the user undertaking.

Enforcement of their rights is, as noted beyond, a very complicated affair. The rules that can be applied in this enforcement are spread over several national and EU regulations and their effectiveness can be questioned. Moreover, the thin line in abusive situations between the enforcement of workers' rights and the application of (restrictive) migration policies can lead to a balancing act between protection and policing. In such a situation it is necessary to establish enforcement procedures and reporting mechanisms that prioritise the well-being and safeguarding of TCNs over potential immigration offences.

²³ <https://www.ilo.org/global/topics/fair-recruitment/fri/lang--en/index.htm>

Dealing with third-country nationals working in the EU - A summary

Jan Cremers / Revised version, 19-10-2023

Introduction

In recent years, the debate about rights-based mobility in the EU, about cross-border labour recruitment and about the way to deal with skills shortages have brought the phenomenon of third-country nationals (hereafter TCNs) working inside the EU (back) on the agenda. Social partners, governments and inspection services all deal in different manners with the issue. In principle, the entrance of TCNs to the labour market is a national competence based on policies formulated by an individual Member State. Unlike the free movement of EU-citizens, the recruitment of TCNs falls under migration right, a legal area that is almost exclusively assigned to the Member States. Member States decide on this entrance, based on points systems or national quota, 'sponsorship' by companies, blue cards in case of high-skilled workers or on (bilateral) agreements with preferred and dedicated countries. Only in exceptional situation, like the war in the Ukraine, the EU can, if Member States agree, step in.²⁴

This summary looks after experiences that inspection services have with TCNs on the labour market. It is drawn from 12 contributions of partners involved in the Eurodétachement-project, covering in total 11 countries: Belgium, Bulgaria, Finland, France, Germany, Norway, Poland, Portugal, the Slovak Republic, Slovenia and Spain. This paper is neither an exhaustive, nor a complete overview of experiences. It has served as a background paper for the focus group of the project that was organised in September 2023. The structure of the paper follows the structure of the questionnaire and is supplemented with a brief overview of identified challenges.

1. National debates about opening up the labour market for TCNs, as a consequence of a lack of skilled labour.

Overall, Member States have to deal with an ageing workforce and unemployment is in several regions in the EU relatively low. This leads in general terms to debates about the (necessary or possible) recruitment of TCNs. However, not only the sense of urgency differs, also the chosen policies and methods vary. The shortages are becoming especially manifest in some sectors.

For instance, in Belgium shortages are manifest in construction, health care, meat processing, agri- and horticulture and IT. The country's regions decide, based on lists with occupational shortages, on work permits, the federal government is responsible for the residence permit.

In Bulgaria, the National Employment Agency produces analyses and forecasts. Shortages are common in the harvest season, and these are tackled with a relatively open access to the labour market for TCNs. For seasonal work up to 90 days no work permit is required, registration suffices. This practice is almost similarly used in Norway, where the employer is not obliged to apply for agriculture and seasonal work as long as the national quota are not exceeded.

In France, the policy goes in two directions. The country has announced a new law for the regularisation of undocumented workers in certain activities with shortages like construction, domestic and health care work. On the other side, more severe sanctions are announced for illegal migration. Special measures were formulated in recent years for certain occupations and regions that have to deal with shortages, including legal acts that open up the possibility to recruit TCNs.

In Germany, the search for skilled labour is very topical in health care, in transport and in the IT-sector. Germany has passed this year a new Law on the Entry of Skilled Workers, which opens opportunities for people without formal qualifications but with relevant work experience and good perspectives on the market. In some regions, the share of TCNs in seasonal work is remarkably high. However, the focus of the policy remains on employment in the skilled sector.

