

Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals

Final Report

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EXECUTIVE SUMMARY

This Final Report on cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals (the Report) is prepared under Specific Contract ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 2 - Report on the Cooperation Practices and Challenges between Member States. Its main purpose is to assist the European Labour Authority (ELA) and the Member States in the effective and uniform application of European Union (EU) legislation regulating the posting of third-country nationals, in respect of both labour mobility and social security coordination.

The Report focuses on the **administrative cooperation practices, possibilities and challenges between Member States' competent authorities** in relation to the **posting of third-country nationals**. National research mapped the reality of posting of third-country national workers in each Member State, and is presented in country reports identifying the relevant competent authorities, an overview of the trends and statistics on the number of inbound and outbound postings of third-country nationals, legal framework, applicable administrative requirements for the purposes of inbound posting (including with regards to the right to stay), enforcement framework and practices, as well as issues and good practices in enforcement and cooperation with other Member States.

The Report was prepared on the basis of EU-27 country reports and desk research at EU level. The Report first presents the EU legal framework applicable to the posting of third-country nationals, followed by an overview of the national legal frameworks, including the challenges in the interpretation and application of EU law at national level. It then focuses on the specific situation of posted third country-nationals and presents the administrative requirements applicable to the posting of these workers. The Report presents also a horizontal analysis of the enforcement of the rules applicable to the posting of third-country nationals in the Member States, and the related cooperation and exchange of information between Member States. It then highlights the main challenges hindering adequate enforcement. At the end, the Report presents an overview of the labour mobility flows of posted third-country nationals in the EU and among Member States. Finally, a set of operational conclusions is put forward to address the challenges identified.

The Report includes three Annexes: Annex 1 maps the obligations stemming from EU legislation applicable to posted third-country nationals, in particular those binding the Member States; Annex 2 lists the administrative requirements for the posting of third-country nationals in each Member State.

The Report first draws several main **conclusions on the legal framework applicable to posted third-country nationals and the specificities of their situation**:

- The posting of third-country national workers is a **growing phenomenon** of labour mobility, which appears as an alternative to the traditional avenues of migration to and between EU Member States;

- ▶ The EU legal framework on posting of workers¹ applies equally to EU and third-country national posted workers as the legislation does not distinguish on grounds of the posted workers' nationality. This is mirrored at national level as most Member States do not regulate the posting of third-country nationals specifically and the same general rules on posting apply equally to posted EU workers and to posted third-country nationals;
- ▶ The national frameworks covering posting of third-country nationals, beyond the requirements set out in EU legislation, vary considerably between the Member States in their complexity and the level of protection provided to workers, with matters like remuneration or leave being largely regulated by collective agreements;
- ▶ It is well-established CJEU case-law that **Member States may not impose administrative formalities or additional conditions** for posted third-country nationals who are employed by a service provider established in another Member State and who are *lawfully and habitually employed* in that Member State. In particular, they may not require a work permit; CJEU case-law is subject to different interpretations in the Member States;
- ▶ The EU acquis on **legal migration** and the national rules on migration of the sending Member State, including relevant bilateral immigration agreements with third countries, are important when considering the specific situation of third-country national posted workers as they determine the residence status of the third-country national in the sending Member State;
- ▶ Abusive practices exist in relation to posting, such as, social fraud, fake posting, letterbox companies, undeclared work or posting, complex contracting lines resorting to intermediaries. Enforcement of the applicable legislation is crucial to tackle such practices. Third-country national posted workers present a **higher degree of vulnerability** than EU posted workers for a variety of reasons, in particular, their dependency on the employer for the renewal of the work and residence permits and language barriers. Given their particular vulnerability, third-country national workers are more exposed to abusive practices and fake posting, breach of labour rights and terms and conditions of employment, and the irregular payment of social contributions;
- ▶ Posting implies the application of more than one legal order, thus efficient **cooperation between Member States** must be ensured, particularly considering the specificities that result from the application of internal migratory frameworks. Many of the cooperation issues emerging between Member States affecting EU posted workers also impact the posting of third-country nationals. However, some **specific issues** were identified in respect of third-country nationals: the need to access information on the accuracy of the identity of the worker; the need to check if the worker has the right to reside in the sending country, including taking into consideration possible expiry, non-renewal or withdrawal of their status; the need to check if the worker has the right to work in the sending country; the need to verify the length of the worker's residence and work in the sending Member State prior to posting; applicable social security regime; or proof of professional qualifications;
- ▶ Austria, Belgium, Germany, and the Netherlands are the main receiving countries of posted third-country national workers, whereas Poland, Slovenia, and Spain are among the main sending

¹ The EU legal framework on posting of workers includes the Posting of Workers Directive (PWD) and the Revised PWD, Directive (EU) 2020/1057 for posting drivers in the road transport sector, and the Enforcement Directive. Directive (EU) 2019/1152 on transparent and predictable working conditions in the EU is also relevant as it establishes additional information rights for posted workers. The social security legislation applicable to the posted worker are Regulation (EC) No 883/2004 on the coordination of social security systems and its implementing Regulation (EC) No 987/2009, by force of Regulation (EU) No 1231/2010, which extends the coordination rules for social security laid down in those Regulations to third-country nationals legally resident in the EU and in a cross-border situation.

countries; Ukraine and Bosnia and Herzegovina have the **highest numbers of nationals posted** within the EU, followed by Serbia and Belarus;

- ▶ Third-country national posted workers in the EU work most within the **construction, (road freight) transport, and agriculture sectors**;
- ▶ The **main corridors** between Member States for posted third-country nationals are: Ukrainian and Belarusian workers are posted from Poland and Lithuania, and Bosnian workers are posted from Slovenia. Most of these posted workers go to western European countries, such as Austria, Belgium, France, and the Netherlands.

The Report identifies a number of challenges relating to the applicable EU and national regulations, enforcement of the applicable rules at national level, and cooperation among Member States. It also presents good practices and possibilities to enhance and improve enforcement and cooperation, in particular.

The **main challenges** are presented below, together with a summary of the proposed **conclusions** in each case. These are organised in four main groups: enhancing the application of the legal framework, administrative cooperation, enforcement and other conclusions. The main body of the report identifies good practices in the Member States.

1. Enhancing the application of the legal framework

The first set of challenges identified relate to the need for **enhancing the application of the legal framework**. Of these, the first challenge identified concerns **diverging interpretations and application of EU law and CJEU caselaw**. The interpretation and application of the current EU legal framework on posting of third-country national workers must consider the caselaw of the CJEU. However, almost thirty years after the decision in *Vander Elst* was issued, the CJEU's interpretation of the rules applicable to third-country national posted workers in light of the Treaties continue to raise questions and issues of interpretation and practical application impacting on the work of Member States' authorities dealing with third-country national posted workers. Moreover, not only does the interpretation and application of the CJEU caselaw possibly differ between the national authorities in the different Member States, also authorities in the same Member State may have different interpretations. This has an impact on the enforcement of the applicable rules and creates more space for abuse and circumvention, thus affecting the posting of third-country national workers.

Within the limitations of the existing EU legal framework, one of the most suitable avenues to help solve such questions and issues include guidelines clarifying and reminding the applicable rules in accordance with the CJEU caselaw set out above.

Conclusion 1): Guidelines can be provided to Member States to ensure the correct application of EU law in this matter, including the requirements resulting from CJEU case-law. Conclusion 1) includes a list of concepts and non-exhaustive parameters and examples to be considered as a basis for discussion.

The second challenge relates to **mutual learning and understanding of national legal frameworks between the Member States**. In fact, beyond the minimum requirements set out at EU level, Member States have the competence to regulate additional areas of law that are of relevance to posted third-country nationals, such as working conditions and labour rights, occupational health and safety requirements, or the right to reside and work in the home Member State. As posting implies the application of more than one legal order, the differences in the national legal frameworks pose specific challenges.

Firstly, it complicates the exchange of information between the competent authorities and potentially reduces its efficiency. Authorities from one Member State may request information that is not easily understood by the authority of another Member State because of differences in national procedures, documentation or internal organisation (e.g. specific social security benefits available to a worker, documents required). Although the single national websites that are accessible via the Your Europe Portal already contain some relevant information, they are intended to inform citizens and businesses, posted workers and employers, on the applicable terms and conditions of employment and do not necessarily contain comprehensive information that could facilitate cooperation between authorities.

Secondly, in the case of third-country national posted workers, the issue is exacerbated by the fact that national legal frameworks on migration also apply, with quite distinct rules on the right of entry and right to stay in the sending and host Member States. As the posting of third-country national workers requires that they have a residence and work permit in the sending Member State, inspection authorities in the host Member State may have to navigate the rules of that other Member State to understand whether the posting complies with all the legal requirements. Given that Member States retain significant room for regulating the right to stay and work at national level, and with different rules applying across the EU Member States, this entails cumbersome work for inspection services, particularly when the competent authorities do not have competence on migratory matters.

Conclusion 2): Information exchange on the applicable legal regimes on posting and regimes intersecting with posting, specifically, in the case of posted third-country nationals, on the right of entry and work, should be further encouraged.

In order to facilitate competent authorities' access to the relevant information, two complementary avenues could be considered:

- ▶ The development of an up-to-date *information tool* for competent authorities, encompassing a description of the national legal framework on posting of workers, including the national framework on enforcement, possibly with links to the applicable legislation translated into English. It should include information specific to the posting of third-country national workers, namely the relevant rules on the right to stay and work. The information provided would be the responsibility of the relevant Member State, but could follow a common structure developed with assistance of ELA and the European Commission, within the context of the *Posting 360 mutual learning and understanding multi-annual programme to be launched in 2023*. National liaison officers could be encouraged to update the information on a regular basis, e.g. biannually. Member States would also be requested to notify any changes to the contact information or internal organisation.
- ▶ The development of a *practical handbook* for competent authorities, on enforcement of the applicable rules on posting of workers and cooperation between Member States, could help to navigate the different legal frameworks. This tool could target more practical or specific situations creating bottlenecks in the cooperation between Member States. A handbook could contain practical examples of situations that could occur and how they can be addressed.

2. Administrative cooperation

A first challenge in the context of **administrative cooperation** relates to the **differences in inspection landscapes in the Member States**. Each Member State remains competent for defining the institutional landscape of authorities responsible for addressing issues raised by the posting of third-country national workers in its territory. As a consequence, the Member State competent authorities best suited to

respond to a request for information may not always be easily identifiable by the authorities of the requesting State. This is reinforced in the case of third-country nationals, where immigration authorities may also need to be involved. The internal organisation in the Member States may also vary, resulting in additional difficulties in identifying the right addressee for the cooperation or information request. This may be a consequence of decentralisation in certain Member States, or differences between the domestic and the other Member States' distribution of competences, investigatory powers or the way inspections are carried out.

The concern with the identification of the right counterpart in another Member State emerged very clearly from the stakeholder consultation, despite the existence of two relevant tools: the IMI directory and the Your Europe Portal.

Conclusion 3): Exchange of information between Member States on the relevant competent authorities in the context of posting of TCN workers should be regular. This should include information on the immigration authorities where these need to be involved. Such information should cover both information on the scope of their powers as well as the relevant contact information.

In order to facilitate the identification of each Member State's competent authorities for the different issues emerging in the context of posting of third-country nationals, an easily updateable *directory* is being developed which will include the identification of the competent authorities in each Member State, the scope of their powers and the relevant contact information. The information included in this directory will need to be regularly updated, which could be ensured via a questionnaire to be filled out by national liaison officers (e.g. biannually) in view of confirming the information and by requesting Member States to notify any changes to the contact information or internal organisation.

Another issue in the context of administrative cooperation relates to the **insufficiently efficient use of cooperation tools**. On the exchange of information between Member States, stakeholders pointed to the added value of **the IMI system**, but noted several aspects that **could benefit from improvement**. These relate to the entities authorised to participate in the IMI, its material scope and articulation with EESSI, and the type of information requested and how it is requested, and other issues impacting the efficiency of the platform.

Notwithstanding, many of the issues identified seem to result from a failure to understand or apply the relevant rules on the functioning of the system and to explore its full potential. One particular issue regards the access to the IMI of other competent authorities in the national legal order with competences in the context of posting of third-country national workers (e.g. immigration or police authorities) in view of ensuring that cooperation requests are dealt with within the applicable deadlines. In this connection, it should be noted that access to the IMI system is coordinated at Member State level and, as such, the expansion of access to the IMI to other competent authorities could be considered internally. In alternative, internal cooperation should be ensured between the authorities participating in the IMI and other authorities relevant in the context of posting of third-country nationals not linked to the IMI to promote the quick flow of information between the competent authorities and, thus, the reply to the cooperation request. Moreover, on the concerns regarding the lack of efficient cooperation, it should be noted that the Enforcement Directive establishes rules on time limits and on the procedures to follow in case of difficulty meeting a request by the requested authority or in case of persisting problems in the exchange of information or a permanent refusal to supply information (Article 6 of the Enforcement Directive).

It also resulted from the consultation and desk research that a wider use of digital tools or its diversification can also contribute to make access to relevant information easier and quicker, as well as cooperation swifter. Some good practices may even be identified as warranting wider dissemination as apt to resolve issues affecting horizontally enforcement and cooperation in the Member States.

Conclusion 4): In order to ensure efficient cooperation and exchange information concerning posted workers, as stipulated in the PWD and the Enforcement Directive, a closer consideration and application of the rules applying to IMI is essential. The potential of the platform should also be further explored.

In the context of ELA's *IMI-PROVE mutual learning and understanding multi-annual programme* launched in 2022, particular attention could be devoted to the topic of posting of third-country nationals, i.e. requests on relevant information for the enforcement of the applicable rules in such cases.

In addition, the use of digital tools for the exchange of information should be improved and supported. The promotion of good practices, in particular those apt to resolve issues affecting horizontally enforcement and cooperation in the Member States, is warranted.

Finally, swift and efficient cooperation between Member States is hindered by **practical issues or problems relating specifically to cooperation between two or more Member States**. In the context of cooperation between two or more Member States, notably those with a significant inbound/outbound relation, concrete practical issues or problems often arise. Targeted bilateral or multilateral exchange initiatives may constitute an important tool directed at solving such issues, help to facilitate contact between competent authorities, open communication channels, and educate authorities from other Member States on the functioning of inspectorates. Such exchanges could, for instances, provide an opportunity to explain why some documents are needed, to ask questions, and to translate and explain legal concepts interpreted differently by the various national authorities.

Specifically, considering the challenges of posting of third-country national workers, such exchange could serve the purpose of clarifying the conditions under which third-country nationals have the right to work and stay in the host country, as well as assisting the detection of fraud and abuse (false identity documents, falsified employment contracts, non-existent EU companies, false residence permits, etc.) and the identification of accommodation-related issues.

In addition, such exchanges could also provide the forum for the exchange of good practices which constitute an important tool for competent authorities to learn from each other and consider the approaches taken by their counterparties in other Member States to issues similar to the ones identified domestically.

Given the additional complexity in relation to posted third-country nationals - which requires a thorough understanding of their status in the sending Member State – as well as language difficulties in communicating with third-country national workers, joint or concerted inspections may constitute a relevant instrument for effective inspection operations. Joint or concerted inspections may also have a learning effect through the exchange of good practices on the ground.

Conclusion 5): Measures should be taken at national level to further encourage exchange of information and good practices between Member States, particularly those with significant

outbound/inbound flows, notably by promoting exchange activities on posting of third-country national posted workers.

3. Enforcement

The third main group of challenges relates to **enforcement**, specifically the issue that national inspectorates face different challenges that **hinder performance of their functions** in relation to posted third-country nationals. These include lack of human resources, lack of preparation or knowledge of national authorities, and difficulties faced by inspectors in the field (primarily language barriers).

Conclusion 6): The provision of specific training, also through the use of the various capacity building opportunities offered by ELA, to competent authorities on the topic of posting of third-country nationals, including other authorities than the enforcement authorities, e.g. immigration authorities or authorities issuing PD A1 forms, should be encouraged. The specific guidelines and materials prepared to support the correct application of the EU legal framework could be used in this regard.

Moreover, staff exchanges and secondment schemes between national authorities, also facilitated by ELA, particularly between those with significant outbound/inbound flows, could also be promoted. In addition, the potential offered by ELA in terms of facilitation and support to concerted and joint inspections at cross border level should be exploited in full.

Finally, sufficient resources should be dedicated to the enforcement of the legislation on the posting of third-country nationals.

4. Other conclusions: awareness-raising and data collection

A last set of challenges includes the **lack of awareness of posted third-country nationals regarding their rights** and of **employers on the rules on posting of workers**. Posted third-country nationals' lack of awareness of their rights in the context of posting stems largely from language barriers in accessing the relevant information. This leaves them more vulnerable to abuse and less likely to submit complaints on breaches of their rights and of the applicable rules. Employers also face difficulties in accessing the relevant information on the applicable rules on posting of workers, including third-country nationals, to other Member States and thus ensuring compliance. The information available to employers is also provided on the single national websites, but the same issues apply, e.g. difficulty accessing information on collective agreements.

Conclusion 7): The implementation of measures to ensure that posted third-country national workers have access to the relevant information on their labour rights should be encouraged. This also applies to the exchange of best practices.

In this regard, some initial examples of Member States' good practices in tackling specific challenges in relation to the application of the EU rules on posting of third-country nationals are presented in this Report. To ensure a more-encompassing gathering of best practices, such best practices could be compiled into a booklet or in other information materials directed at competent authorities, presented at WG meetings and workshops, or other training activities. This should complement other initiatives by ELA to gather and compile good practices.

Finally, awareness-raising campaigns targeting third-country national posted workers and employers could be organised, focusing in particular on the most relevant sectors of activity employing posted third-country nationals or areas where issues have already been detected.

Conclusion 8): The accessibility and usefulness of the information provided on the single national websites should be regularly assessed. ELA's assistance in assessing and improving national websites should be considered. In this connection, measures to increase its visibility and quality could be considered and adopted, as appropriate.

Challenges were also identified in relation to the **collection of data**, specifically the **lack of comprehensive and comparable data across the EU**. Currently, there is no uniform method of data collection on third-country national posted workers, which compromises the comparability of the data gathered by Member States. The lack of collection of comprehensive data on posted third-country national workers (e.g. intra-EU typical work patterns, usual types of fraud, main issues encountered during inspections, practical issues relating to enforcement of sanctions), compromises competent authorities' ability to understand the reality in certain industries, adopt evidence-based policy, enforce the applicable rules, cooperate with competent authorities from other Member States, and effectively tackle fraud and undeclared work.

Conclusion 9): The existing national methods of collection of the relevant data on the posting of third-country nationals should be reassessed and measures should be taken, where appropriate, to ensure that the information collected is appropriate and sufficient for enforcement purposes and for policy-making. A systematic data collection of data on posting of third-country nationals – and posting in general – on the EU level is desired to obtain the necessary comparable data. The European Labour Authority can provide assistance and logistical support in systematising data collection on the EU level. Coordination with the Administrative Commission for the coordination of social security systems would be required when it comes to data related to the application of Regulations 883/2004 and 987/2009.

1.0 Introduction

This Draft Final Report (the Report) has been prepared under Specific Contract ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 2-Report on the Cooperation Practices and Challenges between Member States. The Report focuses on the administrative cooperation practices, possibilities and challenges between Member States' competent authorities in relation to the posting of third-country nationals. Its main purpose is to assist the European Labour Authority (ELA) and the Member States in the effective and uniform application of European Union (EU) legislation regulating the posting of third-country nationals in relation to labour mobility and social security coordination.

Deriving from the freedom to provide services, posting of workers is a form of cross-border labour mobility anchored in the Treaties of the EU. The posting of third-country nationals lies at the crossroads of labour mobility within the EU and migratory policy. As a growing phenomenon² with specific challenges, it warrants particular attention. The growth is explained by the fact that it constitutes a more flexible and expedited form of mobility for third-country nationals within the EU, as an alternative to more cumbersome traditional avenues available for third-country nationals to move from one Member State to another³.

Despite the shortcomings in the collection of data on posting, available figures suggest that the importance of posted third-country nationals is increasing throughout the EU, with an upward trend for most countries with data available over multiple years (see Section 4.1). The share of third-country nationals of total posted workers in some Member States (e.g. Belgium, France, Luxembourg, the Netherlands) has also increased. In Slovenia, 60% of posted workers are third-country nationals, the largest share in the EU, followed by the Netherlands (35%). The share of third-country nationals also exceeds 20% in Belgium, France and Austria.

The main receiving countries of posted third-country national workers are Austria, Belgium, Germany, and the Netherlands, with Poland, Slovenia and Spain among the main sending countries. Ukrainian and Bosnian are the most represented nationalities of posted third-country nationals, followed by Serbian and Belarusian workers. The available data show that posted third-country nationals often work in the construction, (road freight) transport, and agriculture sectors.

There are several main corridors between Member States for posted third-country nationals. Ukrainian and Belarusian workers are most often posted from Poland and Lithuania, while Bosnian workers are often posted from Slovenia. Most of these posted workers go to western European countries, such as Austria, Belgium, France, and the Netherlands. Other important corridors are the posting of Brazilian workers from Portugal to Belgium, and the posting of Moroccan workers from Spain and Italy to France.

The EU legal framework on posting of workers does not deal specially with third-country nationals, as the legislation applies equally, regardless of the nationality of the posted worker. In practice, however, the posting of third-country national workers implies specific challenges. The intersection of the different

² Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', *Con3Post*, 2020, pp. 7, 28-30; Lens, D., Mussche, N. and Marx, I., *Europe's ever-expanding mobility patterns posting, third-country nationals and the single European labour market*, Working Paper no. 19.08, University of Antwerp - Herman Deleeck Centre for Social Policy, 2019, p. 2; De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 34-35.

³ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', *Con3Post*, 2020, pp. 64-65; Lens, D., Mussche, N. and Marx, I., *Europe's ever-expanding mobility patterns posting, third-country nationals and the single European labour market*, Working Paper no. 19.08, University of Antwerp - Herman Deleeck Centre for Social Policy, 2019, pp. 2, 8; Mussche, N., Corluy, V. and Marx, I., *The rise of the free movements: how posting shapes a hybrid Single European Labour Market*, IZA Discussion Paper No. 10365, Institute of Labor Economics, 2016, pp. 3, 15-17.

sets of rules requires the intervention of several types of national authorities and stakeholders. In addition, third-country nationals posted workers are particularly vulnerable, given their higher level of dependency on their employer, notably for the renewal of their work and residence permit⁴. This leaves them open to exploitation and abuse, and also impacts on the efficiency of enforcement⁵.

Enforcement of the applicable rules in the context of posting third-country nationals requires the application of more than one legal order – that of the sending Member State and of the host Member State. Cooperation between Member States is thus necessary to ensure full enforcement of the applicable rules. This is not, however, specific to the posting of TCNs. The existing difficulties and shortcomings in the cooperation and exchange of information between national authorities that apply to the posting of workers in general also apply - perhaps more acutely - to the monitoring of compliance with the applicable rules on posting of TCN workers. The migratory aspect of third-country nationals' presence in a Member State adds a layer of complexity that is not normally dealt with by the authorities competent for posting matters.

ELA was established in 2019, with the primary aim of helping 'Member States and the Commission in their effective application and enforcement of Union law related to labour mobility across the Union and the coordination of social security systems within the Union'⁶. Although the field of migration falls outside the scope of ELA's mandate, posting of third-country nationals raises several issues and challenges which ELA may play an essential role in addressing, notably, by facilitating access to information and facilitating and enhancing cooperation between Member States in the enforcement of Union law covered by its scope of action.

The Report seeks to facilitate the understanding of EU legislation on posting, identify challenges in its implementation and in cross-border cooperation, and propose possible solutions to address them. It begins with a presentation of the EU legal framework, including the relevant instruments on the right to reside and work in the sending Member State, followed by the main issues and practices impacting on the posting of third-country national workers (including the right to reside and to work), as identified in the horizontal analysis of the national legal frameworks. The Report then deals with enforcement: firstly, the relevant administrative requirements for posting and the requirements relating to the right of stay of posted third-country nationals, as a basis to understand how enforcement works in practice. Secondly, it examines national practices and enforcement challenges, as well as the existing tools for cooperation and exchange of information and the issues hindering efficient and effective mutual assistance in the context of posting of third-country nationals. It then analyses the labour mobility flows of posted third-country nationals and looks at the available methods for collection of data. Finally, it proposes a set of operational conclusions for the application of EU law on posting of third-country nationals.

⁴ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', *Con3Post*, 2020, p. 8.

The control of employers over the posting process exacerbates such dependency - Lens, D., Mussche, N. and Marx, I., *A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants*, International Migration, 2021, p. 13.

⁵ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 106-107; Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', *Con3Post*, 2020, pp. 8, 64-65; Lens, D., Mussche, N. and Marx, I., *A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants*, International Migration, 2021, p. 13; Lens, D., Mussche, N. and Marx, I., *Europe's ever expanding mobility patterns posting, third-country nationals and the single European labour market*, Working Paper no. 19.08, University of Antwerp - Herman Deleeck Centre for Social Policy, 2019, pp. 7, 8.

⁶ Article 1(2) of Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

2.0 Legal framework applicable to posting of third-country nationals

2.1 EU legal framework applicable to posting of third-country nationals

This chapter describes the EU legal framework applicable to posting of third-country nationals and provides an overview of Member States' –and, indirectly, employers' – legal obligations deriving from EU legislation applicable to posted third-country nationals. While the analysis focuses on the EU legislation that is within the scope of ELA's mandate, it briefly presents any other EU legislation that impacts posted third-country nationals and is important for a full understanding of their legal situation. The analysis also covers the relevant Court of Justice of the European Union (CJEU) case-law.

2.1.1 Posting of third-country nationals: at the crossroads of the freedom to provide services in the EU and the right to reside and work in the EU as a third-country national

Posting of workers is a **form of cross-border labour mobility** within the context of the freedom to provide services, with a legal basis in Articles 56 to 62 of the Treaty on the Functioning of the European Union (TFEU). Directive 96/71⁷, on the posting of workers (PWD) defines a '**posted worker**' as a worker who for a limited period carries out their work in the territory of a Member State other than the State in which they normally work (Article 2(1)). In the *Vander Elst* case, the CJEU confirmed that the possibility of employers established in one Member State⁸ to send their employees to perform economic activities in another Member State also applies where the **posted workers are third-country nationals**, if they are lawfully and habitually employed in the Member State where their employer is based⁹. The CJEU stated that lawfully and habitually employed third-country nationals who are posted to another EU country do not require work permits in the EU Member State where they are posted.