²⁴ Since the start of the Russian military invasion of Ukraine millions of people fled the country. To respond to this unprecedented situation, the EU agreed to activate the [Temporary Protection Directive](#) to help people fleeing war. The Directive became applicable on 4 March 2022. It allows to reside on EU territory and offers immediate protection and a clear legal status. Article 12 of that Directive prescribes: *The Member States shall authorise, for a period not exceeding that of temporary protection, persons enjoying temporary protection to engage in employed or self-employed activities, subject to rules applicable to the profession, as well as in activities such as educational opportunities for adults, vocational training and practical workplace experience.*

The situation in Poland is somehow special. Pursuant to the Act of 12 March 2022 on the Assistance Provided to Citizens of Ukraine, both refugees and Ukrainian nationals who entered Poland before the outbreak of the war and who have valid residence documents may take up employment without the need for their employer to obtain a permit or to register a declaration provided that the employer makes an online notification on engaging of a foreigner within 14 days of the date when performance of work was entrusted to this foreigner. Aside from this, Poland for many years applies a procedure of simplified access to the labour market based on a 'declaration of an employer on entrusting work to a foreigner' to nationals of the following countries: Belarus, Ukraine, Armenia, Moldova and Georgia. Before October 2022, this group of countries included also Russian citizens. The procedure exempts employers from the obligation to obtain a work permit on condition that they register a declaration in the County Employment Office – work may be performed for up to 24 months with the possibility of extending that period by registering a new declaration.

In general terms, the Republic of Slovenia is not considering to fully open its labour market to third-country nationals. But the country has an agreement on the employment of citizens of Bosnia and Herzegovina and an agreement on the employment of citizens of the Republic of Serbia. The agreements guarantee the controlled employment of these third-country nationals, as the procedures are carried out through the national employment services. Furthermore, Slovenia is currently in talks with other so-called third countries with which it would like to conclude an agreement on the employment of their nationals in the Republic of Slovenia.

Spain introduced measures to tackle the problem of labour shortages in a new Royal Decree. Royal Decree 629/2022 of July 26, 2022, amends the Immigration Regulations. The aim was to update and enhance the immigration legislation in relation to employment, and to cover needs and gaps in the labour market, partly by a regularisation of TCNs irregularly residing in Spain. The amendments have led to provisions related to the list of hard-to-fill positions. An immigration processing unit to manage procedures was created.

2. Are TCNs signalled in compliance and enforcement work?

The practice in most countries is that the authorities deal with TCNs in their compliance and enforcement on a regular basis, but not with special instruments. However, other partners and procedures might be necessary if irregularities are found, also because other competences are needed in such cases. One key problem for inspection services is the verification of the legal status of TCNs during site inspections. Concerning the frequency and features on the labour market of TCNs, the outlook varies, although, in general, reliable data are missing. Some respondents have the impression that posting of TCNs is increasing.

The counselling offices in Germany, for instance, signal an important increase of cases with TCNs involved. For instance, the Berlin office had for the first time in 2022 more cases with TCNs than with EU workers. The German Employment Agency identifies different reasons for the increased arrival of TCNs: such as the 2020 Skilled Worker Immigration Law, influx from crisis-areas and more bilateral contracts with non-EU Eastern European and South-Eastern European countries. The counselors identify a rising number of undocumented people working in Germany, a group that is not included in the official statistics of the Employment Agency because of their irregular status.

In the Finnish report, a substantial share of TCNs is signalled in the hospitality, the construction and agricultural workforce. In the field of seasonal work, there is in the Finnish report reference to a substitution, due to the war, of workers from the Ukraine by TCNs from new countries of origins.

3. Which type of (legal) status are TCNs working in?

Regarding the features and forms of work of TCNs, the answers provide a patchy picture. There is no dominant pattern. TCNs are directly engaged by firms, some are legally residing in another Member State and use the free movement to go to neighbouring countries, some are posted from another Member State, others are present in an illegal setting. The fact that TCNs for their first entrance depend for their visas on their employer can lead to situations of vulnerability. A separate segment of TCNs (in some countries up to 25%) has entered through high-skilled schemes (blue card or national systems). However, this segment is in most cases not very prominently present in the work of the enforcement authorities.

A special feature was added, i.e., the posting of TCNs residing in one Member State who are posted as bogus self-employed to another Member State. Furthermore, traditional connections exist between certain third countries and some EU-member states. For example, it was quite easy for a Belarusian citizen to get a work permission in Lithuania

or Latvia. They often signed a contract in that EU-country and were sent to work in other Member States. In some countries (for instance between Poland and Ukraine), these connections have a long history.