Consequently, the Member State where the employer of the posted third-country national is established is competent for all aspects related to the work permit of the posted third-country national and their right to reside in its territory, including when that person temporarily provides services in another Member State. While a core set of rights and obligations indistinctly applies to EU and third-country national posted workers, this feature distinguishes the situation of posted third-country nationals from that of posted EU workers. This Report will briefly note the aspects of the right to stay and to work in an EU Member State that are relevant to understanding the full legal picture applicable to posted third-country nationals.

⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, pp. 1-6).

⁸ Although the PWD and the Enforcement Directive were originally established to guarantee appropriate working conditions for employees on secondment between EU Member States, it is the EU and European Economic Area (EEA) Member States, and Switzerland that follow the guidelines established by the EU. The EU rules on social security coordination apply in 31 countries (the 27 European Union Member States (EU-27) + Iceland, Liechtenstein, Norway and Switzerland) and no longer apply to or in the United Kingdom (UK) as of 1 January 2021. However, the rights of persons covered by the Withdrawal Agreement concluded between the EU and the UK continue to be protected. Finally, Regulation (EU) No 1231/2010 does not apply to Denmark.

⁹ CJEU, Judgment of the Court of 9 August 1994, *Raymond Vander Elst v Office des Migrations Internationales*, C-43/93, EU:C:1994:310.

- a) The PWD and CJEU's caselaw on the freedom to provide services for lawfully and habitually employed third-country nationals

The main legal instrument regulating the posting of workers in the EU is the **PWD**, which establishes minimum requirements for the terms and conditions of employment of posted workers. While workers posted to another Member State continue to be employed by the sending company and subject to the laws of that Member State, the PWD ensures the posted worker is entitled to a set of core rights established by the applicable laws in the host Member State. Its legal basis is the freedom to provide services (Article 56 TFEU) and it aims to contribute to the removal of obstacles to the cross-border provisions of services in the EU internal market. The PWD also establishes a framework for cooperation and information exchange, in particular for the enforcement of its provisions.

The PWD does not contain any specific provisions for posting of third-country nationals¹⁰. Recital 20 refers briefly to third-country nationals, stating that the Directive shall apply without prejudice to bilateral agreements concluded by the EU with third countries and Member State legislation on intra-EU mobility of third-country service providers and entry, residence and access to employment of third-country workers.

However, it is well-established **CJEU case-law** that the right to temporarily send workers to another Member State to **provide services** covers third-country nationals employed by a service provider established in a Member State and *lawfully and habitually employed* there. The posting of third-country national workers is, according to the CJEU's decision in **Vander Elst**¹¹, subject to the **lawful and habitual employment** of the posted third-country national in the sending Member State. These concepts have not been further developed by the CJEU in the *Vander Elst* case, other than the conclusion that the facts of the case did constitute such an instance of lawful and habitual residence - *in casu*, in Belgium, notably, as the workers were legally resident in Belgium, held Belgian work permits, were covered by the Belgian social security scheme (par. 3) and had valid employment contracts governed by Belgian law (par. 24).

In subsequent caselaw, the CJEU clarified that legislation imposing a requirement of prior existence of an employment contract of indefinite duration for at least six months¹², at least one year's prior employment¹³ or an employment contract of indefinite duration¹⁴ is disproportionate to the objectives sought. In this regard, the CJEU noted that "the Court did not couple the concept of 'lawful and habitual employment' with a requirement of residence or employment for a certain period in the State of establishment of the service provider"¹⁵.

¹⁰ The PWD contains a reference to undertakings established in a third country. Article 1(4) PWD stipulates that undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State. Posting of workers, including third-country nationals, from such companies as regulated under national law can therefore not take place under more favourable conditions than posting by companies set up in the EU.

¹¹ CJEU, Judgment of the Court of 9 August 1994, *Raymond Vander Elst v Office des Migrations Internationales*, C-43/93, EU:C:1994:310.

¹² CJEU, Judgment of the Court (First Chamber) 21 October 2004, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-445/03, EU:C:2004:655, pars. 32 and 44-45.

¹³ CJEU, Judgment of the Court (First Chamber) 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, C-244/04, EU:C:2006:49, par. 63; CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 50.

¹⁴ CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 50.

¹⁵ CJEU, Judgment of the Court (First Chamber) 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, C-244/04, EU:C:2006:49, par. 55; CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 51.

In addition, the CJEU also implicitly referred to “habitual employment” as meaning that the posted workers are “carrying on their main activity in the Member State in which the service providing undertaking is established”¹⁶.

As a consequence of *Vander Elst*, Member States are precluded from requiring a **work permit** for third-country nationals posted by an undertaking established in another Member State *and who hold a valid residence and working permit in the sending State*.

Similarly, in *Commission v. Luxembourg*¹⁷, a rule was at stake whereby all service providers deploying non-EU personnel in Luxembourg should have their personnel obtain an individual working permit or, alternatively, have a collective working permit issued for them. This permit was conditional on the existence of an employment relationship of unlimited duration for at least six months before the posting. This rule only concerned the right to work and applied in addition to any entry requirements to which workers were already subject.

The CJEU further reinforced the **freedom to provide services** by undertakings posting third-country national workers in subsequent caselaw, notably dealing with national legislation requiring the posted worker to apply for a residence permit in the host Member State. In *Commission v. Austria* (C-168/04), a national provision which had the practical result of imposing that the posted third-country national worker had to hold a visa or a residence permit in the host Member State, as it established an automatic refusal to issue an entry and residence permit in the event of the entry without a visa of a lawfully posted worker, was declared disproportionate¹⁸.

In alternative to the contentious procedures in place in national legislation analysed in *Commission v. Luxembourg*, *Commission v. Germany* (C-244/04) and *Commission v. Austria*, the CJEU held that an **obligation for the service provider to provide information** to the authorities in the host Member States showing that the situation of the workers concerned is **lawful** as regards matters such as **residence, work permit and social coverage in the sending Member State** would give, in a less restrictive but as effective a manner, the competent authorities in the host Member State a guarantee that the situation of the posted third-country national workers is lawful and that they are carrying out their main activity in the Member State where the service provider is established¹⁹.

The CJEU has further decided on other administrative formalities or additional conditions for lawfully employed third-country nationals impacting on the freedom to provide services²⁰.

¹⁶ CJEU, Judgment of the Court (First Chamber) 21 October 2004, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-445/03, EU:C:2004:655, par. 46; CJEU, Judgment of the Court (First Chamber) 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, C-244/04, EU:C:2006:49, par. 41; CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 57.

¹⁷ CJEU, Judgment of the Court (First Chamber) 21 October 2004, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-445/03, EU:C:2004:655.

¹⁸ CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 67.

¹⁹ CJEU, Judgment of the Court (First Chamber) 21 October 2004, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-445/03, EU:C:2004:655, par. 46; CJEU, Judgment of the Court (First Chamber) 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, C-244/04, EU:C:2006:49, par. 41; CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 57.

²⁰ The CJEU established the kinds of measures imposed on cross-border provision of services that amount to restriction to the free movement of services. In the Judgment of the Court (Sixth Chamber) of 25 July 1991 *Manfred Säger v Denemeyer & Co. Ltd.*, C-76/90, ECLI:EU:C:1991:331, it clarified that not only discriminatory measures could amount to unlawful restrictions to the free movement of services, but also ‘...to any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where

It is therefore clear from CJEU case-law that third-country nationals may work in a Member State without having the required working permit, as long as such work is provided in the framework of an employment contract with an undertaking based in any other Member State. There is no specific harmonising legislation at EU level on the requirements that Member States can impose for the posting of third-country nationals specifically. However, the key principles for the posting of workers from CJEU case-law and the PWD relating to workers' employment conditions apply regardless of the nationality of the posted workers, as long as the third-country national is lawfully and habitually residing and working in the sending Member State.

Finally, in the cases of *Gebhard*²¹ and *Schnitzer*²², the CJEU found that the **temporary nature of the service provision** in the host country has to be determined in light of not only the duration of the service but also other aspects, such as regularity, periodical or continuous nature. Thus, in the context of complex projects (e.g. in the construction sector), the temporary provision of services may be extended for a longer period of time. This is the same for EU citizens and third-country nationals who are posted. According to the *Schnitzer* ruling, an activity carried out on a permanent basis, or without foreseeable limits in its duration, does not fall within the freedom to provide services and cannot be considered a posting. At the same time, there is **no minimum duration** for a posting in the PWD. A posting lasts as long as is necessary to provide the service to a client, after which the worker returns to their workplace in the sending Member State. In this context, it should be noted that a short-term posting may fly under the radar of authorities as some Member States exempt short-term postings from notification to the competent authorities (see Section 3.1; see Section 4 for challenges in data collection).

- b) The right to reside and work in the sending Member State: shared competence between the EU and Member States

The **right of residence and employment in the sending Member State** is regulated by the EU acquis on legal migration, as well as by national rules on the right to reside and work in the territory of the sending Member State. Even when a third-country national is posted to provide temporary services in another Member State, the aspects related to their right to stay and work in the EU remain within the competence of the **sending Member State** where their employer is established²³.

A number of EU directives have been adopted on the basis of Article 79 of the TFEU, which sets out the development of a **common immigration policy** as one of the EU's objectives, to streamline the legal migration of third-country nationals to the EU. These directives establish rules relating to admission criteria, procedures for the application for residence and work authorisations and the rights of **specific categories of legal migrants to the EU**. They also set out a **common framework for the renewal**,

he lawfully provides similar services' (e.g. provision of services subject to the issue of an administrative licence for which the possession of professional qualifications is required).

The CJEU further established that restrictions of the free movement of services can be accepted only if justified by overriding reasons of public interest (e.g. social protection of workers in the construction industry) and if they are proportional (i.e. the measure is suitable to achieve the objective and does not go beyond what is necessary). The CJEU has also scrutinised national measures in cases on the requirements to have a representative on the territory (Joined Cases C-369/96 and C-376/96 *Arblade* - Judgment of the Court of 23 November 1999 Criminal proceedings *against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* ECLI:EU:C:1999:575; and C-319/06, *Commission v Luxembourg* - Judgment of the Court (First Chamber) of 19 June 2008, *Commission of the European Communities v Grand Duchy of Luxembourg*, Case C-319/06, ECLI:EU:C:2008:350), requirements to obtain authorisation from the authorities in the host Member State (Judgment of the Court (Sixth Chamber) of 25 July 1991 *Manfred Säger v Dennemeyer & Co. Ltd.*, C-76/90, ECLI:EU:C:1991:331), requirements to make a declaration to the host Member State's authorities before posting (C-515/08, *Santos Palhota* - Judgment of the Court (Second Chamber) of 7 October 2010 Vítor Manuel dos Santos Palhota and Others C-515/08 ECLI:EU:C:2010:589) and requirements to keep and maintain social documents on the territory of the host Member State (Joined cases C-369/96 and C-376/96 *Arblade*).

²¹ CJEU, Judgment of the Court, 30 November 1995, *Gebhard / Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, EU:C:1995:411.

²² CJEU, Judgment of the Court (Fifth Chamber) 11 December 2003, *Bruno Schnitzer*, C-215/01, EU:C:2003:662

²³ Independent of any registration or temporary residence permit requirements that may apply in the Member State of posting.

rejection or withdrawal of a work and residence permit, such as, for example, timeframes for the renewal of a permit or the minimum grounds for its withdrawal. The directives also aim to ensure equal treatment between lawfully working third-country nationals and Member State nationals of their country of residence when employed there.

The current EU legislative package on legal migration includes the following directives.

Table 1. EU instruments regulating third-country nationals' right of residence

Seasonal workers

Directive 2014/36/EU establishes the conditions of entry and stay of third-country nationals entering the EU for the purpose of employment as seasonal workers. Under such a regime, third-country nationals are entitled to stay and work in a Member State. Each Member State shall determine the maximum period of stay for seasonal workers but it should not be less than five months and not more than nine months within a 12-month period.

Intra-corporate transfers

Directive 2014/66/EU governs the conditions of entry and residence for more than 90 days of third-country nationals and their family members in the framework of intra-corporate transfer (ICT). ICTs cover situations in which a third-country national working for an undertaking established outside the EU is sent to a Member-State based entity belonging to that undertaking or to the same group for a temporary secondment or for occupational or training purposes. ICTs shall last for a maximum of one to three years depending on the position held by the employee.

Beneficiaries of temporary protection

In case of mass influx of displaced persons from third countries which threatens the effective process of arrivals by Member States' asylum systems, **Directive 2001/55/EC** establishes the procedure to provide immediate and temporary protection to third-country nationals unable to return to their country of origin. The Temporary Protection Directive was activated for the first time by **Council implementing Decision 2022/382** adopted in March 2022, following Russia's military invasion of Ukraine. The Decision grants temporary protection to persons residing in Ukraine on or before 24 February 2022, including Ukrainian nationals, stateless persons, third-country nationals other than Ukrainians who held refugee status or equivalent protection in Ukraine before 24 February 2022, as well as their family members. Member States are allowed to extend temporary protection to other persons legally residing in Ukraine and who cannot return under safe and durable conditions to their country of origin. According to the Directive, persons covered by the temporary protection automatically benefit from a residence permit for the entire duration of the protection, access to employment and self-employment, as well as the right to family reunification in certain cases. The expedited nature of the procedure granting work permits to beneficiaries of this temporary protection implies that those workers can be posted almost immediately after their arrival in the EU.

Workers

The Single Permit Directive (**Directive 2011/98/EU**) establishes rules for the issuance of residence permits for third-country nationals coming to a Member State to work. It facilitates the procedure to work and reside in an EU Member State by the creation of a single permit combining the national work and residence permit.

The EU has adopted specific directives regulating the right to entry and residence of other categories

of third-country nationals. For instance, the Blue Card Directive (**Directive 2009/50/EC**), regulates the conditions of entry and residence for more than three months of highly skilled third-country national workers and their family members.

Long-term residents

In accordance with **Directive 2003/109/EC**, third-country nationals shall be granted long-term resident status after having resided legally and continuously within a Member State's territory for five years. It establishes that long-term residents enjoy equal treatment with nationals in respect of access to employment and the right to reside in the territory of other Member States for a period exceeding three months, subject to the conditions laid down in the Directive.

Third-country national family members of EU citizens

Third-country nationals can derive their right to reside and work in the EU from **Directive 2004/38/EC**. Adopted in 2004, this instrument establishes rules relating to the right of residence of family members (irrespective of their nationality) of EU citizens having exercised their freedom of movement. The Directive covers a spouse, legal partner, direct descendants of the EU citizen or of their spouse/legal partner if they are under 21 or dependent, and the dependent direct relatives in the ascending line of the EU citizen or their spouse/legal partner. The family members of EU citizens falling within the scope of the Directive are also entitled to take up employment in the Member State where they have been granted residence.

Directive 2003/86/EC regulates the right to family reunification of third-country nationals lawfully residing in the EU. According to the Directive's provisions, family members authorised to join their sponsor in the EU are also granted to right to access employment.

Legal migration is a shared competence between the EU and Member States, thus **Member States** remain **competent** for several aspects of a third-country national's right to work and reside in their territory. The procedural aspects regulated at EU level in the directives described above are **harmonised requirements** which should be integrated into existing national procedures for obtaining work and residence authorisations. Consequently, for **third-country nationals covered by those EU instruments**, the renewal or withdrawal of a work or residence permit, even if conditions might be harmonised at EU level, is taken by the Member State authorities. For posted third-country nationals, this means that the decision on the renewal of their work permit needs to be submitted in the sending Member State, in accordance with the procedure set out in national law, based on the minimum requirements of the EU directives, even when they are temporarily providing services as a posted worker in another Member State. Similarly, a decision to withdraw a residence and work permit (e.g. for non-compliance of the employer with social security legislation or for a conviction for undeclared work²⁴), shall be taken by the authorities of the sending Member State. This has important implications for the enforcement of the EU legislation applicable to posted third-country nationals (see Section 3).

The ICT Directive, for example, contains intra-EU mobility provisions that facilitate immigration formalities for ICT third-country nationals posted to another Member State and who do not require a residence authorisation in that Member State. The provisions of the PWD apply equally to the mobility

²⁴ Examples of grounds for the withdrawal of a seasonal worker permit set out in Article 9 Directive 2014/36/EU.

of ICT workers who exercise their right to intra-EU mobility, as they are considered posted workers when temporarily providing services in the other Member State.

For third-country nationals who do not have a right of residence based on one of the EU legal migration directives that contain intra-EU mobility provisions, additional residence requirements may exist in the Member State of posting. Nevertheless, the work permit and related right to reside in the EU will be determined by the sending Member State, and its renewal or withdrawal are therefore competencies of the sending Member State.

For **third-country nationals not covered by specific EU instruments**, Member States remain competent to determine the applicable conditions and rules for entry, residence and the right to work.

Finally, some Member States have concluded bilateral immigration agreements with third countries, which may set out more favourable entry and residence conditions for citizens of those third countries (see Section 2.2).

Further EU legislation is anticipated as part of the EU legal migration package presented by the Commission in 2022. The Commission highlighted that between two and three million nationals from non-EU countries come to the EU legally each year²⁵. Although not covered by ELA's mandate, EU rules determining third-country nationals' right to reside and work in the EU are therefore essential for understanding the full legal picture of posted third-country nationals. Indeed, as highlighted above, their lawful employment in a Member State is a precondition for posting.

Specific difficulties were identified by stakeholders in relation to certain categories of third-country national workers, such as seasonal workers and ICT trainees. For example, situations were identified in which posted ICT trainees remained subject to the labour law of the sending country when they should be subject to the posting rules when posted to another EU Member State²⁶. These issues require particular attention from the enforcement authorities of the Member State of posting, a sufficient understanding of the specificities of the migratory status of the third-country national in the sending Member State, and close cooperation between the competent authorities of both Member States.

2.1.2 Core set of rights applicable to posted third-country nationals

The protection of posted workers, both EU nationals and third-country nationals, is provided by a comprehensive set of core rights that combine sending country and host country provisions.

The **PWD** establishes a core set of rights in relation to the **terms and conditions of employment** of posted workers, both to protect these rights within the EU and to facilitate a level-playing field in the Member State of posting. They include remuneration, rest periods, annual leave, and occupational health and safety requirements. Other directives also regulate the terms and conditions of employment of posted workers, namely Directive 2019/1152/EU²⁷, on transparent and predictable working

²⁵ European Commission, 'Legal migration: Attracting skills and talent to the EU', Press release, 27 April 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2654

²⁶ Interviews with academic experts.

²⁷ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (OJ L 186, 11.7.2019, pp. 105-121).

conditions, and Directive (EU) 2020/1057²⁸, laying down specific rules for posting drivers in the road transport sector.

The **social security of posted workers** is regulated through Regulation No 883/2004 on the coordination of social security systems²⁹. Regulation (EU) No 1231/2010³⁰ on the inclusion of third-country nationals in EU social security coordination offers third-country national workers posted from one Member State to another the same social security protection as EU citizens moving within the EU, provided they meet certain conditions.

These directives apply fully to posted third-country national workers in respect of the terms and conditions of employment, their enforcement, the rules specific to posting of drivers, and the requirements on transparent and predictable working conditions.

a) Legislation on the employment conditions of posted workers: recent developments

In the rulings on the cases of *Viking*, *Laval*, *Rüffert* and *Luxembourg*,³¹ issued in 2007 and 2008, the CJEU interpreted key provisions of the PWD. Particularly in *Laval* and *Luxembourg*, the CJEU ruled that 'the core labour rights enumerated in the PWD are not to be considered as minimum floors but should be considered as an exhaustive list of rights that must be respected by the posting companies'³². This applies in the same manner to EU and third-country national posted workers.

Member States were also confronted with other challenges, such as increasing wage gaps between countries and contrasting labour costs (which contributed to a significant increase in the use of posted workers by businesses), abusive practices (e.g. rotational posting, the use of letterbox companies³³) and difficulties in enforcement, mostly owing to a lack of clarity regarding the applicable standards and weaknesses in the cooperation between authorities³⁴. This led to the adoption of **Directive 2018/957/EU (Revised PWD)**³⁵ on 28 June 2018³⁶. Similar to the original PWD, its provisions apply indistinctly to EU and third-country national posted workers. The Directive did not explicitly integrate the *Vander Elst* case-law.

²⁸ Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 (OJ L 249, 31.7.2020, pp. 49-65).

²⁹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p.1).

³⁰ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ L 344, 29.12.2010, pp. 1-3).

³¹ Judgment of the Court (Grand Chamber) of 11 December 2007 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* C-438/05 ECLI:EU:C:2007:772; Judgment of the Court (Grand Chamber) of 18 December 2007 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* C-341/05 ECLI:EU:C:2007:809; Judgment of the Court (Second Chamber) of 3 April 2008 *Dirk Rüffert v Land Niedersachsen* C-346/06 ECLI:EU:C:2008:189 and Judgment of the Court (First Chamber) of 19 June 2008 *Commission of the European Communities v Grand Duchy of Luxembourg* C-319/06 ECLI:EU:C:2008:350.

³² Voss, E., Faioli, M., Lhernould, J., Iudicone, F., *Posting of Workers Directive – current situation and challenges*, Study for the EMPL Committee, Directorate-General for Internal Policies, Policy Department A: Economic and Scientific Policy, European Parliament, 2016, p. 31.

³³ Cremers, J., *Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping*, Policy Brief No. 5/2014, European Trade Union Institute (ETUI), 2014. "Letterbox companies", in a definition proposed by the European Commission's Directorate-General for Justice and Consumers, are "those companies that are incorporated in one Member State but do not perform any activity in that Member State or anywhere else" - European Commission, 'Letterbox companies: overview of the phenomenon and existing measures – Executive Summary', *Publications Office of the European Union*, p. 5., 2021

³⁴ European Parliament, '[Posting of workers](#)', *Fact Sheets on the European Union*, 2021.

³⁵ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ L 173, 9.7.2018, p. 16–24).

³⁶ Pursuant to Article 3(1) of the Revised PWD, Member States had until 30 July 2020 to incorporate the measures of the Revised PWD into national law.

The Revised PWD makes no separate reference to third-country national workers. However, some of the amendments introduced, considering the most frequent characteristics associated with the posting of third-country nationals, are worth noting:

- ▶ **Remuneration and allowances:** the terms and conditions of employment laid down by law, regulation or administrative provision, and/or by collective agreements or arbitration awards in the Member State where the work is carried out relating to remuneration apply also to posted workers, and not just the 'minimum rates of pay' ensured by the previous PWD. The principle of equal pay for the same work in the same place therefore applies unless there are more favourable rules for the worker that apply in the Member State³⁷. The revision introduces clearer rules for allowances, providing that allowances specific to the posting shall be considered to be part of remuneration, except if they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging (Article 1(7), par. 2). The mandatory elements that constitute remuneration in a Member State must be published on a single national website (Article 3(1), par. 4);
- ▶ **Working conditions:** the Revised PWD extends to posted workers the terms and conditions of employment applicable in the Member State of posting in respect of the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work, and on the allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons;
- ▶ **Posted temporary agency workers:** The Revised PWD ensures equal treatment of posted temporary agency workers. It obliges Member States to ensure that temporary employment undertakings or placement agencies guarantee the terms and conditions of employment that apply pursuant to Article 5 of Directive 2008/104/EC³⁸ (Article 3(1b)). The option to require undertakings to guarantee other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out remained (Article 3(9)).

In 2020, specific legislation was adopted for the posting of workers in the international road transport sector. **Directive (EU) 2020/1057** came into force on 1 August 2020 and lays down specific rules with respect to the PWD and the Enforcement Directive for **posting drivers in the road transport sector**, in particular to clarify when a cross-border transport operation is considered a posting. Member States had until 2 February 2022 to transpose the provisions of the new Directive into national law. **Drivers posted within the framework of the Directive can either be EU nationals or third-country nationals legally residing in an EU Member State and employed in that Member State.**

The Directive distinguishes the **types of transport operations** to which rules on posting should apply. The general criterion for such distinction is the degree of connection with the territory of the host Member State. One crucial question for enforcement authorities in determining whether a third-country national driver in a Member State can be considered posted is whether there is a habitual country of work and whether the conditions of the Directive on posting of drivers are complied with. A driver shall not be considered posted when performing:

- ▶ International bilateral transport operations – understood as transport operations based on a transport contract from the Member State where the operator is established (Member State of

³⁷ With the exception of supplementary occupational retirement pension schemes.

³⁸ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ L 327, 5.12.2008).

establishment) to another Member State or to a third country, or from another Member State or a third country to the Member State of establishment;

- ▶ Limited additional activities of loading and/or unloading (i.e. cross-trade operations) carried out in the context of bilateral operations in the Member States or third countries that the driver crosses;
- ▶ Transit through the territory of a Member State without carrying out any activity of loading or unloading;
- ▶ Initial or final leg of a combined transport operation, as defined in Council Directive 92/106/EEC, where the road leg on its own consists of an international bilateral transport operation.

The driver shall be considered posted when performing cabotage or cross-trade with all of the applicable rules and rights. The Directive is considered a ‘first step towards a truly “socially responsible road transport sector” in which fair working conditions and social protection will be guaranteed for the driver’³⁹.

In its Framework for Action on Road Transport in February 2022⁴⁰, ELA noted that ensuring compliance with the applicable rules in this sector faces a number of specific challenges, particularly the lack of information for posted drivers and language barriers appear as particularly relevant for posting the of third-country nationals. In addition, the reference to the common phenomena of undeclared work and fake posting in this sector should be of particular concern, given that third-country nationals are a significant group of workers in the road freight transport sector⁴¹ and are especially vulnerable to abusive and unlawful practices (see Section 3.1).