The Finnish reply specifies interesting findings of an investigation among foreign labour in 2022. 15% of workplaces had at least one foreign employee with no right to work in their current function. Instead, only a few individuals staying and working illegally in Finland were discovered. Each employee's residence permit defines the field(s) in which the permit holder can work. Working in an incorrect field was the most common deficiency. In the construction sector, more than every fifth inspection brought to light foreign labour with no right to work. In agriculture, at least one foreign employee with no right to work in Finland was found in every seventh inspections carried out. In hospitality, foreign labour with no right to work in Finland was found in every tenth inspection.

4. The handling of TCNs in compliance and enforcement activities.

In the first part of the summary, it was already noted that most authorities apply the same policy for all foreign labour. However, there are also relevant exceptions. The legislation in force and to be checked that allows third-country nationals to enter, stay and work is different. The fact that the legal status of TCNs is most often based on migration law, not on the usual free movement that applies for EU-citizens leads to additional control activities. These aspects also have an impact on the chosen or applicable sanctioning, varying from out of court agreements with the involved employer or the user undertaking, administrative sanctions, or proceedings based on civil or criminal law. It can also lead to other compliance and enforcement activities, and to more focused advice and assistance.

For instance, the counselling offices of Arbeit und Leben in Germany prioritises the protection of TCNs. They deal with enforcement of labour rights, compensation for underpayment, liability of user undertakings, and addressing cases to the relevant authorities. The basic philosophy is to settle cases as much as possible out of court for more than one reason. It is in the workers interest, given the mobile and temporary character of their stay, to have a smooth and quick solution, also because judicial procedures are cumbersome and of a long duration. Moreover, persons with an irregular status risk deportation even before a case is solved before a court.

The importance of handling TCN-cases in cooperation with other authorities is stressed by all respondents. The intensity of this cooperation can vary according to the found irregularities, as these can range from breaches of the rules to trafficking and labour exploitation. Depending on the seriousness and complexity this cooperation is set up with the juridical services, the police or the custom services, social security and tax instances, immigration and employment services, regional and local authorities, or NGOs. The intensity also varies as a consequence of (sometimes limited) competences to verify the validity of residence and work permits, or the identification of TCNs met during inspections. In most countries additional tasks are added to the inspection work, such as to check if the actual work performed is the work listed in the provided work permit and in an official information document specifying all the conditions and elements of employment or work for which permission was granted. And for instance, in Slovenia user undertakings and hirers who provide accommodation to foreigners must ensure compliance with the minimum housing and hygiene standards, which is also checked during inspections.

5. The used instruments.

The answers to this question are of course strongly related to the answers treated under point 4. Basically, authorities make use of databases and registration desks, risk assessment tools, notifications, warnings, IMI, administrative sanctioning, addresses to legal advisors or the court. They cooperate with social partners, with NGOs and local and regional institutions and authorities. A special instrument that is sometimes used if illegal or clandestine activities are found is the (temporary) closure of a site or activity. There are countries with extra applications that serve to better identify workers or to find other data (for instance, ADEXTRA in Spain, the UMA register in Finland, AGDREF in France or My Dia in Belgium).

To give one example, the Slovenian inspection services apply sanctions (with fines ranging from 500 to 75,000 euro), but also the prohibition of carrying out work until the elimination of an irregularity. These measures can be applied if employers fail to ensure minimum housing or hygiene standards, fail to give notice of termination of the employment contract in writing, fail to provide additional payments for night work, overtime work or work on Sundays or public holidays, or fail to guarantee workers' rights in accordance with the law. Employers who have been fined for an offence are prohibited from employing foreigners or engage them in work. In certain prescribed cases like the transfer of a worker to another user, non-payment of wages, criminal offences of labour exploitation or violation of fundamental

rights, an employer can be prohibited to provide services for 1, 2, 3 years, or 5 years from the final date of the offence or after a judgement becomes final.

For the direct contact with workers during inspections, most authorities make use of interpreters/translators and/or of questionnaires in the relevant languages. But also, instructions and other special documents in several languages about their rights handed over to workers that are not well informed are used. Thus, the instruments range from prevention by informing workers, to compliance control, enforcement activities and solving and settling cases.

In many cases, information exchange and other forms of cooperation with authorities abroad are crucial (see point 9).

6. Which instruments are seen as effective.

There is overall agreement that the ideal policy is a combination of preventive activities (prevention programs, communication campaigns for employers and foreign workers), including free of charge legal advice, and compliance and enforcement activities. Additionally, the necessity of planned and well-prepared campaigns was stressed by several respondents. Most respondents stress the added value of national and transnational cooperation as it can lead to better verification of recruitment practices and shed a light on issues such as substance and real activities in different countries. However, serious doubts are expressed whether all instruments are already fit for purpose. In the area of sanctioning, the reference to the (temporary) closure of sites or activities as an effective measure are confirmed. Thus, the most effective instrument are fines, which in turn lead to a prohibition of the employment and work of foreigners. However, very often the competence to activate this instrument is missing.

7. The obstacles that authorities are confronted with.

One fundamental challenge is signalled by almost every respondent, and that is the language and communication problem. Given the fact that TCNs can come from all over the globe, communication is hampered if no common language can be found. Other key problems have to do with the collection of the necessary evidence, with the verification of (falsified) documentation or a lack of their presence at the workplace and with difficulties to trace the real employer. Relevant is that authorities still have difficulties in finding the right counterparts in all countries involved, leading to too lengthy investigations or delays in the handling.

And finally, the vulnerable position and the dependency of a sponsor or intermediate are barriers for TCNs in seeking redress. Besides, it is not self-evident to find your way in an unknown constituency. The fear for being fired, for the loss of income with serious consequences for the families at home and for deportation lead to serious reservations from the side of the TCNs in contacts with competent authorities. Authorities signal problems to gain trust among TCNs.

8. Positive and negative experiences.

This part of the responses will be illustrated in the focus group. We resume relevant findings here.

In general, Member States that introduced regularisation schemes are positive about the results of this strategy. A similar effect is noted in situations where TCNs are explicitly protected, for instance with temporary residence permits, who actively cooperate in the tackling of labour exploitation and illegal practices. The establishment of new forms of cooperation with third countries is seen as an important achievement, it can help to enforce the rights of recruited TCNs and to clarify procedures.

Negative experiences often have to do with complicated and fragmented recruitment chains and the risk that TCNs end up in a clandestine environment. Problematic issues are the detection of competent authorities with, as a consequence, delayed procedures, the pressure to complete files before certain legal deadlines, and other reasons why people give up before cases are solved. Several respondents pinpoint worst cases, situations linked to labour trafficking and exploitation. This often goes hand in hand with poor housing.

9. With which (national and international) institutions and actors is cooperation installed?

At national level, the cooperation goes in two directions. First of all, cooperation is common and installed among and with the relevant stakeholders and partner organisations that have the task to deal with labour mobility and the enforcement of labour standards and labour legislation: labour inspections, social security and tax authorities, social partners and sectoral institutions, in many cases also NGOs or organisations active in the area of social protection. But with immigration issues coming in, the cooperation is, secondly, developed with the national authorities competent in these policy areas: the border and revenue services, national employment agencies, the police, immigration

services, and, in appropriate cases, criminal investigation offices and institutions specialised in human trafficking. In this area also, especially with a view to guarantee the necessary protection, the role of NGOs must be mentioned.

At transnational level, this double track is mirrored. However, given the fact that Member States have their own tradition in building up the labour market and the necessary systems of flanking social policy it is not always easy to trace the necessary cooperation partners. As a result, not only compliance and enforcement of decent and fair labour mobility is tackled in different ways, but this certainly also applies to activities that aim to guarantee fair and decent treatment of TCNs on the labour market. Beyond partners in other countries, there is reference by respondents to EU-institutions like EUROPOL and ELA, and (sometimes, especially if expertise is necessary) to European Trade Union Federations.

A special feature at transnational level is the existence of bilateral agreements between EU Member States and certain third countries. In other research, it has been concluded that these bilateral agreements can have a serious impact, especially regarding the recruitment for and entrance to the EU labour market. This will not be explored further in this paper.