Additional clarification on the posting of drivers was provided by the CJEU in *Van den Bosch Transporten BV and Others*⁴², where it ruled that a worker who provides very limited services in the territory of the Member State to which that worker is sent cannot be regarded as ‘posted’ because there is no sufficient connection to this Member State. The characteristics of the provision of services to which the worker in question has been assigned, as well as the nature of the activities carried out by that worker in the territory of the Member State concerned constitute relevant factors in determining whether such a connection exists. To that extent, drivers merely transiting through the territory of a Member State or carrying out only cross-border transport operations from the Member State where the transport undertaking is established to the territory of another Member State would not be considered as posted workers. Similarly, in *Dobersberger*⁴³, the CJEU excluded workers performing on-board services on international trains from the PWD’s scope of application, instead considering that the absence of sufficient connection was linked to the fact that the workers carry out a significant part of their work in the Member State of establishment of the undertaking assigning them to provide services, including beginning and ending their shifts in that Member State.

³⁹ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 54.

⁴⁰ Available at: <https://www.ela.europa.eu/en/news/ela-publishes-its-framework-action-road-transport>

⁴¹ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 58.

⁴² CJEU, Judgment of the Court (Grand Chamber) of 1 December 2020, *Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV and Others*, C-815/18, EU:C:2020:976.

⁴³ CJEU, Judgment of the Court (Grand Chamber) of 19 December 2019, *Michael Dobersberger v Magistrat der Stadt Wien*, C-16/18, EU:C:2019:1110.

a) Transparent and predictable working conditions

Directive (EU) 2019/1152⁴⁴ on transparent and predictable working conditions in the European Union (DTPWC) was adopted in 2019. The DTPWC replaced the former Written Statement Directive (91/533/EEC)⁴⁵ and aimed to ensure that posted workers have access to all relevant information on working conditions. The information shall be provided to **all workers** posted for a consecutive period of more than four weeks, although Member States may extend these information requirements to shorter postings. The DTPWC entered into force on 31 July 2019 and Member States had until 1 August 2022 to put in place the necessary measures to comply with this Directive. The effect of the Directive should therefore be visible in the national legal orders as of this year.

The DTPWC ensures that all workers in the EU, irrespective of their nationality, have the right to:

- ▶ More complete information on the essential aspects of the work, to be received early by the worker, in writing (Article 4);
- ▶ A limit to the length of probationary periods at the beginning of the job (Article 8);
- ▶ Seek additional employment, with a ban on exclusivity clauses and limits on incompatibility clauses (Article 9);
- ▶ Know a reasonable period in advance when work will take place, for workers with very unpredictable working schedules, as in the case of on-demand work (Article 10);
- ▶ Anti-abuse legislation for zero-hour contract work (Article 11);
- ▶ Receive a written reply to a request to transfer to another more secure job (Article 12);
- ▶ Receive free-of-charge the mandatory training that the employer has a duty to provide (Article 13).

Article 7 of the DTPWC establishes additional information rights for posted workers. Those required to work in a State (Member State or third country) other than that in which they habitually work shall be provided with a document containing at least information on the country in which the work is to be performed and its anticipated duration, the currency to be used for the payment of remuneration, if applicable, the benefits in cash or kind relating to the work assignments, and information as to whether repatriation is provided for and, if so, the conditions governing the worker's repatriation. The second paragraph of Article 7 deals specifically with posted workers and provides that they shall also be notified of the following: the remuneration to which they are entitled in accordance with the applicable law of the host Member State, where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging, and the link to the single official national website of the host Member State. **The provisions of the DTPWC indistinctly apply to EU posted workers and third-country nationals meeting the conditions of the *Vander Elst* case.**

Article 3 of the DTPWC establishes that the employer shall provide the information required under the Directive in writing.

⁴⁴ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (OJ L 186, 11.7.2019, pp. 105-121).

⁴⁵ Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

a) EU social security framework

Regulation (EC) No 883/2004 on the coordination of social security systems⁴⁶ and its implementing Regulation (EC) No 987/2009⁴⁷ provide a legal framework which determines in which Member State the posted worker is to be insured, specifically the conditions to be satisfied for the person to remain covered by the social security legislation of the Member State where they normally pursue an activity as an employed person.

Regulation (EU) No 1231/2010⁴⁸ extends the coordination rules for social security laid down in Regulations (EC) No 883/2004 and 987/2009 to third-country nationals legally resident in the EU and in a cross-border situation⁴⁹. This Regulation does not apply to Denmark⁵⁰. A pre-requisite for the application of the rules on social security coordination to third-country nationals is their legal residence in the EU. Regulation (EU) No 1231/2010 does not define 'legal residency', whereas Regulation (EC) No 883/2004 defines 'residence' as 'the place where a person habitually resides' (Article 1(j)). In addition, it only applies to third-country nationals whose situation is not confined within a single Member State.

In *Balandin and Others*⁵¹, the CJEU clarified the notion of 'legal residence' under Regulation (EU) No 1231/2010, specifically addressing the question of whether third-country nationals *temporarily* residing and working in different Member States but employed by a company established in one Member State would be covered by the Regulation. The CJEU noted the different purposes of the notions of (i) 'residence', defined in Regulation (EC) No 883/2004, and (ii) 'legally resident' in Regulation (EU) No 1231/2010. It clarified that the objective of Regulation (EC) No 883/2004 is to ensure that people benefit from social security coverage while ensuring they are subject only to the social security scheme of one Member State. In this context, 'residence' intends to determine the Member State to which the person concerned is more closely connected, in light of their habitual centre of interests. By contrast, the CJEU highlighted that Regulation (EU) No 1231/2010 aims to extend the personal scope of Regulations (EC) No 883/2004 and 987/2009 to third-country nationals not already covered, solely on the grounds of their nationality. With recourse to this Regulation's preparatory works and also to the interpretation of Directive 2011/08, the CJEU concluded that neither the duration of the presence of the third-country nationals in the territory of a Member State, nor their centres of interest are relevant to establish if they are legally residing in a Member State. As such, 'third-country nationals [...] who **temporarily** reside and work in different Member States in the service of an employer established in a Member State, may rely on the coordination rules laid down by Regulations No 883/2004 and 987/2009 in order to determine the social security legislation to which they are subject, provided that they are legally staying and working in the territory of the Member States' (par. 44). This conclusion raises a second question for posted workers, who work in two or more Member States: which social security legislation covers them? This

⁴⁶ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p.1).

⁴⁷ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, pp. 1-42).

⁴⁸ Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ L 344, 29.12.2010, pp. 1-3).

⁴⁹ European Commission, *EU legislation, Modernised coordination*, Directorate-General for Employment, Social Affairs and Inclusion, available at <https://ec.europa.eu/social/main.jsp?catId=867&langId=en>

⁵⁰ Danish derogations to EU cooperation continue to apply and companies in the EU cannot apply the EU regulations on social security to third-country nationals moving to and from Denmark.

⁵¹ CJEU, Judgment of the Court (First Chamber) of 24 January 2019, *Raad van bestuur van de Sociale verzekeringsbank v D. Balandin and Others*, C-477/17, EU:C:2019:60.

shall be determined in accordance with the connecting factors established under Article 13 of Regulation (EC) No 883/2004.

Third-country national workers to whom Regulation (EU) No 1231/2010 applies and who are allowed to move and be posted from one Member State to another benefit from the exception to the general rule subjecting mobile workers to the social security system in the Member State of employment (Article 11(3)a Regulation (EC) No 883/2004) in the same way as EU nationals. In the case of posting, the exception only applies under the conditions listed in Article 12 of Regulation (EC) No 883/2004:

- ▶ Expected duration of work in the host Member State shall not exceed 24 months; and
- ▶ The person shall not be sent to replace another posted person.

This exception can only be applied if the employer normally carries out its activities in the Member State from which the person is posted, and the posted person performs work on that employer's behalf during the posting period, i.e. a direct relationship is maintained between the posting undertaking and the posted worker.

These conditions are intended to prevent posting from negatively impacting the labour market of the host Member State and adversely affecting the social security of posted workers.

In *Walltopia AD*⁵², the CJEU ruled that Article 14(1) of Regulation (EC) No 987/2009, together with Article 12(1) of Regulation (EC) No 883/2004, must be interpreted as meaning that an employee recruited with a view to being posted to another Member State must be regarded as having been 'just before the start of his employment ... already subject to the legislation of the Member State in which his employer is established', within the meaning of Article 14(1) of Regulation (EC) No 987/2009, even if that employee was not an insured person under the legislation of that Member State immediately before the start of their employment, if, at that time, that employee had their residence in that Member State. Indeed, if it is for the Member States to establish the rules of affiliation to the social security scheme, those conditions cannot have the effect of excluding a person to whom the legislation is applicable pursuant to Regulation (EC) No 883/2004.

According to the social security coordination rules, if the conditions of Article 12 of Regulation No 883/2004 are met, **social security contributions for posted workers need to be paid in the State where the employer normally carries out its activities**, i.e. in the posting/sending Member State (the competent Member State). Similarly, posted workers can claim social security benefits (unemployment, pensions, work accidents) in the country where they are insured.

Article 15 of Regulation (EC) No 987/2009 lays down an obligation for the employer to notify the posting to the competent institution of the Member State whose social security legislation is applicable to the worker. The competent institution provides an attestation that the legislation of that Member State is applicable (PD A1 form). The issuing institution shall carry out a proper assessment of the facts, i.e. verify that all relevant requirements for a posting are met, before issuing a PD A1 form⁵³.

⁵² CJEU, Judgment of the Court (Sixth Chamber) of 25 October 2018, *Walltopia AD v Direktor na Teritorialna direksia na Natsionalnata agentsia za prihodite – Veliko Tarnovo*, C-451/17, EU:C:2018:861.

⁵³ This obligation has been repeatedly emphasised by the CJEU. See, for instance, Case C-359/16, *Altun and Others*, ECLI:EU:C:2018:63; 'the principle of sincere cooperation, laid down in Article 4(3) TEU, requires the issuing institution to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable to social security and, consequently, to ensure that the information contained in an E 101 certificate is accurate' (§37); 'It should, [...], be noted that it follows from the principle of sincere cooperation that any institution of a Member State must carry out a diligent examination of the application of its own social security system. It also follows from that principle that the institutions of the other Member States are entitled to expect the institution of the Member State concerned to fulfil that obligation' (§42).

2.1.3 Enhanced enforcement of the EU provisions on posting of workers: Enforcement Directive

Directive 2014/67/EU (Enforcement Directive)⁵⁴ was adopted by the Parliament and Council on 15 May 2014. It establishes a common framework of provisions, measures and control mechanisms to facilitate better and more uniform implementation, application and enforcement of the PWD⁵⁵.

The Directive sets out the framework for inspections of workplaces where posted workers are active, in order to ensure compliance with the posting rules established at EU level. Such inspections cover all posted workers at the workplace, including third-country nationals.

The Directive contains provisions on:

- ▶ Access to information: Article 5 binds Member States to ensuring that information on the terms and conditions of employment applicable to posted workers is ‘made generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means’, notably, via a single official national website;
- ▶ Monitoring compliance: Article 9 foresees the administrative requirements and control measures that Member States may impose, while Article 10 binds Member States to ensuring appropriate and effective checks and monitoring mechanisms to verify compliance with the rules laid down in the PWD. Article 4 lists factual elements to help assess whether a specific situation qualifies as a genuine posting;
- ▶ Enforcement: Article 11 requires Member States to set up effective mechanisms for posted workers to lodge complaints and to ensure the right to institute judicial or administrative proceedings, with the support of trade unions and other interested third parties;
- ▶ Mutual assistance and administrative cooperation: Article 6 notes that such cooperation shall particularly ‘consist in replying to reasoned requests for information from competent authorities and in carrying out checks, inspections and investigations with respect to situations of posting’, while Article 13 (and following) refers to cross-border enforcement of financial administrative penalties and/or fines.

The Practical Guide on posting of workers notes that, in order to check whether a worker qualifies as a posted worker, Member States must make an overall assessment, taking account all factual elements⁵⁶. For example, in determining whether an undertaking genuinely performs substantial activities in the Member State from which the posting takes place, pursuant to Article 4(2) of Directive 2014/67/EU, Member States may take into account the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions, etc.; the place where posted workers are recruited and from which they are posted; the place where the undertaking performs its substantial business activity and where it employs administrative staff. Enforcement authorities consider a range of factual elements in their assessment. To determine compliance of the employer of a posted third-country national with the applicable local requirements and to determine whether a posting is genuine, inspection authorities will also consider all factual elements relating to the posting

⁵⁴ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) (OJ L 159, 28.5.2014, pp. 11-31).

⁵⁵ Pursuant to Article 23(1) of the Enforcement Directive, transposition by Member States into national legislation was due by 18 June 2016.

⁵⁶ European Commission, *Practical Guide on Posting of Workers*, Directorate-General for Employment, Social Affairs and Inclusion, 2019, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ac7320a-170f-11ea-8c1f-01aa75ed71a1/language-en>

condition of the third-country national worker. This may include the lawful and habitual residence and employment status of the worker in the sending Member State, as per the *Vander Elst* case-law, as well as their identity or terms and conditions of employment of the posted third-country national.

The Enforcement Directive was adopted to enhance legal certainty and ensure a uniform interpretation and enforcement of the core set of rights for posted workers set out in the PWD. In addition to ensuring equivalent protection of posted workers' rights across the EU, the adoption of the Enforcement Directive was necessary to guarantee a level playing field between service providers by reducing the different levels of application and enforcement of the PWD among Member States. To that extent, the common interpretation of the PWD, facilitated by the Enforcement Directive, aims to tackle issues relating to fraud, circumvention of rules, inspections and monitoring, joint liability in subcontracting chains, and the exchange of information between Member States.

2.1.4 Role and mandate of ELA in supporting the application of the EU *acquis* to posted workers

The European Labour Authority (ELA) was established in 2019 with the primary aim of helping 'Member States and the Commission in their effective application and enforcement of Union law related to labour mobility across the Union and the coordination of social security systems within the Union'⁵⁷.

Article 2 of the ELA Regulation establishes the Authority's objectives. Of interest here are its intention to facilitate and enhance cooperation between Member States in the enforcement of relevant Union law across the Union, including facilitating cross-border concerted and joint inspections. However, in light of the findings, the Report will also refer to the objective to facilitate access to information on rights and obligations in respect of labour mobility across the Union, as well as to relevant services, and to support cooperation between Member States in tackling undeclared work.

Accordingly, ELA carries out the tasks set out in Article 4 of the ELA Regulation, including facilitating access to information, cooperation and exchange of information between Member States with a view to the consistent, efficient and effective application and enforcement of relevant Union law, coordinating and supporting concerted and joint inspections, and supporting Member States with capacity-building regarding the effective application and enforcement of relevant EU law (Articles 5, 7, 8, 9, 11 ELA Regulation).

Although all of the EU instruments previously described are relevant to this Report, ELA shall only act within the scope of the Union acts listed in Article 1(4) of the ELA Regulation⁵⁸. The legal analysis and conclusions carried out in the framework of this Report therefore focus on those areas where ELA has competence to act.

⁵⁷ Article 1(2) of Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (OJ L 186, 11.7.2019, pp. 21-56).

⁵⁸ ELA's scope of activity covers: the PWD and Revised PWD, the Enforcement Directive, the instruments on posting drivers in the road transport sector, Social Security Regulations No 883/2004, No 987/2009 and No 1231/2010, Council Regulation (EC) No 859/2003, Regulation (EU) No 492/2011, Directive 2014/54/EU, Regulation (EU) 2016/589, Regulation (EC) No 561/2006, Regulation (EC) No 1071/2009.

2.2 National legal frameworks for the posting of third-country nationals

Beyond the minimum requirements set out at EU level, Member States have the competence to regulate additional areas of law that are of relevance to posted third-country nationals, such as working conditions and labour rights, occupational health and safety requirements, or the right to reside and work in the home Member State.

This section presents a comparative analysis of Member States' national legislation applicable to the posting of third-country nationals, covering the employment and social security-related legal requirements in the Member States, beyond the provisions of the PWD and requirements related to the residence status of the posted worker in the Member State of residence.

2.2.1 Competence of the national legislator in relation to posted third-country nationals

Most Member States do not specifically regulate the posting of third-country nationals and the same general rules on posting, transposing and implementing the relevant EU legislation apply equally to posted EU workers and posted third-country nationals. Both third-country nationals and EU posted workers benefit from the application of the principle of equal treatment: under Article 3 of the PWD, Member States cannot lawfully less favourably regulate the terms and conditions of employment for the posting of third-country nationals for the matters covered by the Directive. The few⁵⁹ national provisions that specifically regulate the posting of third-country nationals cover requirements relating to the lawfulness of the work permit in the sending Member State (see Section 3.3).

This Report focuses on the issues related to employment conditions and social security coordination for third-country nationals, which fall within the mandate of ELA. However, the residence status of third-country nationals is an important element in the legal framework applicable to posted third-country nationals, as lawful residence is one of the main factors determining their qualification for posting from one Member State to another by their employer.

National law plays an important role, as the renewal or withdrawal of a work permit are ultimately decided by the sending Member State. The literature notes that the intersection between the migration and employment regimes enhances the vulnerability of third-country nationals, whose mobility rights are weaker than those of posted EU citizens⁶⁰. That vulnerability stems from their dependency on their employer 'not only for employment but also for the renewal of their work and residence permits in the sending country'⁶¹. Several of the EU migration instruments provide the Member State with the possibility to grant an employer of a third-country national the power to submit an application, for example, to issue, amend or renew the work permit (e.g. Article 4(1) of Directive 2011/98/EU, for the single permit; Article 12(3) of Directive 2014/36/EU, for requests for a seasonal work permit). This reliance of the third-country national posted worker on their employer for the renewal of their residence and/or work permit may make these workers less inclined to complain about non-compliance with working conditions and information requirements in the Member State of posting.

⁵⁹ HR, LV, NL.

⁶⁰ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., *Posting of Third-Country Nationals: A Comparative Study*, ZRC SAZU (Con3Post, Posting of Third Country Nationals. Mapping the trend in the construction sector - project VP/2018/011/0019), 2020, p. 15.

⁶¹ As in AT and SI (Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., *Posting of Third-Country Nationals: A Comparative Study*, ZRC SAZU (Con3Post, Posting of Third Country Nationals. Mapping the trend in the construction sector - project VP/2018/011/0019), 2020, pp. 16, 39, 58).

A decision on the withdrawal of a work and/or residence permit is taken in accordance with national procedures and national law on the right to reside and work in a Member State, even in those situations where the grounds for withdrawal are harmonised at EU level. For instance, where Article 9 of the Seasonal Workers Directive provides for the withdrawal of a seasonal worker permit in case of sanctioning of the employer for non-compliance with labour or social security legislation, the specific conditions leading to such sanctions are determined by the national legislator in each Member State. Such a decision to withdraw a seasonal worker permit would have an important impact on the legal status of the posted third-country national, as the legal basis for their posting ceases to exist (see Section 2.2.1.d).

a) National legal frameworks on employment matters relevant to the posting of third-country nationals

The research conducted for the purpose of this Report did not reveal any Member State with practices in alleged breach of the *Vander Elst* caselaw, that is, imposing that the posted third-country national applies for a work permit in the host Member State. It did, however, reveal that, in practice, in what concerns the verification of the legality of residence and of the right to work, Member States take different approaches⁶².

The national frameworks covering posting of third-country nationals, beyond the requirements set out in EU legislation, **vary considerably among the Member States** in their complexity and level of protection provided to workers. In some Member States (e.g. Germany⁶³, Romania⁶⁴, Slovenia⁶⁵), the legal framework applicable to posted third-country nationals is more complex and fragmented, while other Member States have developed specific legal frameworks for posted workers, including third-country nationals. A complex and fragmented legal framework can make it more difficult and time-consuming for posted third-country nationals and their employers to understand and apply the legal requirements in the Member State of posting and be informed of their rights. Several stakeholders noted that it can often be difficult to ensure that posted workers' working situation corresponds to the national regulations, as this is often only achieved through inspections. Posted workers often work under the radar of the local authorities, especially when they are posted for short amounts of time⁶⁶, with one stakeholder noting that this is especially the case for posted third-country nationals. A recent report on posting of workers noted that the complex regulatory framework, enforcement structures and protection mechanisms, combined with personal factors, can lead to underreporting, lack of detection, and insufficient preventive or reparatory interventions on the part of the authorities and social partners⁶⁷.

In some Member States⁶⁸, certain matters like remuneration or leave are largely regulated by collective agreements, while in others, only individual contracts determine remuneration or leave, based on minimum statutory requirements. In the Finnish construction sector, the applicable collective agreement also applies to posted workers, in addition to employment legislation, so third-country national posted workers should be entitled to the same employment conditions as locals. In Austria, collective agreements play a central role, with multiple agreements in the construction sector alone. Each

⁶² Section 3.3. above and the guidelines below.

⁶³ DE country fiche points out that there is no Labour Code and, as such, labour law is fragmented.

⁶⁴ RO country fiche points to a lack of coherence in legislation, as provisions are not structured and included in various pieces of legislation.

⁶⁵ SI country fiche notes that the regulation applicable to posting of third-country nationals in general is particularly complex (notably regarding the issuance of work permits for outbound-posted third-country nationals) and, specifically, that the rules applicable to postings by temporary work agencies are particularly complex and spread across several pieces of legislation.

⁶⁶ Stakeholder interviews; also mentioned as a cause for under-reporting of the number of posted workers in the EU (De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT, project VS/2020/0499, 2022).

⁶⁷ Danaj, S., Zólyomi, E., Kahlert, R., Prinz, N. and Sandu, V., *The gap between legal procedures and practices in posting rule enactment: a comparative working paper*, European Centre for Social Welfare Policy and Research, 2021.

⁶⁸ E.g. AT, BE, FI, SE.

collective agreement includes definitions of occupations and tasks (e.g. apprentices, unskilled workers, skilled workers) and the minimum hourly and monthly wage to be paid for each occupation, the level of benefits (e.g. holiday pay), weekly and monthly work hours and overtime rules. In Sweden, collective agreements regulate certain areas of labour relations and employment requirements not covered by legislation; in addition, collective agreements may also allow for derogations from legislative provisions.

While regulation by collective agreement usually offers greater protection for national workers, the dispersion of the national legal framework and lack of easy access to the applicable collective agreements may affect third-country nationals in terms of accessibility of information and identification of applicable legal requirements (see Section 3.1).

The provisions of the DTPWC should enhance the accessibility of information on the working conditions applicable in the Member State where the third-country national is posted, including when determined by more complex regulatory frameworks. The Directive not only extends the list of information that employers must provide to workers and shortens the deadline for doing so, it also requires employers to include information on the laws and collective agreements applicable to the employment relationship. Article 7 of the DTPWC requires additional information to be provided to posted workers. The Directive had to be transposed by all Member States by 1 August 2022. It will therefore be important to analyse how the Directive's requirements have been transposed in the national legal orders and how they enhance the protection of posted workers, particularly posted third-country nationals in the different Member States.

b) Transposition and implementation of recent legislation applicable to posted third-country nationals

The changes introduced by the Revised PWD reinforce the legal protection to EU and third-country national posted workers, in particular for postings exceeding 12 months. All Member States have transposed the Directive, which fully entered into force on 30 July 2020. However, as the directives do not prohibit the application of more favourable working conditions, differences in the level of protection of posted workers will remain, particularly for postings of less than 12 months.

Some Member States are in the process of adapting their legislation to ensure conformity of the national legislation with some of the EU legal instruments relevant to posting of third-country national workers, such as the Enforcement Directive⁶⁹. The specific rules for the cross-border posting of drivers (including third-country national drivers) regulated by Directive (EU) 2020/1057⁷⁰ were reflected in the legislation of 19 Member States, as of early September 2022⁷¹. The remaining eight Member States⁷² had not yet notified any transposing measures, with a transposition deadline of 2 February 2022⁷³. The deadline for transposition of the DTPWC, which is relevant for the purpose of posting third-country nationals as it aims to ensure that posted workers have access to all relevant information on working conditions, passed on 1 August 2022, at which time 19 Member States had yet to communicate full transposition to the Commission⁷⁴. For social security matters, Member States apply Regulations (EC) No 883/2004 and No 1231/2010 directly, without adopting additional national implementing legislation. Croatia, Finland, Hungary, Italy, Lithuania and Slovakia have adopted specific laws and guidelines. Third-country nationals are covered by Regulation (EU) No 1231/2010, provided they are legally resident (legally

⁶⁹ Country research carried out for this study.

⁷⁰ Directive (EU) 2020/1057 was published on 31 July 2020, entered into force on 1 August 2020 and should have been implemented in national regulation on 2 February 2022, at the latest.

⁷¹ As notified to the European Commission and published on Eur-lex on 5 September 2022.

⁷² CY, HR, IT, LU, MT, NL, PT, SI.

⁷³ Available at: <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32020L1057>

⁷⁴ Available at: https://ec.europa.eu/commission/presscorner/detail/en/INF_22_5409

staying and working) in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.

National legal frameworks on social security matters relevant to the posting of third-country nationals

While regulations are directly applicable in Member States' legal systems, some have adopted **additional measures** implementing the rules on social security coordination enshrined in Regulation (EU) No 1231/2010 and Regulation (EC) No 883/2004. For example, in Hungary, a new Social Security Act⁷⁵ entered into force on 1 July 2020. Several Member States have adopted specific legislation to enforce the legislation on social security coordination.

National guidelines on the determination of social security coverage for posted workers, whether EU or third-country nationals, provide guidance to employers and posted workers in a number of Member States (e.g. **Finland**⁷⁶, **Italy**⁷⁷). In **Sweden**, an internal document⁷⁸ has been adopted to regulate the Social Insurance Agency's operations in relation to the PD A1. Although not legally binding, it is used to illustrate the Agency's interpretation of its obligations in respect of various topics.

c) Relevant frameworks on the right to reside and work in the EU as a third-country national

The right to reside and work in the EU is a **shared competence** between the EU and the Member States. For certain categories of third-country nationals, the right to reside and work in the EU is set out in directives, which harmonise the requirements relating to the application for residence, the right to work, the renewal and withdrawal of a residence and/or work permit, and the provisions implementing the right to equal treatment. Such rules exist for seasonal workers, for ICTs, for third-country nationals applying for residence for the purpose of work, or people benefiting from the protection provided by the Temporary Protection Directive.

National authorities remain competent for the implementation of the directives for these specific categories of workers. For example, the procedure for the renewal of the residence and work permit of a seasonal worker employed in Belgium but posted to Spain for a temporary assignment will need to be submitted to the Belgian authorities, even if the renewal needs to be processed during the worker's posting in Spain. For the renewal, the minimum requirements of the Seasonal Workers Directive must be complied with, such as the timeframes for the adoption of a decision on the renewal. Similarly, while the Directive defines the minimum mandatory grounds for the withdrawal of a seasonal worker permit (e.g. insolvency of the employer; sanctioning for undeclared work), the conditions for being sanctioned for undeclared work or additional grounds for withdrawal may be set out or defined in national legislation.

Any other third-country nationals already lawfully residing in a Member State outside the categories of legal migration set out in EU law, and who are employed by an employer established in that Member State, can be posted to another Member State.

The exchange of information between the authorities of the two Member States in relation to posted third-country nationals, which is necessary for the correct application of the EU rules applicable to posted third-country nationals, covers a broader range of information than for posted EU workers. Inspection

⁷⁵ Act CXXII of 2019 on the beneficiaries of social security and the funding of such services (2019. évi CXXII. törvény a társadalombiztosítás ellátásaira jogosultakról, valamint ezen ellátások fedezetéről), available at: <https://njt.hu/jogszabaly/2019-122-00-00>

⁷⁶ *Lähetetyn työntekijän vakuuttaminen EU-tilanteissa*, available at: https://www.tyoelakelakipalvelu.fi/telp-publishing/vepa/folder1.faces?folder_id=200253&navigation_history=200246_0,200251

⁷⁷ Circolare INPS n. 51 of 15 March 2011, available at: <https://www.inps.it/Circolari/Circolare%20numero%2051%20del%2015-03-2011.htm>

⁷⁸ Försäkringskassans vägledning 2017:1 Övergripande bestämmelser i SFB, unionsrätten och internationella avtal.

services are confronted with additional challenges, such as the need to verify whether a posted worker is still legally employed in the sending Member State (Section 3).

The **Temporary Protection Directive** was used for the first time to facilitate the entry and residence of Ukrainian third-country nationals in the Member States. At national level, Member States adopted instruments to implement the Temporary Protection Directive. National legislative provisions ensure that beneficiaries of the temporary protection are granted the right of temporary residence, as well as access to the labour market almost immediately after their arrival and without any additional requirements. For example, in Germany, the work permit is generally delivered together with the temporary residence permit⁷⁹. In the Netherlands, employers of persons displaced from Ukraine are exempt from the obligation to apply for a work permit with a full-fledged labour market test. However, employers are required to file a notification, and beneficiaries of the temporary protection must register at the municipality before being entitled to work in the Netherlands⁸⁰. In Poland, there is a highly flexible ‘announcement procedure’ for Ukrainian nationals under temporary protection, which sees employers entitled to hire Ukrainian nationals following a notification to the competent authority and before they obtain a national identification number. As national implementing rules may vary and limitations could be foreseen in national law to the right to work, the conditions under which a Ukrainian national benefiting from temporary protection could be posted to other Member States will need to be determined.

In addition to EU and national requirements, further legal requirements on entry, residence and the right to work applicable between an EU Member State and a specific third country can be set out in **bilateral agreements** that exempt those third-country nationals from the requirement to have a work permit in the sending Member State. For example, Slovenia concluded such bilateral agreements with Bosnia and Herzegovina⁸¹ in 2013 and with Serbia⁸² in 2019. They provide for a derogation regime for citizens of those States who have to obtain a special work permit to be entitled to work in Slovenia, while other third-country nationals must obtain both a work permit and a residence permit. The bilateral agreements establish swifter procedures to enter Slovenia and are being used as a ‘pull factor’ or even as a ‘business model’ whereby Slovenian companies recruit third-country national workers from those Balkan countries in order to post them to other EU countries⁸³.

In Poland, citizens of Ukraine, Belarus, Moldova, Armenia and Georgia can work without having to obtain a work permit provided they are legally residing in Poland based on so-called ‘declarations on entrusting work to a foreigner’ regulated in the Act of 20 April 2004 on promotion of employment and institutions of labour market. Citizens of Ukraine, Georgia and Moldova can use biometric passports to enter and reside in Poland without the need for a visa, and at the same time benefit from simplified rules for being hired. However, this right is limited to 90 days within a period of 180 days.

⁷⁹ ELA, *Overview of national measures regarding employment and social security of displaced persons coming from Ukraine: Country fiche – Germany*, August 2022, available at: <https://www.ela.europa.eu/sites/default/files/2022-09/de-country-fiche-ela-national-measures-ukraine.pdf>

⁸⁰ ELA, *Overview of national measures regarding employment and social security of displaced persons coming from Ukraine: country fiche – the Netherlands*, August 2022, available at: <https://www.ela.europa.eu/sites/default/files/2022-09/nl-country-fiche-ela-national-measures-ukraine.pdf>

⁸¹ Available at: <https://www.uradni-list.si/1/objava.jsp?sop=2012-02-0086>

⁸² Available at: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2019-02-0033?sop=2019-02-0033>

⁸³ Danaj, S., Geyer, L., Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., ‘Regional Case Study. From Bosnia and Herzegovina to Austria via Slovenia: migration and posting of third-country nationals in the EU’, European Centre for Social Welfare Policy and Research and ZRC SAZU, in *Con3Post – Posting of Third-Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 29.

2.2.2 Challenges relating to the legal framework applicable to the posting of third-country nationals

For the country research for this study, regulatory issues were reported concerning the EU and national legislation on posting of third-country nationals. Moreover, the analysis showed challenges in the interpretation and application of EU law and CJEU caselaw. These are categorised and summarised below.

a) Application and interpretation of EU law

As stated above, following the *Vander Elst* judgment, Member States are precluded from requiring that the posted third-country national worker applies and holds a work permit in the host Member State. This is, however, restricted to posted third-country national workers who are **lawfully and habitually employed** in the sending Member State.

Within these lines, different approaches are identified in the Member States, namely, the inclusion in the applicable national provision of an additional interpretative element (such as in **Luxembourg**⁸⁴, **France**⁸⁵ and **Italy**⁸⁶), the specific reference to the lawfulness of the work situation of the posted third-country national worker in the sending Member State (as in **Austria**⁸⁷ and in **the Netherlands**⁸⁸), the imposition of an obligation on the sending employer to confirm that the worker is legally employed, coupled with an explicit prohibition for service users to use work of posted workers when they know the worker is not legally employed in the sending Member State (**Croatia**⁸⁹). In many other Member States, the legislation is silent in this regard and national authorities rely on the assumption that the work permit in the sending Member State is valid (as **Belgium**⁹⁰).

The *Vander Elst* case refers indirectly to the **right of residence of the third-country national worker in the sending Member State**. Lawful employment cannot be dissociated from a regular situation regarding the right to stay of a third-country national in the space of the Union.

While the *Vander Elst* clarified that the posted third-country national worker needs a work permit only in the sending Member State, the same does not apply for residence permits⁹¹. The right of residence of posted third-country national workers has, thus, to be verified both in the sending Member State, even if indirectly, in order to conclude that worker is lawfully employed, and in the host Member State, to cover the worker's stay during the provision of services⁹². In a 2019 decision, the French Council of State ruled that the requirement set out in Article L 421-3 of the Immigration Code requiring that foreign posted workers are issued a temporary residence permit, does not amount to a prior authorisation to posting and is thus not contrary to the freedom to provide services⁹³.

⁸⁴ Article 49(1) of the [Law of 29 August 2008](#) on free movement of persons and immigration refers to posted workers having the right to work and reside in the country in which the sending company is established for the duration of the posting.

⁸⁵ Articles R 341-1-1 (b) and R 5221-2 2° of the Labour Code refers to third-country nationals posted to France from another Member State working regularly and habitually for an employer established in the territory of a Member State of the European Union.

⁸⁶ Article 27, para. 1-bis of *Testo Unico sull'Immigrazione (TUI, Decreto Legislativo 25 luglio 1998, n. 286)* refers to the circumstance of the employee being "regularly paid" by the sending employer.

⁸⁷ Section 18 (12) [Foreign Workers Act refers to the posted worker](#) posted TCN worker being duly admitted to employment in the Member State of the establishment and being lawfully employed by the posting company.

⁸⁸ Article 4.6 of the [Implementation Decree regarding the Aliens Employment Act, refers to the condition of the posted worker complying](#) with the residence, work and social security obligations to be employed in the country where the employer is established.

⁸⁹ Article 20 of the [Law 128/2020](#) of 20 November 2020.

⁹⁰ BE Country fiche.

⁹¹ The CJEU will decide on this issue in case C-540/22.

⁹² This is further expanded upon in Section 3.3.

⁹³ Conseil d'Etat, 2^{ème} et 7^{ème} chambres réunies, 30 janvier 2019, n° 415818, available at : <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000038077333>.

In practice, in many Member States, the lawfulness of the third-country nationals' residence in the sending Member State is considered at the moment of deciding on the issuance of a residence permit for the posted third-country national in the host Member State. For example, Germany provides concrete guidance to national authorities on what constitutes 'legal employment' in line with the CJEU caselaw in the '[Visa Handbook](#)' of the German Ministry of Foreign Affairs. Legal employment of a posted third-country national must be verified in the visa procedure by presenting appropriate proof of the residence/employment permit for the State of establishment. The Visa Handbook provides several indicators regarding what can be considered 'legal employment' (point 2.2.2).

The rules applicable in **Finland** merit specific attention (although a legislative reform is in course). According to Sections 40(1)(6) and 79(1)(4) of the [Aliens Act](#), a worker, who is a *permanent* employee of a company operating in another Member State, has the right to perform gainful employment, namely posting, without a residence permit in Finland, provided that they hold a permit in the sending Member State entitling them to reside and work in that Member State. The permit should remain valid after the completion of work in Finland. These provisions have been interpreted in a way that it is required that the foreign worker must have a *permanent work contract*. In addition, it is considered that before arriving in Finland, the worker should normally have worked in the Member State that has issued a permit⁹⁴. A [draft Government proposal](#) amending Chapter 5 of the [Aliens Act](#) has been published. The provisions now included in Section 79(1)(4) of the [Aliens Act](#) would remain largely unchanged, but would be clarified on the basis of the case-law of the EU Court of Justice. Based on the draft proposal, it will be proposed to delete the word 'permanent' from the provision. Also, it would no longer be required that the permit in the other Member State is issued at least for one year, but it would remain necessary that the permit allows returning to the other Member State.

One Latvian stakeholder noted that the legislation under which Member States should cooperate with one another in cases of **fake posting** is unclear, i.e. whether the legal regime on the posting of workers would still apply⁹⁵.

The consultation revealed several issues with the **EU legal framework on social security** applicable to the posting of workers.

In the **Netherlands**, the interpretation of 'legal residence' under Regulation (EC) 1231/2010 raises doubts, despite the CJEU's decision in *Balandin and others* (see Section 2.1.2), especially as it refers to residence in the territory of a Member State, not specifying whether the sending or host Member State. Dutch stakeholders raised doubts about its articulation with the rules of Article 13 of Regulation (EC) No 883/2004 to determine the social security legislation an employee working in more than one Member State should be subject to. More specifically, stakeholders questioned whether, for placement agencies, the relationship between the employee and the employer in the sending Member State is strong enough to fulfil the conditions of the connecting factor. They noted the difficulty for social security institutions to assess the legality of residence in the other Member State and fear that this may lead to abuse and/or employers choosing advantageous arrangements. They noted that they would welcome more guidance from the European Commission or ELA on these matters.

In this connection, it should be noted that the German [Deutsche Rentenversicherung](#) provides extensive guidance regarding Regulation (EU) 1231/2010. Pursuant point 3 of these guidelines, 'Legal residence means that third-country nationals are legally present in the territory of an EU Member State (excluding

⁹⁴ [Government's proposal to the parliament to amend the Aliens Act and related laws and information obtained from a national stakeholder.](#)

⁹⁵ Interview with LV public administration representative.

Iceland, Liechtenstein, Norway and Switzerland) and consequently have a temporary or permanent right of residence. The legality of residence is determined by the applicable national law of the EU Member State concerned.⁹⁶ For procedures initiated by the (contact) institution of another EU Member State, it is assumed that this institution has checked the lawfulness of residence there.

The **German** country report notes that in the context of the coordination of social security, it is difficult to make a clear-cut distinction between posting (Article 12 Regulation (EC) No 883/2004) and multiple employment (Article 13 Regulation (EC) No 883/2004)⁹⁶. This makes it cumbersome to draw clear lines in more subtle cases, such as workers in international transport (where personnel working in transborder transport (lorries, busses, cars, railways, ships) are treated as being in multiple employments and not posted workers), or in the context of seasonal agricultural work.

Difficulties are reported in some Member States, such as the **Netherlands**, on challenging the validity of PD A1s issued by other Member States for workers posted to the Member State. This is also the case in **Sweden**, where the topic is being debated⁹⁷. The Swedish Social Security Agency has suggested that PD A1s should be delivered with indications of the grounds on which they were issued, together with information corroborating the decision to issue the PD A1⁹⁸. In **Belgium**, stakeholders reported that corroborating the PD A1 forms from other Member States is often difficult.

The **Finnish** country report states that for third-country nationals posted from Finland, it might be difficult to determine whether Regulation (EC) No 883/2004 on the coordination of social security is applicable, i.e. whether the conditions of the Regulation 1231/2010 are fulfilled⁹⁹. It also questioned how the applicable social security legislation might be determined for a third-country national working in several Member States but residing permanently in a third country. According to one Finnish stakeholder, it would be useful to establish common interpretations on the EU social security coordination regulations¹⁰⁰. The **Polish** report notes that Regulation (EC) No 1231/2010 is not applicable to EEA countries and Switzerland, which nevertheless apply Regulations (EC) No 883/2004 and 987/2009. According to one stakeholder, this can lead to complications.

Some Member States have adopted guidelines on the determination of social security coverage for posted workers¹⁰¹.

b) Complex national legal frameworks

The reports of several Member States explicitly refer to interpretation and/or application problems stemming from the complexity of the legal framework regulating the posting of third-country national workers and that impact on enforcement at Member State level. The differences in approach followed by the Member States also have an impact on cooperation between Member States (see Section 3.6.1).

The **Slovenian** country report notes that the national rules applicable to posting of third-country nationals in general are complex (particularly issuance of work permits for outbound-posted third-country nationals) and, specifically, that the rules applicable to postings by temporary work agencies are particularly complex and spread across several pieces of legislation. Fragmentation of the relevant legislation across various instruments is also mentioned in the **German** country report.

⁹⁶ Interview with DE public administration representative.

⁹⁷ Interview with SE public administration representative.

⁹⁸ Ibid.

⁹⁹ Interview with FI public administration representative.

¹⁰⁰ Ibid.

¹⁰¹ E.g. I, It, LV (see Section 2.2.1.c).

Other challenges were reported – albeit not specific to third-country nationals – in relation to the lack of clarity of certain legal concepts, such as ‘posted worker’ or ‘sending and receiving employer’. This is the case in **Sweden**, where stakeholders highlighted the opacity of the definition of posting and the issues in determining to which category a working migrant belongs¹⁰².

Some stakeholders reported that the notification procedure in some Member States is overly complex and burdensome for employers, especially for short-term postings.

c) Complex national institutional landscape

Other country reports point to the complexity of the internal institutional landscape. For posted third-country nationals, in particular, other national authorities may be involved in the administrative requirements in the sending or receiving Member State than those usually involved in posting. For instance, immigration services or authorities responsible for issuing/renewing a work permit may need to be involved in the enforcement of the applicable legal provisions. However, their scope of competence may not reflect this reality. For example, the Finnish Centre for Pensions does not have competence to confirm whether a posted third-country national has a right to work in the receiving Member State¹⁰³. The Finnish country report points to difficulties in confirming a third-country national’s right to work in Finland, reporting that, since February 2022, the Tax Administration has started to confirm the right to work in Finland when issuing tax numbers to foreign workers (including posted third-country nationals).

The competences for labour or social security inspections may be spread across different governmental departments. In Belgium, several authorities are responsible for the different aspects related to the posting of a third-country national worker, with most at federal level. An Italian stakeholder noted that the absence of a single Italian office responsible for dealing with the posting of workers is an issue¹⁰⁴. In some Member States, such as Belgium, Italy or the Netherlands, the competence for accidents at work or occupational diseases lies with independent agencies, while in other Member States, it is centralised within the social security authority.

This issue closely relates to another challenge in internal cooperation. For example, the Finnish country report states that the legal framework for the authorities’ rights to receive information and to disclose information to other authorities on their own initiative might create challenges for effective enforcement of workers’ rights and monitoring. For example, the Occupational Safety and Health Authority is allowed to request information from the Tax Administration on a case-by-case basis, but the legislation does not allow mass data exchange requests.

Decentralisation may further complicate matters. In Spain, the central government does not have competence for the implementation of employment issues, so it is incumbent on the Regional Governments (AA.CC) to receive the notifications for postings. However, the competence for social security systems remains with the central government.

d) Coherence with other legislation

Coherence with other national legislation may pose another challenge. In Poland, after the outbreak of war in Ukraine, issues arose with the posting of workers under temporary protection: Article 11(2) of Act from 12 March 2022 on assistance to Ukrainian nationals provided that Ukrainian nationals who leave Poland for a period of over a month lose the right to legal stay in Poland. This made it impossible to post Ukrainian nationals under temporary protection to other countries. This was addressed via an

¹⁰² Interviews with SE civil society organisation representative.

¹⁰³ Interview with FI public administration representative.

¹⁰⁴ Interview with IT public administration representative.

amendment to the Act from 8 June 2022 providing that Article 11(2) is not applicable to workers posted from Poland.

e) Collective agreements

Certain stakeholders noted that collective agreements may further complicate identification of the applicable regulations. The Italian country report stated that in light of the variety of collective agreements and the differences between Member States in precisely defining economic sectors, it is sometimes difficult to identify the economic sector in which a company operates. Despite efforts to identify the applicable collective agreements, this remains extremely complex and uncertain, as competing collective agreements may be applicable in whole or in part to the same industry. This creates significant risks for the protection of the rights of posted third-country nationals, most notably compliance with the applicable minimum wage established in collective agreements and the verification of instances where companies continued to apply the minimum wage of the third-country national's country of origin¹⁰⁵. Authors argue that addressing this lack of clarity would contribute to tackling fraudulent practices related to working conditions and posted workers' remuneration¹⁰⁶.

f) Right to stay

Some of the national regulatory challenges reported relate specifically to the right to reside in the Member State of posting. While these are not directly within the remit of the ELA mandate, they affect the right of third-country nationals to make use of their right to be posted.

In **Czechia**, two visa exemptions exist in relation to posted workers: (a) posting of workers in international transport, and (b) posting of workers with the aim of deepening workers' skills and qualifications. However, there is no exemption covering other posted workers, thereby creating additional complexities in its cooperation with other Member States.

The **Latvian** country report indicates concerns about the monitoring of residence rights of third-country nationals in situations where they are granted a Schengen Visa that allows residence in another EU Member State for a maximum of 90 days. The control system for compliance with the Immigration Law seems to be insufficient, i.e. whether after the expiration of the Schengen visa, the posted third-country national obtains a residence permit for the Member State where they are posted¹⁰⁷.

Different national regimes for the issuance of residence permits may hinder the posting of workers. In **Portugal**, there is a special regime of residence authorisation for the exercise of subordinated professional activity, without the need for a residence visa. Third-country nationals should submit an 'expression of interest' to the immigration authority, which exempts them from obtaining a residence visa to work in Portugal, provided that they have an employment contract or promise of employment contract, or have a proven employment relationship, among other conditions¹⁰⁸. However, Portuguese authorities report that this regime hinders posting, as some Member States do not accept the 'expression of interest' as a valid ground for staying and exercising a professional activity¹⁰⁹.

¹⁰⁵ Dorigatti, L., Pallini, M. and Pedersini, R., *Posted Workers from and to Italy. Facts and Figures*, Leuven: POSTING.STAT 2022 (project VS/2020/0499), 2022, pp. 41-43.

¹⁰⁶ Cillo, R. and Perocco, F., *Italian authorities' challenges in the monitoring of the posting of workers*, Policy brief, European Centre for Social Welfare Policy and Research, 2021, p. 8.

¹⁰⁷ Interview with LV public administration representative.

¹⁰⁸ In addition to the other general conditions: they have legally entered national territory and are registered with social security, except in cases of a promise of an employment contract. Regime established in [Article 88\(2\) of Law No. 23/2007 of 24 July](#).

¹⁰⁹ Interview with PT public administration representative.

The relevant differences in the national regimes impacting on the posting of third-country nationals is further expanded upon in Section 3.3 below.

Finally, one Dutch stakeholder noted that increased posting from certain Member States has entailed a loss of control over the Dutch admission policy, as increasingly greater numbers of third-country nationals residing in these Member States are being posted to the Netherlands¹¹⁰.

¹¹⁰ Interview with NL public administration representative.

3.0 Enforcement of rules on the posting of third-country nationals

Section 2.1 presented the EU legal framework applicable to the posting of workers, including third-country nationals. The respect for the set of rules applicable to posting and the rights of posted workers depends heavily on adequate enforcement. Posting of workers is necessarily a transnational phenomenon requiring the application of (at least) two different legal frameworks. However, beyond the core body of legal requirements of the applicable EU legal framework, the national legal frameworks differ. Differences relate to the conditions and terms of employment beyond the requirements of EU law: the type of authority competent for a specific matter in the Member State, particularly inspection authorities; their scope of competence (which may or may not cover the whole range of matters involved in monitoring posting of third-country national workers, including migration); the type of investigatory powers; the way inspections are carried out; and extent of the competence of the competent authority in the outcome.

The different national legal frameworks and institutional landscapes for the posting of third-country nationals, where the already complex rules on posting of workers interact with migration law, create difficulties in enforcing the applicable rules. The Enforcement Directive thus constitutes a very important instrument: firstly, it harmonises the administrative requirements and control measures to ensure effective monitoring of compliance with the obligations of the PWD (Article 9); secondly, it establishes the general principles on mutual assistance and cooperation between Member States (Article 6).

Enforcement of the applicable rules on posting of workers is essential to detect and sanction the circumvention of the rules and recourse to abusive practices such as social fraud, fake posting, letterbox companies, undeclared work or posting¹¹¹, complex contracting lines resorting to intermediaries, etc. More worryingly, literature and the Italian report highlighted the links between Italian sending companies and organised crime¹¹², with the second pointing to the lack of an effective EU response in this regard (i.e. while companies engaging in organised crime may be convicted by the Italian courts and excluded from the possibility to participate in public contracts, they can still operate in other Member States and post workers across borders).

Special mention should be made of the use of letterbox companies¹¹³ for posting workers¹¹⁴ which may be used to avoid taxation and reduce social security costs¹¹⁵, thus generally increasing profits or

¹¹¹ Most often in the agriculture sector (ES, HU) and hospitality sector (HU) (European Commission, *Intra-EU mobility of Seasonal Workers: Trends and challenges*, Final Report, 2021, available at: [¹¹² Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU, in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* \(project VP/2018/011/0019\), 2020, pp. 7, 39.](https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8400&inCarrascosa, M.D. and Contreras, Ó., <i>Posted workers from and to Spain. Facts and figures</i>, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 74; Female workers suffer particularly badly in this situation (see García Pastora, F., Alonso, L., Martínez Moreno, C. and Ramos Antuñano, T., <i>La situación de las jornaleras en los campos de fresa de Huelva</i>, Informe jurídico, Feminist Observation Brigade, May 2021, on the situation of agricultural workers in Huelva (Spain), especially Moroccan women); Information gathered through interview with a Hungarian public administration representative.</p>
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¹¹³ 'Letterbox companies', in a definition proposed by the European Commission's Directorate-General for Justice and Consumers (DG JUST) are 'those companies that are incorporated in one Member State but do not perform any activity in that Member State or anywhere else' (European Commission, [Letterbox companies: overview of the phenomenon and existing measures: Executive Summary](#), Publications Office of the European Union, 2021, p. 5).

¹¹⁴ Issue stressed in reports from BG, DE, DK, FR, HR, IT, LV, PL, PT, SK.

¹¹⁵ Country Report Germany: *POOSH – Occupational Safety and Health of Posted Workers: Depicting the existing and future challenges in assuring decent working conditions and wellbeing of workers in hazardous sectors*, Project number VS/2016/0224; 2017-2018, p. 7; European Commission, [Letterbox companies: overview of the phenomenon and existing measures: Executive Summary](#), Publications Office of the European Union, 2021, p. 7.

disguising illegal conduct¹¹⁶. The use of letterbox companies is associated with serious violations of fundamental rights, such as labour exploitation, human trafficking, and infringements of social and labour obligations binding the employers of posted workers (e.g. undeclared work, withholding of salaries, poor provision of poor accommodation, excessive working hours, failure to pay overtime, night work and holidays)¹¹⁷. Inspectorates face particular difficulties in dealing with these types of companies¹¹⁸. Stakeholders have noted shortcomings in both EU and national law to effectively tackle this type of complex scheme, particularly where there is a multinational and non-EU dimension¹¹⁹.

3.1 The specific situation of posted third-country nationals

The general difficulties arising in the context of inspections and enforcement of posting rules apply more acutely in the case of posting of third-country nationals. In fact, the intersection of the rules on posting with the rules on migration and entry of third-country nationals to the EU Member States makes enforcement of the applicable rules more challenging. Firstly, the **right of the third-country national to reside and work** in the sending Member State is a precondition for posting. In many cases, the status of the third-country national in the sending Member State is temporary and the expiry or withdrawal of their right to reside and work in the sending Member State will have a direct impact on their posting, as the basis for the posting ceases to apply (see Section 2.1.1.b); Section 2.2.1.d)). Third-country national posted workers may be in a more precarious and vulnerable situation compared to posted EU workers, due to their enhanced dependency on their employer for renewal of their work and residence permit. Fear of reprisals makes posted third-country nationals less likely to bring forward complaints if their rights are breached¹²⁰.