10. How to find the right balance between policing and protection?

Most respondents express their concern in this area. In the text beyond, it was already mentioned that regularisation can be a righteous instrument. A second strategy mentioned was the provision of (temporary) residence/work permits at the start of proceedings that aim to tackle labour exploitation and illegal work. For instance, in Spain, a special law about rights and freedoms of TCNs includes measures for TCNs in irregular situation that cooperate with the authorities.

In general, the priorities are to inform TCNs of their rights and obligations/duties, to enforce minimum terms of employment and labour standards and to focus on legal advice, even in situations where TCNs are working without the necessary permits. In this respect, the TCNs are seen as the weaker party in a labour relation. The practice shows that TCNs can and will be more open and help investigations as soon as this policy is clear. In some countries, the enforcement authorities have special units with officers that deal with labour exploitation and trafficking.

Nevertheless, if there is no guarantee of protection, respondents are often worried about the consequences of reporting to authorities that are dealing with illegality. It is quite common in such situations to contact in parallel NGOs that are specialised in assisting victims.

11. What are the consequences of the performed activities for TCNs?

Respondents reply that activities are successful if TCNs are included on the labour market, legally employed with direct employment, normal working conditions and equal treatment. The aim is to bring an end to harmful practices and to violations of rights that can be derived from a labour relationship. Thus, the enforcement of TCNs rights, whether through compensation or sanctioning, in or out of court, comes first. In order to avoid negative consequences for victims of breaches and abuses, all interventions that lead to new opportunities on the labour market are seen as positive effects. Interesting is also the informative and preventive effect that the awareness raising activities can have on employers.

On the negative side, respondents report that it can be very frustrating if victims are deported in short notice, even without a decent tackling of the case.

Summary

During the focus group the participants discussed the results of the questionnaire and complemented the outcome with experiences, procedures and best practices.

In general terms, there are clusters of challenges that can be identified.

Although in essence the enforcement activities are not different from the ordinary practice of posting investigations and compliance control and some of the problems that can be traced are very often similar to the problems in cases with posted EU-workers (for instance, the questionable 'temporality' of the posting, the recruitment via long chains with no substance in the activity of the recruiter, questionable use of A1-forms, lack of regularity), the handling of such breaches can lead to additional complications that cannot be tackled by the regular enforcement authorities.

As soon as national migration policies become relevant, for instance when the outcome of an investigation is that the posting of TCNs is irregular and fraudulent, the handling of cases goes beyond the competence of the labour

enforcement institutions and must be handed over to other competent instances (the customs, border control, national authorities that deal with asylum, the police).

Whilst the EU Member States have developed tools, mechanisms and structures for cooperation in the area of labour mobility, these facilities are missing not only with authorities in third countries, but also between authorities that deal in the Member States with migration issues.

The collection of evidence becomes more complicated. Besides, sanctioning of local brokers and gangmasters outside the EU and collecting fines are much more complicated. It is not an easy task to find out who is the real employer. And there is sometimes a thin line between abuses or breaches of the posting rules and labour exploitation or trafficking. This can lead to the use of other sanctioning procedures. However, hard evidence becomes even more important.

TCNs are depending for their residence in the EU on a work permit that was handed out by one of the Member States, based on national migration policies. If they are posted, they become completely depending on their recruiter for the working, housing and living conditions. This leads to a very uneven balance of power. Therefore, the establishment of good cooperation with governmental and non-governmental organisations, outside the social scope, is key.

Whilst EU-citizens that are posted still have the possibility to return to their sending country, posted TCNs are always at risk of losing not only their job, but also their residence permit. In the most notorious cases their stay becomes 'illegal', and they become undocumented and/or homeless. As a consequence, TCNs can be reluctant to contact authorities. This leads to additional challenges for inspection services. Moreover, the common assistance of ordinary mobile labour (through official helpdesks or websites that provide information about working in a Member State, for instance) is completely 'out of place'. In such situations, it is crucial to build trust and to handle with the utmost confidentiality.