The vulnerability of posted third-country nationals is reinforced by **language and cultural barriers**, which may hamper proper awareness of applicable rules and rights. The literature points out that all stakeholders should 'intensify their efforts to inform posted workers about their rights and responsibilities in several languages', 'extend multilingual information to [third-country national] TCN posted workers', provide 'information about the posting arrangement and other aspects of everyday life, employment documents and job training' in the language of third-country nationals' country of origin, namely with a 'proper induction session in a language [they] are familiar with', and facilitate contact with authorities¹²¹. This, in addition to Member States' efforts, in line with Article 5(2)l of the Enforcement Directive, to

¹¹⁶ Cillo, R., 'Regional case study: From Morocco and Tunisia to Belgium via Italy: migration and posting of third-country nationals', Foscari University of Venice, in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, pp. 10, 11.

¹¹⁷ Ibid.

¹¹⁸ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU, in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, pp. 38, 39.

¹¹⁹ Interview with FR public administration representative; On national-level shortcomings: interview with LT academic.

¹²⁰ On the renewal of work or residence permits in the sending country: Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 8; On the control of employers over the posting process exacerbating their dependency: Lens, D., Mussche, N. and Marx, I., *A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants*, International Migration, 2021, pp. 1-17.

¹²¹ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU, in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, pp. 59, 71.

provide information in the single official national website in other languages in addition to their national language¹²².

Economic factors also contribute to third-country nationals' special vulnerability, particularly the lack of means and the resulting economic dependency on the employer. They often display a greater willingness to work at lower rates, which may be explained by the comparison with less attractive wage or living standards applicable at home¹²³. **Social factors** such as isolation and low levels of education also contribute to their vulnerability.

These factors have an impact on enforcement, not only because posted third-country nationals may be more reluctant to complain to the competent authorities, but because communication challenges can complicate inspections.

Another factor that results in posted workers' low level of awareness of their rights relates to the duration of the posting, with workers in **short-term postings** often less aware of their rights¹²⁴. This situation is complicated by the fact that the short duration of postings also hinders proper enforcement¹²⁵, especially where such postings may be exempt from notification to the competent authorities (see Section 3.2.1).

The particular vulnerability of third-country national posted workers leaves them more exposed to **abusive practices** and fake posting. Third-country national workers are more likely to be entangled in particularly complex posting situations, 'characterised by subcontracting, cross-border mobility and temporary service provision'¹²⁶ or involving a chain of companies or letterbox companies. More specifically letterbox companies may be used to avoid more complicated or restrictive procedures for obtaining a work/residence permit for third-country nationals in EU/EEA countries where the worker is actually needed¹²⁷.

Fake posting of third-country national workers may take various forms: the worker is posted directly via a temporary work agency in one Member State to another Member State, without having resided or worked in the Member State for which they have documents, or the posted worker comes directly from a third country to the host Member State¹²⁸; the posted worker does not return to the sending Member State and, instead stays in the host Member State or returns directly to their country of origin; or the posted worker does not have a work permit or a residence permit in the sending Member State¹²⁹. Fake

¹²² European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')*, 2019, p. 6, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:426:FIN>

¹²³ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, pp. 41, 47, 64; Lens, D., Mussche, N. and Marx, I., *Europe's ever expanding mobility patterns posting, third-country nationals and the single European labour market*, Working Paper no. 19.08, University of Antwerp -Herman Deleeck Centre for Social Policy, 2019, p. 8; IE country fiche.

¹²⁴ FR, IE country reports.

¹²⁵ Ibid.

¹²⁶ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, pp. 8, 59, 65; Lens, D., Mussche, N. and Marx, I., *A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants*, International Migration, 2021.

¹²⁷ Interview with LV public administration representative; see also Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, pp. 64-65.

¹²⁸ Fake (or bogus) posting covers also situations where the worker does not actually carry out a substantial activity in the sending Member State or is not actually employed by the sending company; where they are hired with the sole purpose of being posted; where the posted worker performs an 'intermediation of employment', performing work normally done by the company's employees; where the PD A1 form is falsified, etc. (BG, CZ, DE, LT, NL, PL, SK country reports).

¹²⁹ For example, the AT and BG country reports state that instances were detected in the construction sector where the third-country national was posted without having a work permit in the sending Member State.

posting, combined with the use of letterbox companies, adds to the vulnerability of third-country nationals. For example, in the *Terra Fecundis* case, a temporary agency company posted seasonal workers most of whom were third-country nationals of Ecuadorian origin, with contracts, work permits and residence permits in Spain, where they were hired. The company posted the workers to French agricultural companies. However, that posting was found to be fraudulent as the third-country nationals did not provide services in Spain. The judgment considered the Spanish company to be a letterbox company and its administrators were deemed to have breached the law for 'disguised work' and 'labour trafficking'¹³⁰. The third-country national posted workers were victims of serious violations of their rights, including unpaid supplementary work, excessive working time, harassing and inappropriate working conditions (including lack of suitable accommodation).

The country reports, supported by the literature¹³¹, point to the risk of **breach of labour rights** of the posted third-country nationals, or to overall abuse. One such at-risk right is the **right to equal pay**. According to Austrian authorities, employers of posted third-country nationals often tend to pay supplements or daily allowances to compensate for incorrect wages¹³². They also reported that posted workers who first received correct wages, are then forced to pay back wages in cash so that the documented wages correspond to the posting provisions in case of an inspection¹³³. The same issue was reported in Finland and in Denmark¹³⁴. In Slovenia, third-country national posted workers often receive the minimum wage, below the agreed compensation and price of the service received by the employer from the user undertaking, and in contravention of the prescribed rate. In addition, workers often work overtime¹³⁵.

The right to equal pay is also circumvented through other means. The Austrian authorities noted that, especially in the construction sector, third-country nationals were often officially assigned lower qualified jobs despite performing work that requires a higher level of qualification, thus circumventing the applicable collective agreement rules and legally paying lower wages and social security contributions¹³⁶. Similarly, full-time workers are sometimes officially registered as part-time workers¹³⁷.

Inspectorates report that enforcement in this connection is particularly difficult. In Austria, one stakeholder noted that these practical issues hinder the inspection of compliance of posting of third-country nationals with the Austrian employment conditions¹³⁸. In Lithuania, stakeholders reported that ensuring that employers pay the actual salary due according to the applicable regulation on equal remuneration is an issue, particularly for third-country nationals posted by letterbox companies¹³⁹. French inspection services also highlighted challenges, especially the lack of reliable recording of working time in the sectors most affected by the employment of posted workers, such as construction or agriculture¹⁴⁰. Sectors that may not be so visible to enforcement agencies (e.g. live-in care) warrant

¹³⁰ Judgment of 8 July 2021 issued in first instance by a French criminal Court of Marseille (*Tribunal correctionnel de Marseille*). This judgment has been appealed. In April 2022, the Criminal Court of Nîmes handed down a second criminal judgment condemning the company *Terra Fecundis* to a fine of EUR 375,000 for 'disguised work' and 'employment of foreigners without authorisation'.

¹³¹ For example, in SI, BE, AT (Cukut Krilić, S., Toplak, K., Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, pp. 16, 18, 37, 38, 40).

¹³² Interview with AT public administration representative.

¹³³ Ibid.

¹³⁴ Interviews with FI and DK public administration representatives.

¹³⁵ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 107.

¹³⁶ Interview with AT public administration representative.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Interview with LT academic expert.

¹⁴⁰ Interview with FR public administration representative.

particular attention¹⁴¹. Despite the obligation for the issuing institution to carry out a proper assessment of the facts (i.e. to verify that all relevant requirements for a posting are met before issuing PD A1 forms (see Section 2.1.2.d)), third-country national posted workers are particularly vulnerable when it comes to social security coverage in the Member State of posting. In Poland, fake or missing PD A1 forms led to the non-payment of social security contributions for Ukrainian nationals posted to Czechia¹⁴². In situations where third-country national posted workers are not covered by healthcare insurance, cases of accidents at the workplace remaining unreported were highlighted, with the posted worker being removed from the site to prevent reporting of the incident as a workplace accident, left to pay their healthcare expenses, or even sent back to the sending Member State without compensation for their injury¹⁴³.

Stakeholders also noted the shortcomings of the applicable rules of the EU regulations on social security in cases of fake posting, notably when the posted third-country national does not return to the sending Member State. In fact, the exception to the general rule subjecting mobile workers to the social security system in the State of employment (Article 11(3)(a) Regulation (EC) No 883/2004) is also applicable to third-country national posted workers if the expected duration of work in the host Member State does not exceed 24 months (Article 12(1) Regulation (EC) No 883/2004 Regulation) (see Section 2.1.2). In those cases, the posted third-country national continues to be subject to the social security legislation of the sending Member State, building up entitlement to benefits there. If they return to the country of origin after the posting, their enjoyment of the accrued social security benefits depends on the export of entitlement from the sending Member State to the country of origin¹⁴⁴.

Another common issue in the posting of third-country national workers consists of irregular payment or non-payment of **social contributions**, notably unemployment benefits and pension insurance contributions. Similarly, lack of or insufficient healthcare insurance coverage has been indicated as commonplace¹⁴⁵.

Employers avoid paying social contributions by paying third-country national posted workers only the minimum wage, or declaring only that amount despite paying third-country nationals by other means, such as *per diem*. Stakeholders consulted as part of the Con3Post study noted that **irregular payment of social contributions** to third-country national posted workers is a significant problem in respect of unemployment benefits in Slovenia and pension insurance contributions in Poland. In those Member States, the reports note that such practices have become a 'business model' used to gain a competitive advantage, to the detriment of posted third-country national workers¹⁴⁶.

The **non-payment of social security contributions** is particularly common when third-country nationals are posted using letterbox companies¹⁴⁷. Companies often use letterbox companies to post third-country nationals from a Member State with lower social security contributions, sometimes without

¹⁴¹ On the prevalence of third-country nationals in this sector, see De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 61-63.

¹⁴² European Platform tackling undeclared work, Counteracting undeclared work and labour exploitation of third-country national workers, 2021, p.25, available at: <file:///C:/Users/gramu/Downloads/Counteracting%20undeclared%20work%20and%20labour%20exploitation%20of%20third-country%20national%20workers.pdf>

¹⁴³ Cukut Krilić, S., Toplak, K., Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 56, available at: <https://www.euro.centre.org/downloads/detail/3930>

¹⁴⁴ Interview with NL public administration representative.

¹⁴⁵ Cukut Krilić, S., Toplak, K., Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, pp. 7, 56, available at: <https://www.euro.centre.org/downloads/detail/3930>

¹⁴⁶ Ibid., p. 56

¹⁴⁷ Ibid., p. 59.

any prior employment in the sending Member State¹⁴⁸. Due to the complex chain of companies involved in their posting, it is often difficult for these workers to understand the employment relationship they have with the companies involved in the posting, including who has to pay social security contributions and thus to whom they should address themselves in case of default¹⁴⁹. This lack of understanding of the posting chain, combined with their increased dependence on their employer for the renewal of their work/residence permit, results in greater non-compliance with the rights of third-country national posted workers¹⁵⁰.

The perspective of the **employer** on the particular difficulties encountered when posting workers including third-country nationals, should also be considered. In fact, lack of compliance may result from difficulties in finding and understanding the applicable rules in the host Member State. The **favourability principle** enshrined in Article 3(7) of the PWD entails comparing the potentially applicable set of rules regarding the different terms and conditions of employment. Accessing the relevant information on the applicable **collective agreements** seems to be especially challenging for employers. Although Article 5(2)(b) of the Enforcement Directive foresees that the single official national website shall provide information on the applicable collective agreements, this information is presented differently by the Member States, with some providing only a link to the database on collective agreements¹⁵¹. This is the case in Italy (with some exceptions)¹⁵², with the literature pointing out that the simple reference to the national archive of industry collective agreements managed by CNEL (*Archivio Nazionale dei contratti collettivi di lavoro del CNEL*) makes it extremely complicated for a foreign company to understand the collective agreement and terms and conditions of employment that apply in a given situation¹⁵³.

Proper access to information is essential to ensure awareness of rights and obligations, not only for posted workers, but also employers, in order to contribute to better compliance¹⁵⁴.

3.2 Administrative requirements related to posting of third-country nationals in the host Member State

The following subsection presents a brief overview of the main administrative requirements in place in each Member State for the posting of a third-country national. Compliance with these administrative requirements is the object of inspections and requests for information from authorities in other Member States.

The administrative requirements related to the posting of workers can be broadly divided into those relating to employment and those relating to social security (see Section 2.1). The main employment-

¹⁴⁸ European Platform tackling undeclared work, *Counteracting undeclared work and labour exploitation of third-country national workers*, 2021, p.24, available at:

[file:///C:/Users/gramu/Downloads/Counteracting%20undeclared%20work%20and%20labour%20exploitation%20of%20third-country%20national%20workers%20\(1\).pdf](file:///C:/Users/gramu/Downloads/Counteracting%20undeclared%20work%20and%20labour%20exploitation%20of%20third-country%20national%20workers%20(1).pdf)

¹⁴⁹ Cukut Krilić, S., Toplak, K., Vah Jevšnik, M., *Posting of Third-Country Nationals: A Comparative Study*, ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 59, available at:

<https://www.euro.centre.org/downloads/detail/3930>

¹⁵⁰ Cukut Krilić, S., Toplak, K., Vah Jevšnik, M., *Posting of Third-Country Nationals: A Comparative Study*, ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 40, available at:

<https://www.euro.centre.org/downloads/detail/3930>; interview with public administration representative.

¹⁵¹ European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')*, 2019, p. 6, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:426:FIN>

¹⁵² Collective agreements applicable to the sectors employing most posted workers - construction, transport and mechanical industry.

¹⁵³ Dorigatti, L., Pallini, M. and Pedersini, R., *Posted Workers from and to Italy. Facts and Figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 43-44.

¹⁵⁴ Interviews with HU and PL academic experts.

related requirements cover the notification of posting, the obligation to keep and present documents, and the obligation to designate a liaison person and a representative. The social security-related requirements are mostly limited to the issuing by the sending Member State of a PD A1 form. Some Member States have established further administrative requirements that apply to the posting of workers, such as the registration of the presence of the posted worker with the competent authorities (regardless of nationality)¹⁵⁵, identification measures of posted workers in certain sectors, or the contribution to sector-specific funds. Based on the national research for this study, with a few exceptions¹⁵⁶, Member States have not created administrative requirements related to the posting of third-country nationals specifically, with host Member States usually applying the same requirements as posting of EU citizens.

Horizontal analysis of the country reports revealed that several Member States' rules on the object of inspections implicitly refer to the national provisions transposing Article 4 of the Enforcement Directive, on the factual elements to assess whether a specific situation qualifies as a genuine posting¹⁵⁷, as well as the national provisions transposing Articles 9 and 10 of the Enforcement Directive¹⁵⁸, pointing to the monitoring of compliance with the relevant administrative requirements applicable to posting.

3.2.1 Notification of posting

The Enforcement Directive applies to all posted workers, including third-country nationals. Pursuant to Article 9(1)(a) of the Enforcement Directive, Member States may impose on a service provider the **obligation to notify** the responsible national authority in the receiving Member State of the posting. All Member States require employers to notify the posting of workers at the latest on the day of commencement of the posting¹⁵⁹. However, some Member State **exempt** certain types of posting from the notification requirement. In **Belgium**, the exemption applies to workers in the international transport sector for passengers and goods, workers attending meetings with a closed attendee list, specialised technicians required to carry out urgent maintenance, athletes, artists with an international reputation (if the stay does not exceed 21 days per quarter), and scientists participating in a scientific programme (if the stay does not exceed three months per calendar year)¹⁶⁰. Similarly, in **the Netherlands**, sectors for which no posting notification requirement applies include, for instance, employers active in the sector classified under transport of persons by railroad (no tram or metro), transport of goods by railroad, transport of persons by road, transport of goods by road through the Netherlands without any charging or discharging in the Netherlands, transport by water, air transport, postal services, public services, assembly or initial installation of a good when this is an essential part of the supply of the good (of less than 8 days), participation in congresses of less than 5 days/month, business trips, international correspondents, participants in international sports competitions, artists and musicians, guest teachers and short-term researchers¹⁶¹. In **Czechia**, posting of workers in international transport is exempt. In **France**, no prior notification is required for a posting of maximum 90 days within 12 consecutive months

¹⁵⁵ A number of Member States (BE, CZ, EE, EL, IE, LT, LU, PT, SI, SK) require registration of the beginning of the employment/presence of the posted worker with authorities, regardless of their nationality. This requirement of registration of presence on the national territory is independent from and applies in addition to the requirements relating the right to stay in the Member State of posting. Indeed, if the registration of presence is required as an administrative step, it does not grant a right to reside on the territory.

¹⁵⁶ AT, BE, CY, DE, HR, IE, LT, LU, SK.

¹⁵⁷ ES, FR, HU, MT, PT.

¹⁵⁸ AT, BE, BG, FR, HR.

¹⁵⁹ Country research for all Member States carried out in the framework of this study.

¹⁶⁰ European Commission, Practical guide on posting, 2019, p.10, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ac7320a-170f-11ea-8c1f-01aa75ed71a1/language-en>

¹⁶¹ Art. 10 [Decree on Terms of Employment for Posted Workers in the European Union \('BagwEU'\)](#).

for artists, athletes, referees, team support or linked to the work of athletes, or apprentices in a situation of temporary mobility.

Short-term posting may also be exempt from notification. In **Lithuania**, the posting notification is only required if the posting is longer than 30 days.

The **form and content** of the notification varies. In nearly all Member States¹⁶², the notification of posting can be transmitted electronically, either via an electronic form or via email. In many Member States, the information to be submitted is included in the online form, while in others the information to be submitted is listed in the legislation.

The content of the posting notification also varies (see table in Annex 2), but usually comprises the information necessary to allow inspection (e.g. information relating to the sending employer, the person of liaison, address of the workplace, nature of the services). In 20 Member States¹⁶³, the posting notification contains information relating to the citizenship of the posted worker. In six Member States¹⁶⁴, the posting notification contains information related to the posted worker (the country reports do not specify whether this includes citizenship).

Regarding the **type of information** contained in the posting notification, the list of information to be declared by the sending employer included in Article 9(1)(a) of the Enforcement Directive is not exhaustive and most Member State request also the provision of information on the **nationality** of the posted worker (**Austria, Denmark, Estonia, Finland, France, Greece, Croatia, Ireland, Italy, Luxembourg, Latvia, Malta, the Netherlands, Spain, Poland, Romania, Sweden, Slovenia and Slovakia**)¹⁶⁵. Moreover, some Member States require the submission of information relating to the **work and residence permit** of third-country national posted workers in the sending Member State (e.g. **Austria**¹⁶⁶, **Luxembourg**¹⁶⁷, **Croatia**¹⁶⁸, **Ireland**¹⁶⁹, **Latvia**¹⁷⁰, and **Lithuania**¹⁷¹).

Should the information contained in the prior posting notification **change**, three Member States¹⁷² require immediate notification of such changes but do not indicate a specific timeframe. The legislation in 10 Member States¹⁷³ indicates a specific timeframe for the changes to be notified. For instance, in

¹⁶² No information obtained for EL.

¹⁶³ AT, DK, EE, EL, ES, FI, FR, HR, IE, IT, LT, LU, LV, MT, NL, PL, RO, SE, SI, SK.

¹⁶⁴ BE, BG, CY, CZ, DE, PT.

¹⁶⁵ See Table 3 above.

¹⁶⁶ According to Section 19 (3) [LSD-BG](#), the notification has to include, among others, the number, date of issue and copy of the work permit if requested by the sending Member State and the number, date of issue and copy of the residence permit if requested by the sending Member State.

¹⁶⁷ Pursuant Article L. 142-2 of the [Labor Code](#), the posting undertaking must communicate to ITM, on its electronic platform, among others, a copy of the residence permit or of any residence certificate for third country nationals posted in the territory of Luxembourg.

¹⁶⁸ The posting declaration should include information on the work permit of the third-country national posted worker in the sending State, including date of issue, the term of validity of work permit, competent body that issued the work permit, competent body that issued the valid stay permit in the state in which the foreign employer is established. Moreover, the employer is obliged to confirm in the posting declaration that the posted third-country national worker is legally employed according to the regulations of the state in which employer is established (Article 20(3) of the [Law 128/2020](#)).

¹⁶⁹ The Form of Declaration must include, if the worker is a non-EEA national, details of the Employment Permit held (if applicable).

¹⁷⁰ The posting notification should contain a declaration ("certification") that the third-country national posted worker is legally employed by an employer in the EU/EEA.

¹⁷¹ In addition to the posting notification, which has to be submitted by the sending employer, receiving Lithuanian employers hiring foreign employees including posted workers, must submit a report to the State Labour Authority before the beginning of the posting. The report is submitted electronically and contains information on the posted worker, including nationality and proof of legal stay in Lithuania.

¹⁷² AT, DE, FI.

¹⁷³ CY, CZ, DK, EL, HR, LT, IT, PL, RO, SE.

Lithuania, the modifications shall be notified one day after the change. In Cyprus and Greece¹⁷⁴, the modifications shall be notified 15 days after the change. For the 14 remaining Member States, nothing in the country reports indicates that national authorities shall be informed of changes in the information contained in the posting notification. The lack of notification of changes is particularly relevant for posted third-country national, as it implies that expiry of their residence or work permit in the sending Member State is not notified to the receiving State. Posted third-country nationals' uncertainty regarding their migration status increases their vulnerability.

In most of the Member States, the posting notification includes information on the estimated duration of the posting, and the beginning and end dates.

In addition to the posting notification, six Member States¹⁷⁵ apply **sector-specific requirements**. In **Belgium**, further registrations and declarations must be submitted by employers posting workers in the meat and construction sectors.

Other obligations arising from the PWD apply indiscriminately to EU and third-country national posted workers, such as the obligation to keep and present documents (time sheets, payslips, proof of payment) in 20 Member States¹⁷⁶, and the obligation to designate a liaison person in the undertaking to ensure communication with the national authorities in the host Member State.

3.2.2 Social security requirements

The social security requirements are mostly limited to the issuance of PD A1 forms by the sending Member State. Irrespective of their nationality, workers posted within the EU are required to obtain and hold a PD A1 form, confirming that they are subject to the social security legislation of the sending Member State and are thus not required to pay social security contributions in the receiving Member State.

Different requirements apply to the PD A1 form in the various Member States. For instance, PD A1s have to be kept at the place of employment and presented during inspections in **Austria, Estonia, Finland, Croatia, Ireland, Italy, the Netherlands and Slovenia**. In other Member States, the PD A1 is kept at a government authority: in **Germany**, at the Pension Insurance Data Centre; in **Greece** and **Sweden**, at the social insurance administration. In **Portugal**, the receiving company or the posted worker has to present the PD A1 to the closest Social Security District Centre.

In **France, Lithuania, Luxembourg** and **Latvia**, information on to the social security obligations of posted workers is contained in the posting notification and must be presented during inspection.

In **Hungary**, the sending employer has to provide a statement proving that the employee was eligible for healthcare services for at least 30 consecutive days immediately before the posting. Employers posting workers from Hungary must also disclose information proving that they are engaged in significant economic activities in Hungary.

¹⁷⁴ European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')*, COM(2019) 426 final, p.9.

¹⁷⁵ BE, DE, ES, FI, LT, SK.

¹⁷⁶ AT, BE, BG, CY, EE, EL, FI, FR, HR, IE, IT, LV, MT, NL, PL, PT, RO, SE, SI, SK.

In **Lithuania**, in order to obtain a PD A1 for a third-country national posted worker, the employer must submit to the competent authority a certified copy of the worker's residence permit in Lithuania or relevant visa (in case of the latter, information on the person's place of residence must also be provided).

3.2.3 Other administrative requirements

Other administrative requirements apply to the posting of both EU and third-country national workers.

Regardless of the workers' nationality, some Member States require **registration** of the beginning of the employment or the presence of a posted worker before municipal authorities¹⁷⁷, the police¹⁷⁸ or immigration authorities¹⁷⁹. This requirement of registration of presence on the national territory applies in addition to the requirement to hold a temporary residence permit in the Member State of posting. The registration requirement applies to both EU nationals and third-country national, but the timeframe for registration may be shorter for third-country national than for EU nationals.

In some Member States, **sector-specific identification** requirements have been established for both third-country national and EU posted workers. For instance, in **France** and **Belgium**, workers in the construction sectors are required to hold a construction card¹⁸⁰. In **Luxembourg**, posted workers are required to hold a social identification badge, irrespective of their sector¹⁸¹. In **Finland**, if posted workers provide services on a construction or a shipyard, they are required to apply for a tax number.

¹⁷⁷ BE, LT, LU, SI.

¹⁷⁸ CZ, EE, EL, SK.

¹⁷⁹ IE, PT.

¹⁸⁰ European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')*, COM(2019) 426 final, p.12.

¹⁸¹ *Ibid*, p.12.

Table 2: Administrative requirements related to the posting of third-country nationals

MS	Employment					Social security	Other	
	Posting notification	Information related to the nationality of the posted worker in the notification	Information related to the work/residence permit of the posted worker in the notification	Obligation to present documents during inspections	Designation of liaison person or representative		Registration of residency	Sector-specific requirements
AT	√ (electronic form)	√	√	√	√ (liaison person and representative)	√ (checked at inspection)		
BE	√ (electronic form)			√	√ (liaison person)	√	√	√ (meat and construction sectors)
BG	√ (electronic form)			√	√ (liaison person)	√		
CY	√ (notification by email, fax or post)		√ (confirmation by the sending employer of the legality of the employment of the third-country national)	√	√ (liaison person and representative)	√		

MS	Employment					Social security	Other	
CZ	√ (notification by email, fax or post)					√	√	
DE	√ (electronic form)					√ (presented to the authorities)		
DK	√	√	√ (not in the posting notification but should be sent to national immigration authority if the posting lasts longer than three months)			√		
EE	√ (form submitted by email)	√		√	√ (representative)	√ (checked at inspection)	√	
EL	√	√		√	√ (representative and liaison person)	√ (presented to the authorities)	√ (for posting longer than three months)	
ES	√ (electronic form)	√	√ (not in the posting notification but should be kept by the employer and	√	√ (representative and liaison person)	√		√ (construction sector)

MS	Employment					Social security	Other	
			presented during inspection)					
FI	√ (electronic form)	√		√	√ (representative)	√ (checked at inspection)		√ (road transport and construction sectors)
FR	√ (electronic form)	√		√	√ (representative)	√ (contained in the posting notification, checked at inspection)		√ (construction sector)
HR	√ (form submitted by email)	√	√	√	√ (liaison person and representative)	√ (checked at inspection)		
HU	√ (electronic form)				√ (liaison person and representative)	√		
IE	√ (form submitted by email or post)	√	√	√		√ (checked at inspection)	√ (within 90 days)	

MS	Employment					Social security	Other	
IT	√ (electronic form)	√		√	√ (liaison person and representative)	√ (checked at inspection)		
LT	√ (electronic form)	√ (information on citizenship is contained in the report sent by the receiving employer)	√ (not in the posting notification but in the report sent by the receiving employer)		√ (representative)	√ (contained in the posting notification, checked at inspection)	√	√ (road transport sector)
LU	√ (electronic form)	√	√		√ (liaison person and representative)	√ (contained in the posting notification, checked at inspection)	√ (within three days)	
LV	√ (form submitted by email)	√	√	√	√ (representative)	√ (contained in the posting notification, checked at inspection)		
MT	√ (electronic form)	√		√	√ (liaison person)	√		

MS	Employment					Social security	Other	
NL	√ (electronic form)	√		√	√ (liaison person)	√ (checked at inspection)		
PL	√ (form submitted electronically, by post or in person)	√		√	√ (liaison person)	√		
PT	√			√	√ (liaison person)	√ (presented to the authorities)	√ (within three days)	
RO	√ (form submitted by email or post)	√		√	√ (liaison person and representative)	√		
SE	√ (electronic form)	√		√	√ (liaison person)	√ (checked at inspection)		
SI	√ (online or notification by post)	√		√	√ (liaison person)	√ (presented to the authorities)	√	
SK	√ (electronic form or form submitted by post)	√	√ (not in the posting notification but in the notification of stay to the authorities)	√	√ (liaison person)	√	√ (within three working days)	√ (road transport sector)

3.3 Administrative requirements on the right of stay of posted third-country nationals

The requirements for posting of third-country nationals for the purposes of providing cross-border services is not harmonised at EU level. Rather, Member States apply various administrative requirements regarding the right of stay of posted third-country nationals on their territory.

It is well-established CJEU case-law that the right to temporarily send workers to another Member State to provide services covers third-country nationals legally employed by the service provider in the Member State where it is established. The host Member State may not impose administrative formalities or additional conditions on the lawfully employed third-country nationals that would amount to administrative barriers to the freedom of movement¹⁸². In *Vander Elst*, the CJEU ruled that Member States are precluded from requiring a **work permit** for third-country nationals posted by an undertaking established in another Member State where they are lawfully and habitually employed¹⁸³. In its subsequent jurisprudence on the matter, the CJEU ruled that previous checks carried out by a Member State to ensure the lawful character of the posting of third-country nationals from another Member State was disproportionate¹⁸⁴. Member States are also prevented from automatically prohibiting the entry or issuance of a residence permit to a posted third-country national lawfully residing in the sending Member State¹⁸⁵.

While the *Vander Elst* clarified that the posted third-country national worker needs only a work permit in the sending Member State, the same does not apply for residence permits¹⁸⁶. The right of residence of posted third-country national workers has, thus, to be verified both in the sending Member State, even if indirectly, in order to conclude that worker is lawfully employed, and in the host Member State, to cover the worker's stay during the provision of services.

In this connection, it should be noted that, whereas few Member States do not impose any additional requirements regarding the right of entry and stay of posted third-country nationals in the host Member State, the majority requires an application for a **temporary residence permit or a *Vander Elst* visa**¹⁸⁷. Within the second group, while there is a clear majority exempting from the necessity to obtain the said permits/visas when the posting is shorter than 90 days (thus falling under a Schengen visa), a minority of Member States seems to impose such an obligation regardless of the duration of the posting.

¹⁸² See Section 2.1.1 above.

¹⁸³ CJEU, Judgment of the Court of 9 August 1994, *Raymond Vander Elst v Office des Migrations Internationales*, C-43/93, EU:C:1994:310, §26.

¹⁸⁴ CJEU, Judgment of the Court (First Chamber) of 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, Case C-244/04, ECLI:EU:C:2006:49, §51.

¹⁸⁵ CJEU, Judgment of the Court (First Chamber) of 21 September 2006, *Commission of the European Communities v Republic of Austria*, Case C-168/04, ECLI:EU:C:2006:595, §65.

¹⁸⁶ This is the object of a recently introduced preliminary question by a Dutch court before the CJEU (C-540/22) which deals with the question of whether it is justifiable that posted TCNs, after the expiry of the Schengen circulation right (90 days out of 180), must apply for a residence permit in the host Member State in addition to their residence permit in the sending Member State. Moreover, it questions also whether such residence permit in the host Member State may have a validity period irrespective of the duration of the provision of services and whether it can be limited to the duration of the work and residence permit in the sending Member State.

¹⁸⁷ In some Member States, the visa required makes express reference to the *Vander Elst* judgement - *Vander Elst* visa. This is the case in Germany although this visa is not referred to in German legislation - https://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Residence-title/Nationals-of-third-countries/uebersicht_aufenthaltstitel.html?nn=206562&faqCalledDoc=206566 - and in Ireland - established by administrative circular, rather than legislation - <https://www.irishimmigration.ie/coming-to-work-in-ireland/what-are-my-work-visa-options/applying-for-a-long-stay-employment-visa/van-der-elst-visa/van-der-elst-policy-document/>.

In general, Member States' administrative requirements on the right of stay of posted third-country nationals can be grouped as follows:

- ▶ Member States in which third-country national posted workers are required to apply for a temporary residence permit when the posting exceeds 90 days (**Belgium, Czechia, Denmark, Germany¹⁸⁸, Estonia, Finland, France, Greece, Croatia, Luxembourg, Latvia, the Netherlands, Poland, Slovenia and Slovakia**);
- ▶ Member States in which a temporary residence permit is required for third-country national posted workers regardless of whether posting exceeds 90 days (**Germany¹⁸⁹, France, Ireland, Italy Malta and Romania**);
- ▶ Member States where no residence permit is required, regardless of the duration of the posting, as long as the posted worker is legally working and residing in the sending Member State (**Austria, Cyprus, Hungary, Spain and Portugal**).

In **Germany**, third-country national posted workers who only have a temporary residence permit in the sending Member State are required to apply for a *Vander Elst* visa, regardless of the duration of the posting. For third-country national posted workers who hold a long-term residence permit in the sending State, they are only required to apply for such a visa if the posting period lasts longer than 90 days within a 12-month period. In **Bulgaria**, third-country national posted workers are required to register with a national authority in order to be posted for up to three months within a 12-month period. However, no information was found on the applicable requirements for posting exceeding 90 days. Third-country national posted workers are allowed to perform tasks relating to the inspection and coordination of the implementation of a contract for tourism services without a work permit and on the basis of a single registration for six months within a 12-month period.

In **Austria, Cyprus, Spain, Hungary and Portugal**, a residence permit is not required for third-country national posted workers, regardless of the duration of the posting, as long as they are legally working and residing in the sending Member State. Notwithstanding, other administrative requirements may be applicable, as is the case in Portugal, where within three days after entering the national territory, a declaration of entry should be submitted to the immigration authority, which, upon submission of evidence of the posting situation, authorises the posted third-country national worker stay to the duration corresponding to the posting¹⁹⁰.

¹⁸⁸ In case the third-country national holds a long-term residence permit in the sending Member State.

¹⁸⁹ In case the third-country national's residence permit in the sending Member State is only temporary.

¹⁹⁰ [Article 40\(2\) and \(3\) of the Regulatory Decree No. 84/07 of November 5th.](#)

Table 3: Administrative requirements on the right of stay of third-country nationals

MS	No requirement to apply for a temporary residence permit	Requirement to apply for a temporary residence permit after 90 days of posting	Requirement to apply for a temporary residence permit, regardless of the duration of the posting
AT	√		
BE		√	
BG			
CY	√		
CZ		√	
DE		√	√
DK		√	
EE		√	
EL		√	
ES	√		
FI		√	
FR			√
HR		√	
HU	√		
IE			√
IT			√
LT			

MS	No requirement to apply for a temporary residence permit	Requirement to apply for a temporary residence permit after 90 days of posting	Requirement to apply for a temporary residence permit, regardless of the duration of the posting
LU		√	
LV		√	
MT			√
NL		√	
PL		√	
PT	√		
RO		√	√
SE		√	
SI		√	
SK		√	

In 13 Member States (Belgium, Czechia, Germany, Denmark, Estonia, Greece, France, Ireland, Luxembourg, the Netherlands, Poland, Sweden and Slovenia), the **duration of the residence permit** is limited to the period of the posting. The **maximum duration** of the residence permit differs across the Member States, ranging from 12 months (in Croatia and Slovenia) to five years (in Spain). In addition, some Member States do not provide for a maximum duration of the residence permit.

However, in some Member States, the duration of the residence permit is further limited to the **duration, in the sending Member State, of the residence** (eg. the Netherlands and Ireland) **or of the work permit** (eg. Germany). This is one of the questions referred by a Dutch court to the CJEU for a preliminary ruling (C-540/22, currently pending). Further to this, information provided by some Member State authorities also indicates that the duration of the residence or work permit in the sending Member State conditions the period of validity of the residence permit in the host Member State, without, however, providing further details (this is the case, e.g., of Sweden, Estonia, Malta)¹⁹¹. Moreover, some national authorities highlight the link between the condition that the worker is lawfully employed and the

¹⁹¹ See European Commission, European Migration Network, 'Ad hoc query on 2020.35 posted workers, 30.09.2020, p.9, available at: https://www.emnnetherlands.nl/sites/default/files/2020-10/202035_posted_workers%20WIDER.pdf.

duration/validity of the residence or work permit in the sending Member State (this is the case, e.g., of France, Luxembourg, Slovenia)¹⁹².

Some Member States require that the relevant visa is obtained before entering their territory, by applying to the competent consular authority abroad (e.g. **France, Germany, Greece and Romania**).

Several instances were identified where the **lawfulness of the third-country nationals' residence and/or work permit in the sending Member State** in the moment of deciding on the issuance of a residence permit for the posted TCN in the host Member State. Some illustrative approaches followed in Member States are further detailed below.

Table 4: Illustrative examples of host Member States considering the lawfulness of the third-country nationals' residence in the sending Member State

MS	Approach
Luxembourg	<p>Article 49 of the Law of 29 August 2008 on free movement of persons and immigration applies for the posting of third-country nationals from another Member State. According to point 1) of the article, companies established in the EU or EEA may freely post workers to Luxembourg regardless of their nationality as long as the posted workers have a right to work and to live in the sending Member State for the duration of the posting.</p> <p>Article 49(3) of the of the Law of 29 August 2008 on free movement of persons and immigration provides that for a posting lasting longer than 3 months, the worker is entitled("de plein droit") to a residence permit on which it is specified "salaried worker of a community service provider. The posted third-country national worker must apply for this residence permit at the Immigration Direction of the Ministry for Foreign and European Affairs (MAEE) within 3 months of their arrival, filling out a special form for that effect. As per Article 2 of the Regulation of 5 September 2008 laying down the terms and conditions for the issue of a residence permit as an employed person, a certified copy of the passport and the working contract, among other documents, shall be attached to the request for a residence permit. The MAEE will check that the conditions are met and issue the residence permit. The residence permit will be valid for the duration of the posting and for the only employer, who made the application for the of posting. If the initial posting is extended, the TCN posted worker must apply for the renewal of his/her residence permit, within the 2 months preceding the expiry date¹⁹³.</p>
Germany	<p>Third-country national posted workers who only have a temporary residence permit in the sending Member State are required to apply for a <i>Vander Elst</i> visa, regardless of the duration of the posting. For third-country national posted workers who hold a long-term residence permit in the sending State, they are only required to apply for such a visa if the posting period lasts longer than 90 days within a 12-month period. The <i>Vander Elst</i> visa, which is not referred to in German legislation and is not a residence</p>

¹⁹² Idem.

¹⁹³ <https://guichet.public.lu/fr/entreprises/ressources-humaines/mobilite/detachement/detache-UE.html>.

MS	Approach
	<p>permit within the meaning of the relevant section of the Residence Act, is specific for posting and must be applied for at the relevant diplomatic missions abroad.</p> <p>According to the 'Visa Handbook' of the German Ministry of Foreign Affairs (point 2.2.2), it is irrelevant whether the third-country national in the first EU/EEA Member State has a national residence permit or only a national visa, provided that the residence title entitles him or her to pursue lawful employment there and that this is legally exercised. The Visa Handbook provides some guidance on the verification of 'legal employment'.</p> <p>The Ministry for Foreign Affairs, as the visa-issuing entity, cooperates with the Ministry for Internal Affairs – which is responsible for residence permits – to verify that the <i>Vander Elst</i>-rules are respected when it comes to posting of third-country nationals. This verification is done on the basis of the information submitted by the employers when notifying posted workers, i.e. through the declarations provided on the status of the posted worker.</p>
Romania	<p>TCN's posted to Romania require a long-stay visa for secondment (marked D/DT)¹⁹⁴ – this type of long-stay visa is granted to third-state nationals in view of carrying out lucrative activities in Romania with a beneficiary of the provided services. The long-stay visa for secondment attests the third-state national's right to stay and work on the territory of Romania.¹⁹⁵ For the purposes of obtaining the visa (which has to be requested from abroad), the following documents, among others, have to be provided: individual employment agreement, translated and notarised copy of the individual contract of employment, registered with the competent authorities from the respective member state; and a residence permit issued by the state where the employer's headquarters are located, in original and in copy.</p> <p>The visa allows entry and stay in Romania for a maximum of 90 days within a 6-month period, but it can be extended by obtaining a <i>residence permit</i>. Foreigners employed by legal entities established on the territory of one of the Member States of the European Union or the European Economic Area or on the territory of the Swiss Confederation, seconded to Romania, shall have their right of temporary residence extended, without being limited to the general validity period of 5 years, if they present, among others, a copy of the individual employment contract registered with the competent authorities of the Member State concerned, translated and legalised, and the valid residence permit issued by the State in which the employer is established, in original and copy.</p>
The Netherlands	<p>For stays exceeding three months, a 'temporary regular residence permit in the context of cross-border service provision' is required (Art. 4.6 BuWa). Conditions to be eligible for this permit include the holding, by the posted worker, of a residence and work</p>

¹⁹⁴ See [eViza | Ministerul Afacerilor Externe \(mae.ro\)](#)

¹⁹⁵ See <http://eviza.mae.ro/SupportingDocuments#simbolDDT>.

MS	Approach
	permit in the EU Member State where the employer is established. To demonstrate legal residence in the posting Member State, it is sufficient that the employee shows his or her residence and work permit from the country where the employer is based.
Ireland	A non-EEA national who is lawfully resident and legally employed in another EU member state may be allowed to work on a temporary basis for that employer in Ireland without the need to obtain a work permit. Moreover, a residence permit is also not necessary, but the posted TCN is required to hold an employment visa – the Van der Elst visa (short-term (up to 90 days) ‘Stamp C’ classification, or a longer-term (more than 90 days and up to one year) ‘Stamp D’ classification). In applying for a Van der Elst visa, the posted worker must supply, among others, the residence or ID card issued by the sending Member State ¹⁹⁶ .
Cyprus	Third-country nationals workers posted to Cyprus do not need a residence and work permit (Section 18YΓ(2)(c) of the Aliens and Immigration Law (CAP.105)). However, prior to their arrival, national authorities will check that the third-country nationals have a residence and work permit in the sending Member State, notably to check that they are legally employed in the sending Member State and that they are approved by the Civil Registry and Immigration Department .
Belgium	If the third-country posted worker from another Member State intends to work and stay in Belgium for more than 90 days, they need to apply for a <i>temporary residence permit</i> . The residence permit will be issued if the posted worker provides all required documents, including a valid work permit in the other Member State (Art. 61/25-2 Aliens Act).

In addition to the above, as described in Section 3.2.1 above, that some Member States request that the posting notification also includes information on the nationality of the third-country national worker, their work and residence permit in the sending Member State.

3.4 Enforcement of the legislation on posting

3.4.1 National enforcement practices

a) Competent authorities

All Member States ensure the enforcement of legislation applicable to posted third-country national workers, with the competent authority for inspection in the context of employment and/or social security also competent to monitor compliance with the applicable legislation on posted workers.

¹⁹⁶ See <https://www.irishimmigration.ie/coming-to-work-in-ireland/what-are-my-work-visa-options/applying-for-a-long-stay-employment-visa/van-der-elst-visa/van-der-elst-policy-document/>.

Only two Member States¹⁹⁷ explicitly foresee inspection by the competent authority of the rules applicable to posted third-country nationals. In **Germany**, the applicable law establishes special requirements for the work of third-country nationals to be examined in the context of an inspection. In **Greece**, the provision on the scope of powers of the Labour Inspectorate expressly states that it shall supervise at any time of day or night, businesses and operations for the implementation of the provisions on the legality of the employment of working third-country nationals. In the other Member States, national laws transposing the posting directives make no distinction between third-country nationals and EU nationals.

There is no clear-cut trend among the Member States in terms of the **material scope** of the competence of the inspection authorities, nor whether a single competent authority covers both **employment-related obligations** and **social security related obligations**, or separate inspectorates deal with these topics. In eight Member States¹⁹⁸, the same inspection authority is responsible for both, while in Greece and Finland, although the authority responsible for enforcement of employment-related obligations is also competent for inspection in social security matters, this competence is shared with the social security authority. In 15 Member States¹⁹⁹, the inspection of employment-related obligations and social security obligations is entrusted to different authorities, although in Belgium they are part of the same entity²⁰⁰.

In three Member States, there is **more than one or two competent authorities** for the enforcement of employment-related and social security related obligations. In **Czechia**, in addition to the Inspectorate, the Customs Office controls whether a foreign national carries out work for a legal or natural person on the basis of an employment relationship, and whether employers fulfil the notification/information/reporting obligations. In **Ireland**, a specific entity is competent for health and safety at work, and in **Italy**, an entity is responsible for work-related accidents. In **Austria**, one entity has specific competence in the construction sector.

The scope of the competence of these inspection authorities broadly covers the workers under their jurisdiction. A **specific authority competent for inspections regarding third-country national posted workers** exists in Austria for workers who are not subject to the Austrian social security system.

Nineteen Member States²⁰¹ entrust the same entity responsible for the inspection of employment-related obligations with **processing the notifications** of posted workers. In some Member States, however, other authorities are in charge of receiving the notifications: in **Belgium**, the Social Security Agency; in **Cyprus, Italy and the Netherlands**, the Ministry of Labour and Social Affairs (in Cyprus, the Ministry accommodates the Labour Inspectorate function in respect of posting); in **Czechia** and **Spain**, the authority in charge of labour affairs at central or regional level; in **Slovenia**, the National Employment Service.

This illustrates the variety of institutional landscapes across the EU for the enforcement of posting of workers' rules and the applicable employment standards. These differences create challenges for effective enforcement of the rules, particularly where it depends on cooperation and exchange of information between the Member States (see Section 3.5).

¹⁹⁷ DE, EL.

¹⁹⁸ AT, CY, DE, ES, LT, SE, SI, SK.

¹⁹⁹ BE, BG, CZ, EE, FR, HU, IE, IT, LU, LV, MT, NL, PL, PT, RO.

²⁰⁰ It should be noted that Regulation (EU) 1231/2010 does not apply to Denmark.

²⁰¹ AT, BG, CY, DE, EE, EL, FI, FR, HR, IE, LT, LU, LV, MT, PL, PT, RO, SE, SK.

b) Triggers for inspections

Inspections may be triggered in several different ways across the Member States.

Thirteen Member States undertake inspections on the basis of **complaints** submitted by the posted worker or on the basis of reports by third parties²⁰². In **Sweden**, anonymous complaints also trigger inspections. However, posted third-country nationals are less likely to submit complaints (see Section 3.4.2.a), thus the existence of other triggers for inspections have increased relevance in this regard.

Austria, Belgium, Cyprus, Malta and Slovakia also foresee the triggering of investigations **ex officio or based on a suspicion** of the competent authority. In **Austria** and **Slovakia**, inspections may also be triggered based on findings from previous inspections, for example, aimed at detecting cases of illegal employment.

In 14 Member States²⁰³, inspections are planned based on a **risk assessment**. Several factors can underpin a risk-based inspection targeting specific sectors of economic activity or work, such as increased delinquency, a high incidence of accidents at work, or new and emerging risks (**Greece**); where there are high numbers of migrant workers in the sector (**Ireland**); where complaints were made in the past or where postings are more common (**Hungary**); or where undeclared work is more common (Latvia). In line with Article 10(1) of the Enforcement Directive, **Malta** and **Portugal** foresee large infrastructural projects as a factor, as well as the existence of a long chain of subcontractors, past record of infringement, or the particular vulnerability of groups of workers. In **Finland**, enforcement data systems, operating environment analyses, other authorities' registers, research data, contacts from customers and stakeholders, and observations during previous inspections are used to target inspections.

In **Germany, Spain, Lithuania, Hungary** and the **Netherlands**, inspections are conducted according to a **pre-established plan**. In Lithuania, the plan targets the economic sectors where there is the greatest risk of harm from illegal work or accidents at work.

Other triggers of inspections were also identified, including explicit requests to perform inspections, reports from other authorities (**AT, SI**) and requests from another Member State (**PL**). In **Ireland**, some inspections are specifically foreseen in legislation. In **Portugal**, random checks are conducted.

c) Investigatory powers

The Enforcement Directive requires Member States to make an overall assessment, taking account of all factual elements to determine whether a worker qualifies as a posted worker and whether the conditions for posting are complied with. Different investigatory powers are granted to the national competent authorities to determine the status of third-country national posted workers and compliance with the applicable rules. Germany foresees that the competent authority will examine the special requirements for the work of third-country nationals, supervise all documents on the type, size and duration of the work done by third-country nationals on the basis of the work contract, and inspect the workers' personal documents. Other specific investigatory powers of competent authorities include: access to database on PD A1s (Austria); the matching of tax data with data on insured earnings (Finland); the right to directly access electronic records on the provision of services with posted workers (Slovenia); and access to the register of posted workers through an app to check whether the workers are registered (Sweden)²⁰⁴. Significant differences were identified in the range of general investigatory powers²⁰⁵. Such discrepancies become relevant in the context of cooperation between competent

²⁰² AT, CY, DE, EL, ES, HR, IT, LV, MT, PL, RO, SI, SK.

²⁰³ EE, EL, FI, HR, IE, HU, LU, LV, MT, NL, PL, PT, RO, SE.

²⁰⁴ Interview with SE public administration representative.

²⁰⁵ While many Member States foresee the power to enter the premises of an undertaking, the LU authority can enter the relevant sites and undertakings by day or night, and the SI authority can enter freely at any time. In DE, it is expressly mentioned that inspections are

authorities and may have an impact on the effectiveness of inspections. For instances, Spanish stakeholders noted that national legislation grants labour inspectors the power to request workers' identification documents, while in other countries, the presence or intermediation of the police is required²⁰⁶.

The country reports of 17 Member States explicitly refer to internal cooperation with other national authorities²⁰⁷, of which four mentioned the possibility to conduct joint inspections²⁰⁸. This is particularly relevant in situations involving third-country nationals where a migratory dimension comes into play. For example, in Denmark, inspections against social dumping (e.g. construction sites, restaurants and other workplaces) are based on a collaboration between the Danish Work Environment Agency, the Danish Tax Agency and the Police. The Danish Agency for International Recruitment and Integration (SIRI) occasionally participates in inspections and its role is to provide guidance to the police on residence status and work permits, including for third-country national workers without a work permit who claim to be posted according to EU rules²⁰⁹.

In Lithuania, a special ruling was approved by the Lithuanian Labour Inspectorate requiring the completion of a questionnaire²¹⁰ for verification of posted employees and determination of actual posting²¹¹ during the inspection. The questionnaire includes the following questions: '(i) are employment contracts concluded in writing and in duplicate? (ii) is the remuneration set and paid to employees no lower than that set by the laws applicable to labour relations, collective agreements, other labour law norms or the remuneration system approved at the workplace? (iii) does the employer provide at least once a month the employee with information about the calculated amounts paid and deducted and about the duration of working time, separately indicating the duration of overtime work? (iv) are employees compensated for additional expenses (transportation, travel, accommodation, etc.) during the posting? (v) if the employee's posting is longer than a working day (shift) or the employee is posted abroad, is to the employee paid per diem? (vi) are posted workers compensated for the travel time to and from the place of work, when the trip took place after working hours, on a day off or on a holiday? (vii) has a notification been submitted to the State Labour Inspection about the employee being posted to the Republic of Lithuania?'

Sanctions

Most Member States apply administrative fines for breaches of employment-related obligations regarding posted workers, notably the failure to comply with the administrative requirements foreseen in Article 9 of the Enforcement Directive²¹². However, other compulsory administrative measures were also identified: issuance of mandatory instructions to stop violations (Bulgaria); suspension of the work (France, in certain cases, and Denmark, in cases of extreme danger); cessation of the work (Luxembourg); and the imposing of an obligation for the employer to report the employment or restricting the economic activity of the employer (Hungary).

conducted without prior notice. Other general investigatory powers, such as the power to see records, take copies or retain records, or require persons to produce records is also foreseen, for example, in BG, DK, IE, SI. The possibility to ask for the employer, their agent or representative, the workers and other persons whose testimony is necessary is also established (BE, BG, DE, IE). In DK, the employees of the inspectorate authority may conduct group interviews with employees when justified by conditions related to the working environment, during which the employer, their representative, or a person designated by the employer shall have the right to be present, unless the inspectorate authority's employees determine there is a risk that this would make the group interview serve no purpose. CY refers more broadly to the duty of employers or their representatives, as well as the duty of posted workers, to provide information when needed to the inspector.

²⁰⁶ Interview with ES public administration representative.

²⁰⁷ BE, BG, CZ, DE, DK, EE, ES, FI, HR, IE, LT, LU, MT, PL, PT, SE, SI.

²⁰⁸ EE, IE, LT, PT.

²⁰⁹ Interview with DK public administration representative.

²¹⁰ Order of SLI on checking questionnaire for verification of warranties for posted employees and determination of actual posting, [EV-96 Dėl Ūkio subjektų patikrinimų kontrolinių klausimų ir teminių ataskaitų patvirtinimo \(e-tar.lt\)](#).

²¹¹ The order of chief state labour inspector on the approval of the procedure description of the actions of the inspector of the SLI of the Republic of Lithuania in order to determine the actual posting, see [EV-241 Dėl Lietuvos Respublikos valstybinės darbo inspekcijos inspektorius veiksmų, siekiant nustatyti ... \(e-tar.lt\)](#).

²¹² AT, BE, CZ, DK, EE, EL, FR, HR, HU, LT, LU, PL, SI.

In line with the provisions of Chapter VI of the Enforcement Directive, on cross-border enforcement of financial administrative penalties and/or fines, the national competent authorities can enforce such penalties at the request of another Member State²¹³.

In Austria and Czechia, the investigating authorities do not have the **competence to apply the corresponding penalty**. In Austria, if an employer does not provide the necessary documents or does not respect the Austrian wage provisions, the Central Point of Coordination of the Agency to Combat Fraud is obliged to inform the Centre of Competence for Wage and Social Dumping of the Austrian Health Insurance Carrier, which in turn is obliged to file a charge at the administrative authority competent for the respective administrative area. In Czechia, the Customs Office submits the documents necessary for launching administrative proceedings to the Inspectorate, in order to impose a fine.

Finally, enforcement of obligations related to posting also relies on **courts**. In Ireland and Malta, courts have the competence to adjudicate the amounts owed by the employer to the posted worker where the employer has breached the relevant applicable provisions.

d) Social security obligations

The inspections refer to inspection of the PD A1 form and confirmation that the workers are still subject to the social insurance system of the sending Member State. If irregularities are found, or it is found to be a false posting, some Member States refer to the possibility of requesting the issuing Member State to annul the form (e.g. Spain and Latvia).

3.4.2 Challenges in enforcement of national scope

In addition to the regulatory challenges mentioned in Section 2.2. b) above, which may have practical implications in the conduction of inspections, several additional practical issues complicate enforcement at national level.

a) Low number of complaints

One important issue noted in several country reports is the low number of complaints brought by posted third-country nationals before the competent authorities²¹⁴. Contributing factors include: third-country nationals' lack of information and awareness of their rights, especially in case of short-term postings, and particularly, lack of information on applicable collective agreements; language barriers; third-country nationals' precarious and vulnerable situation, including high dependency on their employers; cultural differences and different standards of acceptability; fear of being fined; fear of losing their residence status, being deported or restrictions on their future movement in the EU; fear of being fired; low unionisation rate or lack/poor employee representation, particularly in certain sectors (e.g. agriculture, construction); isolation; economic factors (e.g. even if third-country nationals are under-paid, the wage may still be significantly higher than in their home country); precarious social security status; low qualifications; and lack of means. One **Finnish** stakeholder reported that authorities are to a large extent dependent on bystander information²¹⁵. In **Sweden**, trade unions experience practical difficulties in organising posted workers, including third-country nationals, as posted workers claim their rights are

²¹³ Noted in the country reports for EE, HR, IE, MT, SI.

²¹⁴ Reported for BE, CZ, FI, FR, HU, IE, SE, SI, SK; other sources: IE (Doherty, M., 'Ireland', in Rasnača, Z., and Bernaciak, M., *Posting of workers before national courts*, European Trade Union Institute (ETUI), 2020); SI (Kresal, B., *Posting of workers before Slovenian courts*, in Rasnača, Z., and Bernaciak, M. (Eds.), *Posting of workers before national courts*, European Trade Union Institute (ETUI), 2020, p. 217).

²¹⁵ Interview with FI public administration representative.

terminated and are sent back to the sending State²¹⁶. This particular reality for posted third-country nationals underlines the importance of diversifying the triggers for inspections.

Good practices

In Estonia and Finland, inspectors distribute information flyers in multiple languages to workers and employers during inspections at construction sites .

The Polish Labour Inspectorate Counselling Centre launched a helpline for foreigners in 2018 that provides legal advice on employment of third-country nationals in both Ukrainian and Russian. The helpline has reportedly already had a positive impact on the number of complaints lodged by third-country national workers .

The Dutch Labour Authority provides forms to submit complaints in several languages (English, Bulgarian, Romanian, Polish, Portuguese, Czech, and Spanish) .

In 2022, the Belgian inspection services are carrying out pre-announced 'flash inspections' in sectors of concern for posting of third-country nationals (e.g. road transport sector, construction sector, catering industry, agricultural sector, meat-processing industry) . For a period of one month, each sector will be subject to increased inspections to detect non-compliance with the posting rules and inform employers and workers about the applicable rules. In addition, the Action Plan against Social Fraud establishes a minimum number of inspections (400) for 2022 on posting of third-country nationals.

Two country reports referred to obstacles in third-country nationals' accessing justice²¹⁷. Some of the difficulties are relevant here, such as linguistic and financial difficulties, lack of knowledge of procedures and support, and the difficulty for courts in dealing with cases that have a cross-border element within a reasonable timeframe. In **Ireland**, there have been documented cases of posted workers (third-country nationals and EU citizens) pursuing claims under Irish law and facing delays of more than 15 years to get final resolution²¹⁸. Other elements should also be considered for the successful prosecution of cases, such as the costs and logistics of ensuring the testimony of people who are not in the country where the case is being decided.

Also relevant is the procedural legitimacy of trade unions and other third parties (associations, organisations or other legal entities) engaging in any judicial and/or administrative procedure, either on behalf or in support of the complainant (worker or service provider), provided they have a legitimate interest in accordance with the criteria laid down by national law and the approval of the complainant, in line with Article 11(3) of the Enforcement Directive. This was expressly mentioned in the **Greek** and **Portuguese** reports.

b) Practical difficulties

²¹⁶ Interviews with SE public administration and civil society organisation representatives.

²¹⁷ Interviews with IE and PT public administration representatives. For PL, see Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 40.

²¹⁸ Doherty, M., 'Posting of workers before Irish courts', in Rasnača, Z., and Bernaciak, M. (eds), *Posting of workers before national courts*, European Trade Union Institute (ETUI), 2020

The main difficulty reported by stakeholders was the **language barrier**, which hinders communication with third-country nationals, impacting the efficiency of inspections, fact-finding and, as a result, ensuring their rights²¹⁹. Measures to overcome this challenge are already in force in some Member States, such as **France**, where questionnaires for investigations are translated into different languages (also in **Belgium, Estonia and Finland**)²²⁰ and interpreters are present during inspections. Other methods suggested include employing multilingual staff²²¹ and ensuring simultaneous translation, in person, by telephone or videoconference²²².

Good practices

In France, the questionnaires used for investigations are translated into different languages, and interpreters for the relevant languages are present during inspections. For example, during an inspection of workers posted from Spain, Arabic interpreters were present, as the nationality of workers was identified from the declarations posted through the Information System on International Services (SIPSI) platform .

In Belgium, the information brochures distributed during the flash inspections in sectors of concern for posted third-country nationals are translated into eight languages with the support of ELA .

For the verification of administrative requirements applying specifically to the posting of third-country nationals, namely pertaining to the **right to stay**, the **Lithuanian** report indicates that while a foreigner who has a visa or residence permit issued by another Member State can stay in Lithuania (and work as a posted worker) for up to 90 days within a 180-day period, in practice it is impossible to control compliance, as the beginning of the foreigner's stay in Lithuania is not recorded.

As for **social security obligations**, the country reports raise the issue of fraudulent PD A1 forms. **Belgian** and **Dutch** stakeholders explained that in order to claim that an A1 form is fraudulent, there is a significant burden of proof on part of the authorities, taking a lot of time and resources. Notably, it relies on data available nationally and abroad – requiring the availability and willingness of partner institutions abroad – and may also require collection of data in other fields, such as immigration (to check whether someone is legally resident)²²³.

Good practices

The website of the Polish inspection authority includes a validation tool that allows anyone to check the validity of a PD A1²²⁴.

Another issue raised in the **German** report relates to ascertaining the status of the posted person, either as employed or as self-employed, particularly in the sector of health and long-term care. This distinction

²¹⁹ Country reports of BE, BG, FR, HU, IT, PT, SK; highlighted by stakeholders in BE, BG, PT, SK; other sources: FR (Le Rapport public annuel 2019 de la Cour des comptes, 7 February 2019; IT (Cillo, R. and Perocco, F., *Italian Authorities' Challenges in the Monitoring of the Posting of Workers*, Policy brief, European Centre for Social Welfare Policy and Research 2021, 2021).

²²⁰ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., *Posting of Third-Country Nationals: A Comparative Study*, ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 61.

²²¹ Italian literature source: Cillo, R. and Perocco, F., *Italian Authorities' Challenges in the Monitoring of the Posting of Workers*, Policy brief, European Centre for Social Welfare Policy and Research 2021, 2021, p. 5.

²²² Interview with PT public administration representative.

²²³ Interviews with BE and NL public administration representatives.

²²⁴ Interview with CZ public administration representative.

is relevant in Germany, where particular social security rules apply to self-employed posted persons depending on their sector of activity. For the assessment of the status of a posted worker, a PD A1 certificate is normally presented or demanded by the competent authorities, which should demonstrate which social security legislation is applicable²²⁵.

c) General issues impacting the enforcement of rules on posting of third-country national workers

Some general issues affecting enforcement at national level also have a direct impact on the monitoring of compliance with the applicable rules and standards for the posting of third-country nationals.

Firstly, **difficulties** were reported in relation to the **organisation of inspection authorities and systems**, such as understaffing of competent authorities (**Estonia, Hungary, Italy, Slovenia and Sweden**)²²⁶, the lack of expertise on posting (**Romania and Italy**)²²⁷, and difficulties stemming from the internal articulation between authorities (**Portugal, Ireland and Italy**)²²⁸. In addition, technical shortcomings hinder the collection of the necessary information and the efficiency of inspections. For example, in **Italy**, the information technology (IT) systems used by the Labour Office require administrators to manually enter the data from the notifications into their system (instead of an automatic data flow), which, according to one stakeholder, leads to significant delays that impact the State's access to correct data on posted workers²²⁹. In **Spain**, no data are collected at national level on the notification of postings or the numbers of PD A1 documents issued by regional social security authorities, creating gaps in the information registered and procedures followed (e.g. notifications through different online systems)²³⁰.

Secondly, challenges exist in the **verification of elements that support genuine posting**. Workers posted through letterbox companies emerged as a problem in most Member States' reports, including Germany²³¹, and constitute a particular challenge for inspectorates determining whether a posting is genuine. The **Italian** authorities pointed to the difficulty in recognising actual employment of workers in the sending Member State, especially in cases of workers hired by temporary work agencies²³². One **Austrian** stakeholder noted that the duration of employment in the sending Member State before the posting, which is decisive for qualification as posting itself (as well as for wage entitlement, according to the Austrian collective agreements) is difficult to verify²³³. Similarly, **Slovenian** stakeholders indicated problems with the condition that employers posting workers from Slovenia need to habitually perform

²²⁵ Interview with DE public administration representative.

²²⁶ As reported in the national reports and highlighted by various stakeholders from HU and SI; other sources: Italy (Cillo, R. and Perocco, F., *Italian Authorities' Challenges in the Monitoring of the Posting of Workers*, Policy brief, European Centre for Social Welfare Policy and Research 2021, 2021, pp. 6, 8; Dorigatti, L., Pallini, M. and Pedersini, R., *Posted Workers from and to Italy. Facts and Figures*, Leuven: POSTING.STAT 2022 (project VS/2020/0499), 2022, p. 31; Cillo, R., 'Regional Case Study: From Morocco and Tunisia to Belgium via Italy: Migration and Posting of Third-Country Nationals', Foscari University of Venice, in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 53; SI (SLI, 2021 Annual Work Report, 2022, p. 5); interview with SE public administration representative; for an overview of the staff in labour inspectorates focusing on posting in several EU Member States, see De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 104-105.

²²⁷ Interviews with RO and IT academic experts; Cillo, R., 'Regional Case Study: From Morocco and Tunisia to Belgium via Italy: Migration and Posting of Third-Country Nationals', Foscari University of Venice, in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 53; Cillo, R. and Perocco, F., *Italian Authorities' Challenges in the Monitoring of the Posting of Workers*, European Centre for Social Welfare Policy and Research 2021, 2021, p. 8.

²²⁸ Interviews with PT and IE public administration representatives; IT country report.

²²⁹ Interview with IT civil society organisation representative.

²³⁰ Interview with ES public administration representative; Carrascosa, M.D. and Contreras, Ó., *Posted workers from and to Spain. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 74.

²³¹ Albrecht, C., Duran, S., Giesing, Y., Niederhoefer, B., Rude, B. and Steigmeier, J., *Posted workers from and to Germany. Facts and figures*, Section 8, (Leuven: POSTING.STAT project VS/2020/0499), 2022.

²³² Interview with IT public administration representative.

²³³ Interview with AT public administration representative.

activities in Slovenia²³⁴. One Danish stakeholder noted that the verification of the preconditions for posting is particularly challenging, namely that the posting company must be genuinely established in the sending Member State²³⁵.

Thirdly, challenges were reported in monitoring compliance with the applicable **administrative requirements**. Lack of notification of the posting appears to be a key difficulty in control of notifications, as it impedes the detection of these workers²³⁶. It should be considered that employers may be tempted not to fulfil their information obligation in order to limit the likelihood of an inspection²³⁷. This is also connected to the broader problem of undeclared work or undeclared posting. Several other issues hinder enforcement: discrepancies between the information notified and the reality (e.g. commencement of employment was notified but the posted worker did not start working)²³⁸, non-compliance with the obligation to inform about the end of the posting²³⁹, or lack of adherence to the rules on the duration of posting²⁴⁰. One Danish stakeholder highlighted that monitoring compliance with the applicable rules is made impossible when employers do not comply with their obligation to notify posted workers²⁴¹.

Good practices

In the construction and cleaning sectors in Belgium, inspectors match information on notifications in the LIMOSA software system with the information logged through a mandatory digital check-in system ('check in at work') on construction or cleaning sites²⁴². This allows inspectors to verify the information in the notifications with that of workers present on the construction sites, including their identify and time worked.

For social security obligations, stakeholders noted that PD A1 forms are often missing²⁴³. One Swedish stakeholder mentioned that understaffing in both the sending and the receiving State affects the duration of processing of A1 forms²⁴⁴. The inspection of the conditions based on which PD A1 forms were issued are reportedly difficult to control. One Slovenian stakeholder indicated that this a structural problem, as PD A1 forms are somewhat issued automatically without proper verification of all underlying documents²⁴⁵.

²³⁴ Interviews with SI civil society organisation and public administration representatives; the latter also mentioned that this is particularly problematic in case of postings through temporary work agencies.

²³⁵ Interview with DK public administration representative.

²³⁶ For example, in EE, it was reported that the notification of posted work is often not done, particularly during COVID-19, when the filing of declarations dropped (interview with EE public administration representative).

²³⁷ Interviews with CZ and EE public administration representatives, explaining the drop in notifications during the COVID-19 pandemic.

²³⁸ CZ country report, based on literature source: Annual summary report on the results of control actions of the SLIO for 2021 (Roční souhrnná zpráva o výsledcích kontrolních akcí Státního úřadu inspekce práce za rok 2021), p. 48, available at: <https://www.suip.cz/documents/20142/43684/S%C3%9AIP+souhrnn%C3%A1+zpr%C3%A1va+o+v%C3%BDsledc%C3%ADch+kontroln%C3%ADch+akc%C3%AD+za+rok+2021.pdf/2e675a7e-a0e3-cb55-7409-956628795378>

²³⁹ Ibid.

²⁴⁰ Interview with SI civil society organisation and public administration representatives. The latter mentioned that this is particularly problematic in case of postings through temporary work agencies.

²⁴¹ Interview with DK public administration representative.

²⁴² Interviews with BE public administration representatives; 'checkinetwork' is the online registration system of presence at a work site in specific sectors in Belgium, such as the construction sector and the cleaning sector. The information is automatically transferred to the social inspectorate.

²⁴³ As is the case in EE (interview with EE public administration representative).

²⁴⁴ Interview with SE public administration representative.

²⁴⁵ Interview with SI public administration representative.

Practical difficulties were also identified, such as the communication with the employer²⁴⁶ and the employer's work organisation, which may hamper the establishment of facts, due to the existence of double registers for the hourly counts or the practice of cash payment in certain sectors²⁴⁷. One Latvian stakeholder pointed out that the State Labour Inspectorate frequently does not possess information on where posted third-country nationals are employed²⁴⁸. Similarly, a Czech stakeholder noted that although the employer is obliged to indicate the place of work of the posted worker, this information is often filled in incompletely or in general terms (e.g. the entire region is indicated as the place of work), complicating the implementation of an effective inspection. One possible way to address this would be to mandate the indication of a contact person from the receiving employer who is responsible for the posted worker and from whom the inspectorate could request cooperation if it is unable to locate that worker²⁴⁹.

3.5 Existing tools for cooperation between Member States

Cooperation between Member States is essential to ensure that the rights and obligations of posted workers are respected.

In line with Article 6 of the Enforcement Directive, the country reports of several Member States²⁵⁰ reported that the competent authority ensures cooperation and assistance with other Member States by replying to reasoned requests for information from competent authorities, carrying out checks, inspections and investigations, exchanging information, or sending and notifying documents.

Several cooperation practices can be broadly categorised as pertaining to a formal or informal type of cooperation.

3.5.1 Formal cooperation

The most common form of cooperation by Member States is the exchange of data through dedicated platforms – such as the IMI system²⁵¹ or the Electronic Exchange of Social Security Information system (EESSI)²⁵².

²⁴⁶ For example, the BE country report indicates that the organisation of the employer is not always evident and that it may be difficult to identify the person in charge. Similarly, one BG stakeholder stated that the communication process with the employer is difficult and often passes through a contact person appointed from the local legal entity in the host Member State (interview with BG public administration representative).

²⁴⁷ FR (Le Rapport public annuel 2019 de la Cour des comptes, 7 February 2019) ; HU country report.

²⁴⁸ Interview with LV public administration representative.

²⁴⁹ Interview with CZ public administration representative.

²⁵⁰ HR, HU, IE, LU, MT, PT, SI, SK.

²⁵¹ Explicitly mentioned in country reports by AT, CY, CZ, DE, DK, ES, FI, FR, HR, IT, LV, LT, LU, MT, PL, PT, RO, SI, SK; highlighted by stakeholders from AT, CY, CZ, DE, ES, FI, FR, HR, IT, LV, LT, MT, PT, SI; other relevant sources: CZ (Marek Čaněk, Nadnárodní monitoring vysílání a prosazování práv vysílaných pracovníků: Příklad České republiky, Multikulturní centrum Praha, 2018, pp. 6-7, available at: https://aa.ecn.cz/img_upload/67ff55e37c179829cc177283d43f105c/cz1_web.pdf); PL (National Labour Inspectorate, *Report from the National Labour Inspectorate for 2020 [Sprawozdanie z działalności Państwowej Inspekcji Pracy w 2020 roku]*, 2021, p. 172).

²⁵² Country reports for AT, DE, HR, SI; highlighted by stakeholders from AT, DE, HR, SI.

The effectiveness of the IMI system was highlighted by stakeholders from most Member States²⁵³, citing a good flow of information and broader access to information by the competent authorities²⁵⁴, better exchange of information²⁵⁵, improved understanding of working conditions in other Member States²⁵⁶, and immediate and effective exchange of information, which is directly relevant in inspection activities²⁵⁷. As for EESSI, its usefulness was expressly noted in the reports of three Member States²⁵⁸.

Bilateral agreements are another important form of formal cooperation. These are particularly relevant as they may cover cooperation, exchange of information, joint inspections and handling complaints. The closer proximity implied enhances and speeds-up cooperation, enables easier exchange of information and improves the effectiveness of investigations, leading to better results. Table 5 lists the relevant agreements identified by the stakeholders and in desk research.

Good practices

The Polish National Labour Inspectorate has concluded 13 bilateral agreements with the labour inspections/supervision bodies of other EEA States (Slovakia, Denmark, Norway, Estonia, Netherlands, Spain, Bulgaria, Luxemburg, Portugal, Belgium, Norway, Czechia, Lithuania)²⁵⁹. These agreements regulate cooperation and exchange of information between the Polish National Labour Inspectorate and the labour inspections of other States, mostly covering issues related to the posting of workers, including how to handle posted workers' complaints about violations of employment regulations.

Specific cooperation between Czech and Polish authorities in respect of Ukrainian citizens posted by their Polish employers to the Czech territory is based on existing bilateral agreements²⁶⁰.

The cooperation agreements in force between France and other EU Member States, including with Belgium, Portugal and Germany, include regulation on inspections; reciprocal information meetings regarding labour inspections and applicable rules, including the preparation of information flyers targeted at workers; and meetings with employers and workers.

Joint inspections are an important form of general cooperation expressly noted in the country fiches of seven Member States²⁶¹. One Czech stakeholder highlighted the **role of ELA**, including its Working Group (WG) for concerted and joint inspections²⁶². One Bulgarian stakeholder noted the usefulness of ELA's 2020 guidelines for concerted and joint inspections²⁶³.

²⁵³ Country reports of AT, BE, BG, CY, CZ, DE, ES, FI, HU, IT, LV, MT, PT, SI, SK; highlighted by stakeholders from AT, BG, CY, CZ, DE, ES, FI, HU, IT, MT, PT, SE, SI, SK; other relevant sources: CZ (Marek Čaněk, Nadnárodní monitoring vysílání a prosazování práv vysílaných pracovníků: Případ České republiky, Multikulturní centrum Praha, 2018, pp. 6-7, available at: https://aa.ecn.cz/img_upload/67ff55e37c179829cc177283d43f105c/cz1_web.pdf).

²⁵⁴ Interviews with AT public administration representatives.

²⁵⁵ BE country report.

²⁵⁶ Interview with CZ civil society organisation representative.

²⁵⁷ Interview with IT public administration representative.

²⁵⁸ AT, BE, CZ; interview with AT public administration and civil society organisation representatives; interviews with BE and CZ public administration representatives.

²⁵⁹ Available at: <https://www.pip.gov.pl/pl/o-urzedzie/porozumienia/6222,porozumienia-miedzynarodowe.html>

²⁶⁰ Interview with CZ public administration representative.

²⁶¹ Country reports of BE, BG, CZ, FR, IT, PT, SI refer to its use/usefulness; highlighted by stakeholders in BG, CZ, FR, SI.

²⁶² Interviews with CZ public administration representatives.

²⁶³ Interview with BG public administration representative.

Good practices

As an example of a successful joint inspection, the Bulgarian country fiche mentioned the May 2022 week of joint actions between the Bulgarian Labour Inspectorate and the relevant structures in Germany in the federal state of North Rhine-Westphalia, as part of the Work Programme for Partnership between the Ministries of Labour of Bulgaria and Germany²⁶⁴.

ELA's broader role was also highlighted by others. One Dutch stakeholder referred to ELA's facilitation of information exchange, as well as its role in putting important phenomena and challenges on the agenda, such as issues with posting of third-country nationals, facilitating discussion and the identification of solutions²⁶⁵. One French stakeholder mentioned its central role in disseminating information more broadly at EU level and in increasing cooperation between national and European actors²⁶⁶. Slovenian stakeholders consider ELA a good forum for exchange of information, challenges and good practices among Member States²⁶⁷, while the Slovak stakeholders underlined its role in reconciling labour inspections²⁶⁸. One Italian stakeholder mentioned concerted actions by ELA or national embassies involving two or more Member State supervisory authorities with a view to exchanging relevant information²⁶⁹, and the same French stakeholder recalled ELA's action campaign on seasonal workers in 2021²⁷⁰.

The role of **liaison officers** and networks of proximity agents was also noted²⁷¹ as contributing to faster communication and more efficient action²⁷².

Good practices

Liaison offices of the French Directorate for Employment ensure cooperation with the administrations of other Member States, particularly for monitoring working conditions and compliance with employment conditions of posted workers. This includes exchange of information for investigations, legal support, and disseminating information of rules relating to posting of workers. Several decentralised liaison bureaus ensure cooperation with neighbouring countries, namely Belgium, Germany, Luxembourg, Italy and Spain²⁷³.

Other forms of cooperation include joint activities, staff exchanges and capacity-building training, workshops and seminars²⁷⁴. Belgian stakeholders explained the usefulness of workshops in providing an opportunity for open and informal communication between the authorities, allowing them to explain

²⁶⁴ In addition to meetings with representatives of the various structures in DE and familiarisation with their work, within the framework of the initiative, joint inspections were carried out in the meat processing industry, and in the cleaning and construction sectors; in September and October 2021, the Labour Inspectorates of BG and FR carried out joint/coordinated inspections as part of the pan-European campaign "Rights in all seasons". Within that framework, FR employers were inspected in relation to posted workers from BG.

²⁶⁵ Interview with NL public administration representative.

²⁶⁶ Interview with FR public administration representative.

²⁶⁷ Interviews with SI public administration representatives.

²⁶⁸ Interview with SK public administration representative.

²⁶⁹ Interview with IT public administration representative.

²⁷⁰ ELA, Rights for All Seasons: Campaign on Seasonal Workers, available at: <https://www.ela.europa.eu/en/campaigns/rights-for-all-seasons>

²⁷¹ FR, PT, SI, SK country reports.

²⁷² Interview with PT public administration representative.

²⁷³ FR country report.

²⁷⁴ BG and FR country reports; highlighted by stakeholders from BE, MT, SI; IE and RO stakeholders referred more broadly to training.

why some documents are needed, to ask questions, and to translate and explain legal concepts interpreted differently by the various authorities.

Good practices

A workshop was organised for representatives of Belgium and Portugal, allowing them to communicate in a more informal manner, and exchange up-to-date information on who to contact in case of questions or needing a document. The Belgian stakeholders suggested the creation of 'liaison fiches' containing the name and contact details of the reference person to be contacted when information is needed, as done between Belgium and France²⁷⁵.

Cooperation between the Labour Inspectorate for the Control of Social Protection Laws in Brussels and the Regional Directorate for the Economy, Employment, Labour and Solidarity (Hauts-de-France et Grand Est) in France²⁷⁶ is based on exchanges within the framework of immersion courses, which allow Belgian and French agents to cross the border to observe their peers and inspection practices for several days. These internships promote exchanges of practice between France and Belgium. In September 2020, a conference was held to present the Franco-Belgian arrangement and the planning of concerted or joint actions in the following sectors of activity: forestry, transport, construction, cleaning in air transport, and industrial maintenance²⁷⁷.

Monthly or regular meetings have also been indicated as a relevant practice. One Irish stakeholder recommended regular visits to exchange best practices and build working relationships²⁷⁸.

Good practices

Austria highlighted monthly meetings with Slovenia, Germany and Poland, in which the competent bodies of the sending Member States are informed about all payments to posted workers of the Holiday and Severance Pay Insurance Carrier for Construction Workers to ensure that the rights of the posted third-country worker are respected²⁷⁹.

Finnish authorities hold regular meetings with the Estonian social security institution, as well as case handler meetings with the other Nordic institutions²⁸⁰.

Participation in **projects and networks** is also a form of bilateral or multilateral cooperation between Member States.

Several multilateral cooperation projects were mentioned:

²⁷⁵ Interview with BE public administration representative.

²⁷⁶ Ministry of Labour, Employment and Integration, *Evaluation of posted work in France in 2019-2021, 2022*, available at: http://www.eurodetachement-travail.eu/datas/files/EUR/bilan-travaildetache_DGT2019-2021vf.pdf

²⁷⁷ DREETS, *La coopération franco-belge face au travail illégal* (French-Belgium cooperation in the field of illegal work), Press release, 6 October 2020.

²⁷⁸ Interview with IE public administration representative.

²⁷⁹ Interview with AT public administration representative.

²⁸⁰ Interview with FI public administration representative.

- ▶ Global policy network (GPN) for fair recruitment of migrant workers under the IRIS PROJECT²⁸¹;
- ▶ Eurodétachement project^{282,283};
- ▶ European Campaign on Occupational Safety and Health of temporary agency workers²⁸⁴;
- ▶ Senior Labour Inspectors' Committee^{285,286}.

Cooperation in the context of international organisations, such as the International Organization of Migration (IOM) is also considered relevant²⁸⁷.

3.5.2 Informal cooperation

One Latvian stakeholder referred to the practice of using personal contacts, for example their Estonian and Lithuanian counterparts²⁸⁸, a Dutch stakeholder referred to pragmatic information exchange²⁸⁹, and a Slovak stakeholder mentioned exchange by email or telephone²⁹⁰ (as did one Slovenian stakeholder, who noted the flexibility in choosing the manner of communication to maximise efficiency)²⁹¹. The Belgian stakeholders referred to the positive impact of personal contacts on cooperation and exchanges of information. They noted that workshops and joint inspections can help to develop such informal contacts. One Hungarian stakeholder also mentioned the usefulness of informal communication channels²⁹².

Other relevant measures to facilitate cooperation include the setting-up of official websites with relevant procedures translated into English/other languages²⁹³, the role of social partners²⁹⁴, and the use of electronic databases²⁹⁵.

²⁸¹ BG country report.

²⁸² Available at: <http://www.eurodetachment-travail.eu>

²⁸³ BE and IT country reports; interview with PT academic expert.

²⁸⁴ Interview with OT academic expert.

²⁸⁵ Available at: <https://ec.europa.eu/social/main.jsp?catId=148&intPagId=685>

²⁸⁶ SLI, *2021 Annual Work Report*, 2022, pp. 21-22; Belgian country report.

²⁸⁷ BG country report.

²⁸⁸ Interview with LV public administration representative.

²⁸⁹ Interview with NL public administration representative.

²⁹⁰ Interview with SI public administration representative.

²⁹¹ Interview with SI public administration representative.

²⁹² Interview with HU public administration representative.

²⁹³ BE and LT country reports; interview with PL academic expert.

²⁹⁴ Interviews with IT public administration representative and LT civil society organisation representative.

²⁹⁵ Interviews with EE and PT public administration representatives.

Table 5: Relevant bilateral agreements between Member States²⁹⁶

MS	AT	BE	BG	CY	CZ	DE	DK	EE	ES	EL	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
AT						√																					
BE ²⁹⁷												√						√				√	√				
BG						√						√										√					
CY																											
CZ						√						√									√	√					
DE	√		√		√							√									√						
DK																						√					
EE ²⁹⁸											√						√		√			√					
EL																											
ES ²⁹⁹												√										√	√	√			
FI								√																			
FR		√	√		√	√			√							√		√					√				
HR																											
HU					√																	√		√			√
IE																								√			

²⁹⁶ Including bilateral agreements covering combating illegal and undeclared work or abuse of social security benefits, which include provisions on exchange of inspection information.

²⁹⁷ See <http://www.eurodetachment-travail.eu/docs.asp?rub=787>; BE, LU, NL are considering a Benelux agreement to increase cooperation.

²⁹⁸ See full list of agreements and their texts on the web page of the Labour Inspectorate, available at: http://www.eurodetachment-travail.eu/datas/files/EUR/bilan-travaildetache_DGT2019-2021vf.pdf

²⁹⁹ Available at: https://www.mites.gob.es/itss/web/Atencion_al_Ciudadano/Normativa/CONVENIO_INTERNACIONAL/index.html

MS	AT	BE	BG	CY	CZ	DE	DK	EE	ES	EL	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK
IT												√												√			
LT								√											√			√					
LU		√										√									√	√					
LV																	√										
MT																											
NL		√			√	√												√				√					
PL ³⁰⁰		√	√		√		√	√	√								√	√			√		√				√
PT		√	√						√			√			√			√			√	√		√			
RO									√							√											
SE																											
SI																											
SK																						√					

³⁰⁰ In July 2022, the agreement with CZ was under revision, while the agreement with FR was expected to be signed shortly.

3.6 Main challenges and possibilities for cooperation between Member States

The main challenges in respect of cooperation between Member States identified by the consulted stakeholders, as well as the possibilities for improvement, are summarised below. Although many are not specific to the posting of third-country nationals, they nevertheless have an impact on the enforcement of the rules applicable to these workers.

3.6.1 Differences in national legal frameworks and inspection landscapes in the Member States

The main challenge noted by the stakeholders is the different national legal frameworks on enforcement of obligations relating to posting of workers, whether on employment or social security, particularly the different institutional landscapes³⁰¹. Due to the specificities of the legislation in each Member State, different competent authorities are involved in the process of enforcement, making coordination more difficult, less effective and more time-consuming. In the case of posted third-country nationals, this is exacerbated by the potential involvement of immigration authorities in addition to the habitual entities dealing with posting.

The competent authorities for inspection in the Member States have different mandates and scopes of competence. Whereas some have general competence to investigate any legal requirements relating to labour, social security or immigration law (e.g. Spain), other European inspections are specialised and cannot review infringements from different areas³⁰². In practice, it limits the benefits of shadowing inspections conducted abroad³⁰³. Decentralised administrative monitoring systems add another layer of complexity³⁰⁴.

For cooperation to work, the right institution must be identified, requiring authorities to navigate 27 different legal frameworks and corresponding institutional landscapes to identify the relevant contact point. It was noted that it would be helpful for authorities to have access to centralised basic information on the scope, powers and procedures of labour inspectorates in all Member States. One possible solution that emerged from the consultation is the possibility of **ELA creating a database of these contact points**³⁰⁵, in its capacity of facilitating the identification of the relevant competent authority in another Member State³⁰⁶.

There is some divergence in the way inspections are carried out: while some Member States focus their inspections on administrative controls, other European inspectorates are also responsible for starting misdemeanour proceedings (e.g. Croatia)³⁰⁷.

The range of investigatory powers differs, as do the procedural rules for conducting inspections that may compromise investigations. For example, while the Spanish legislation grants inspectors powers to request identification documents from workers, other countries require intermediation by the police³⁰⁸. The difference in internal practices, approaches to inspections, and inspection culture (e.g. in Ireland

³⁰¹ Interviews with BE, BG, CZ, ES, FI, FR, HR, HU, IE, LV, NL, SE public administration representatives; interview with RO academic expert.

³⁰² Interview with ES public administration representative.

³⁰³ Interview with FI public administration representative.

³⁰⁴ Interview with LV public administration representative.

³⁰⁵ Interview with HU public administration representative.

³⁰⁶ BE, IE, IT country reports; interview with NL public administration representative.

³⁰⁷ Interview with HR public administration representative.

³⁰⁸ Interview with ES public administration representative.

the focus is very much on compliance, and prosecution is seen as a last resort³⁰⁹) and even work cultures (e.g. sharing of information between different national authorities) have also been shown to hinder cooperation³¹⁰.

Beyond the requirements set out at EU level, Member States may regulate areas of law of relevance to posted third-country nationals, such as working conditions and labour rights, occupational health and safety requirements (see Section 2.2). Specificities in the national procedures, documentation or internal organisation of the authorities (e.g. the specific social security benefits available to a worker, documents required) may lead Member State institutions to request information specific to their national legal regulation from the authorities in other Member States, which may struggle to fully understand the substance of the request³¹¹. The French national liaison bureau highlighted an instance where it had questions on the nature of ‘civil contracts’ (which are regulated by civil law, rather than labour law, and are subject to lower social security contributions or minimum wages³¹² signed with third-country nationals in Poland before they were posted to France. Their counterparts in Poland provided information to help the liaison bureau to understand the nature of these contracts and how to carry out the relevant inspections³¹³.

The need for inspection authorities to properly understand the applicable terms and conditions of employment in the sending Member State (and vice versa) is all the more relevant in light of Article 3(7) of the PWD. In fact, the favourability principle entails an analysis by inspectorates of each right arising from the employment relationship separately in order to determine which law is more advantageous for the posted worker³¹⁴.

One Finnish stakeholder highlighted that different interpretations of the General Data Protection Regulation (GDPR) by the competent authorities in the different Member States may also constitute an obstacle to speedy cooperation³¹⁵.

For third-country national posted workers, **national legal frameworks on migration** also come into play, with distinct rules applicable on the right of entry and right to stay in the sending and host Member States. As the posting of third-country national workers requires them to have a residence and work permit in the sending Member State, inspection authorities in the host Member State may have to navigate the rules of that Member State to understand whether the posting complies with all of the legal requirements. Given that Member States retain significant room for regulating the right to stay and work at national level, with quite different rules applying across the Member States, this entails cumbersome work for the inspection services to determine whether the posting is legal³¹⁶, particularly given that the normally competent authorities may not have competence in migratory matters.

For example, in Poland, citizens of Ukraine, Belarus, Moldova, Armenia and Georgia can work without having to obtain a work permit if they are legally residing in Poland based on so-called ‘declarations on entrusting work to a foreigner’, regulated in the Act of 20 April 2004 on promotion of employment and institutions of labour market. This system is not very clear for authorities and other Member States, which sometimes question the right to work of third-country nationals posted to their country. Citizens

³⁰⁹ Interview with IE public administration representative.

³¹⁰ Interview with NL public administration representative.

³¹¹ Interview with LV public administration representative.

³¹² On the difference between employment contracts and civil law contracts in PL: Muszyński, K., *Factors behind the growth of civil law contracts as employment contracts in Poland—a study of labour law violations*, *Prakseologia*, Vol. 158, 2016, pp. 323-359.

³¹³ Interview with FR public administration representatives.

³¹⁴ CZ country report.

³¹⁵ Interview with FI public administration representative.

³¹⁶ Stakeholders have even stated that an expert is necessary for this effect - Information gathered through interview with a DK public administration representative.

of Ukraine, Georgia, and Moldova can use biometric passports to enter and reside in Poland, without the necessity to obtain a visa, and at the same time benefit from simplified rules for being hired. However, this right is limited to 90 days within a period of 180 days, but it is not clear how the 90 days should be calculated when third-country nationals are posted. This regime can create hurdles for the labour inspections in other Member States when verifying whether citizens of these countries legally reside in Poland³¹⁷.

The right of residence of third-country nationals in specific Member States may be subject to bilateral agreements, which may create difficulties in cooperation with the Member State where the posting takes place, due to a lack of knowledge of the specific rules of the bilateral agreement. For example, Slovenia has entered into bilateral agreements with Bosnia and Herzegovina and Serbia. The facilitated procedure for obtaining a work permit in Slovenia based on the bilateral agreements should take max. 15 days for specific categories of workers³¹⁸. Citizens from those third countries are required to be employed by the same employer during their first year of employment, although they can immediately be posted by this employer to another Member State. The expedited Slovenian residence and work permit for citizens from the Western Balkans have created difficulties in administrative cooperation with Member States where these third-country nationals are frequently posted³¹⁹. Cooperation and exchange of information is essential if competent authorities in the host Member State are to be able to verify compliance with the requirements for posting, in particular if the third-country national has a residence and work permit in the sending Member State. Challenges arise due to the specificities in the sending Member State's applicable regulations and their lack of correspondence in the host Member State. These are further reinforced by the circumstance that, as explained in Section 2.2.2 (a) above, the caselaw of the CJEU on posting of third-country nationals (Section 2.1.1) is interpreted and applied differently by the Member States.

3.6.2 Enforcement of administrative penalties/fines

Stakeholders from six Member States reported related difficulties in enforcing administrative penalties or fines³²⁰. The Slovenian and Estonian stakeholders mentioned procedural limitations to the cross-border enforcement of fines, in respect of serving documentation and decisions³²¹. In practice, the procedural rights granted to employers may hinder the enforcement of fines in cross-border situations as they cannot be guaranteed (e.g. right to be heard in person; serving of documents in person)³²².

The Spanish country report noted the differences in court jurisdictions, while a Hungarian stakeholder recalled that national legislation may foresee different sanctions that may not be possible to execute in another Member State, due to lack of comparable competence³²³.

One Latvian stakeholder noted that the system of levying administrative fines in another Member State is sometimes lengthy and problematic, particularly in cases where the employer is just a letterbox company. They also noted that there are no efficient national measures to levy administrative fines imposed by authorities of other Member States and that, in practice, such administrative fines are paid

³¹⁷ PL country report.

³¹⁸ Vah Jevšnik, M., Cukut Krilić, S. and Toplak, K., *Posted workers from Slovenia. Facts and Figures*, POSTING.STAT (project VS/2020/0499), 2022, p. 33.

³¹⁹ Ibid.

³²⁰ AT, DE, EE, ES, HU, LV, SI; interviews with representatives from the AT, HU and SI public administration; other sources: DE (Dhéret, C. and Ghimis, A., *The revision of the Posted Workers Directive: towards a sufficient policy adjustment?*, European Policy Centre, 2016, p.11; ES country report.

³²¹ Interviews with SI and EE public administration representatives.

³²² Interview with EE public administration representative.

³²³ Interview with HU public administration representative.

by big and functional companies who are interested in long-term business in other Member States. They suggested that there should be a unified system for enforcing fines, such as harmonised minimum procedural regulations on levying fines imposed by authorities of other Member States³²⁴.

3.6.3 Exchange of data through dedicated platforms

On the exchange of data through dedicated platforms, one Croatian stakeholder noted that differences between Member States in the level and quality of digital tools hinder its efficient use³²⁵. Nevertheless, stakeholders recognised the usefulness of the IMI system and highlighted aspects for improvement.

The Austrian stakeholders believe that important information is missing in the IMI system for third-country nationals, such as duration of employment in the sending Member State or the State of origin, type of employment (full-time/part-time) in the country of origin, or proof of qualification certificates, as well as data on social insurance status³²⁶. One Polish stakeholder suggested the inclusion of background information justifying the request would help the responding authority³²⁷, while one Portuguese stakeholder suggested including the identification of workplaces, date of visit and identification of workers, as well as the time period of the data requested³²⁸. Belgian stakeholders observed that information is not always accessible (e.g. documents are confidential due to their use in judicial procedures)³²⁹.

The Slovenian stakeholders mentioned that requests may be worded overly generally, taking additional time to process and respond. In addition, requests for information may contain several questions, implying the involvement of more than one national institution. It would be helpful, they noted, if the system would allow the request to be split so that the relevant questions could be forwarded to the competent authority in each case³³⁰.

Some stakeholders noted the reluctance of some Member State institutions to cooperate and share relevant information through the system³³¹. One Italian stakeholder suggested this issue could be addressed with application of sanctions for non-compliant States, while the Irish stakeholders suggested that, as some Member State rarely send queries, it could be helpful if common performance standards/expectations could be set centrally and reported annually by the Member States³³².

Although stakeholders from some Member States criticised the length of the process³³³ and called for shorter deadlines³³⁴, the Polish country fiche noted that the short deadlines to answer requests sent via the IMI system are difficult for the National Labour Inspectorate to meet, especially where there is a need to consult other institutions³³⁵. One Italian stakeholder suggesting strengthening the IMI platform to transform it into a faster and more effective tool for dialogue and information exchange between

³²⁴ Interview with LV public administration representative.

³²⁵ Interview with HR public administration representative.

³²⁶ Interview with AT public administration representative.

³²⁷ Interview with PL public administration representative; National Labour Inspectorate, *Report from the National Labour Inspectorate for 2020, 2021*, p. 172.

³²⁸ Interview with PT public administration representative.

³²⁹ Interview with BE public administration representatives.

³³⁰ Interview with a SI public administration representative.

³³¹ Interviews with BE, DK, HR, IT stakeholders.

³³² Interview with IT public administration representative.

³³³ Interviews with DK, LV, SI public administration representatives; interview with SI civil society organisation representative.

³³⁴ Interviews with SI, SK public administration representatives.

³³⁵ National Labour Inspectorate, *Report from the National Labour Inspectorate for 2020, 2021*, p. 173.

Member States³³⁶. Similarly, one Danish stakeholder suggested a better IMI system that allows easy exchange of information between Member States' authorities³³⁷.

Limitations on the material scope of the IMI system were also identified. For example, it was noted that the system only functions well when the competent authority has already detected shortcomings³³⁸. Slovenian stakeholders expressed doubts about its efficiency in cases of international road transport³³⁹. The French stakeholders suggested that the system be improved to support multilateral and multi-sectoral needs, noting that the IMI system was designed for bilateral exchanges, but that fraudulent cases can involve more than two countries³⁴⁰. One Lithuanian stakeholder noted that the current scope of cooperation is not fit to effectively prevent fictitious posting. They suggested that it should be possible to verify the reliability of companies, obtain all relevant information about the company, and be able to cooperate with foreign competent authorities³⁴¹.

Spanish, Polish, Portuguese, Slovenian and Slovak stakeholders called for broader inclusion of other State bodies and entities in the system, primarily regional authorities or tax and immigration authorities³⁴². One Bulgarian stakeholder went on to say the IMI system should be enlarged to include competent authorities from third countries³⁴³.

Finally, the French and Croatian stakeholders criticised the formality and standardisation of the system, with the latter noting that the absence of a designated contact person in another Member State may prolong or complicate exchanges of information³⁴⁴.

Good practice

During the COVID-19 pandemic, Dutch authorities promoted videoconference meetings with enforcing authorities from other Member States to discuss issues arising in the host or sending Member State in relation to posting of workers³⁴⁵.

When asked about **EESSI**, the Czech, Latvian, Dutch and Slovenian stakeholders criticised the length of the process, citing a lack of responsiveness or low speed of response of the other institutions³⁴⁶. The Dutch stakeholders underlined that authorities remain dependent on the willingness of other countries to provide information³⁴⁷, while a Czech stakeholder pointed out that the incorrect completion of electronic documents by the counterparty institutions makes it hard to automatically identify the individual in question³⁴⁸. One Belgian stakeholder also noted that the tool is too rigid and not fully adapted to the reality in the field³⁴⁹. Czech, Finnish and Dutch stakeholders highlighted technical problems, such as reoccurring system downtimes, which impact the exchange of information between

³³⁶ Interview with IT public administration representative.

³³⁷ Interview with DK public administration representative.

³³⁸ Interview with AT public administration representative.

³³⁹ Interviews with SI public administration representative.

³⁴⁰ Interview with FR public administration representative.

³⁴¹ Interview with LT public administration representative.

³⁴² Interviews with ES, PT, SK public administration representatives; PL (National Labour Inspectorate, *Report from the National Labour Inspectorate for 2020*, 2020, p. 172-173); interview with SI civil society organisation representative.

³⁴³ Interview with BG public administration representative.

³⁴⁴ Interviews with FR, HR public administration representatives.

³⁴⁵ Interview with NL public administration representative.

³⁴⁶ Interviews with CZ, NL public administration representatives; interview with LV academic expert; SI (Labour Inspectorate, [2021 Annual Work Report](#), 2022, pp. 54).

³⁴⁷ Interview with NL public administration representative.

³⁴⁸ Interview with CZ public administration representative.

³⁴⁹ Interview with BE public administration representative.

the participating countries³⁵⁰. Finally, the Greek stakeholders stated that the system should be improved to guarantee more accurate data exchange³⁵¹.

Belgian, Czech and Austrian stakeholders preferred to further enhance and develop these existing tools, rather than creating new ones³⁵². One French stakeholder welcomed the ongoing opening of the system to the labour inspectorates³⁵³ and one Lithuanian stakeholder requested such extension³⁵⁴.

To tackle the important issues faced by posted third-country nationals in relation to social security fraud, the Con3Post report recommends improving transnational cooperation by extending the IMI system to allow for the better exchange of social security-related information³⁵⁵.

Stakeholders stressed that the complexity of the regulatory and institutional frameworks in other Member States – with which the labour inspectorates are not always sufficiently familiar – contributes to difficulties in the administrative cooperation and exchange of information on social security-related information. Other sources highlighted the need to enhance joint cooperation procedures between all relevant enforcement authorities in this area³⁵⁶.

3.6.4 Other constraints

Czech stakeholders reported that communication and language barriers still constitute an obstacle. The support provided by ELA in the area of translation is helpful, although it may be time-consuming³⁵⁷. One Irish stakeholder noted that a considerable workload in the competent authorities may deter cooperation³⁵⁸. One Finnish stakeholder noted that there are very few direct contacts with authorities in other Member States at inspector level, and that the practical cooperation with other Member States is low or non-existent³⁵⁹.

Finally, the time gap between the facts and their reporting, or between the request for cooperation with the counterpart and the inspection intervention to verify the facts, may impede the inspection's usefulness³⁶⁰. The French and Slovak country reports that for social security-related obligations, where employers do not have the PD A1 form or when there is a suspicion of a false PD A1 form, the time gap between the authorities requesting and receiving that form can present a problem, especially in the context of short-term/temporary postings³⁶¹.

³⁵⁰ Interviews with CZ, FI, NL public administration representatives.

³⁵¹ Interview with EL public administration representative.

³⁵² Interview with At, CZ public administration representatives.

³⁵³ Interview with FR public administration representative.

³⁵⁴ Interview with LT civil society organisation representative.

³⁵⁵ Con3Post, *Posting of Third-Country Nationals. Mapping the trend in the construction sector*, 2020, p.73, available at:

<https://www.euro.centre.org/downloads/detail/3930>

³⁵⁶ European Platform tackling undeclared work, Counteracting undeclared work and labour exploitation of third-country national workers, 2021, p.42, available at: <https://www.euro.centre.org/downloads/detail/3930>

³⁵⁷ Interview with CZ public administration representative.

³⁵⁸ Interview with IE public administration representative.

³⁵⁹ Interview with FI public administration representative.

³⁶⁰ Interview with academic expert.

³⁶¹ Interview with FR public administration representative; SK country report.

3.6.5 National issues impacting cooperation between Member States

Some internal particularities or challenges in the enforcement of posted workers' rights can impact the efficiency of cooperation with other Member States. In addition to the issues described in Section 3.4.2, several other potential hindrances to cooperation were identified.

Firstly, the lack of or insufficient human resources is an obstacle to cooperation³⁶².

Good practices

The Unit for the Financial Control of Undeclared Work within the German Customs Administration (*Finanzkontrolle Schwarzarbeit, FKS*), which is responsible for the enforcement of the Posted Workers Act (*Arbeitnehmer-Entsendegesetz, AEntG*), announced the recruitment of 121 additional staff in 2021³⁶³.

Secondly, lack of preparation by the competent human resources compromises cooperation, with stakeholders suggesting a need for more capacity-building and training, as well as enhanced awareness and dissemination of good practices³⁶⁴. A further internal issue relating to staff relates to the widespread lack of English³⁶⁵.

Good practices

Officials of the Irish Workplace Relations Commission have been involved in many training programmes (often in Member States which recently joined the Union in central and Eastern Europe), namely, in the framework of the European Platform tackling undeclared work.

The internal distribution of competences and lack of adequate cooperation between national authorities (see Sections 2.2.2 and 3.4.2) may also impact cooperation with authorities from other Member States. One Estonian stakeholder noted that inspections would be easier and more effective if there were joint bodies to process infringements without the need to divide the competences between various authorities (this would also be simpler for workers and employers, which would have only one authority seeking follow-up information)³⁶⁶.

Good practices

In Portugal, the Labour Inspectorate, the Social Security Services and the Borders and Immigration Service are involved in joint inspections to verify undeclared work and working conditions of migrants³⁶⁷.

The Danish Tax Administration, the Danish Working Environment Authority and the Danish National Police have a political agreement whereby the police are obliged to participate in the inspections of

³⁶² Interviews with CZ, EE public administration representatives; interview with SE public administration representative.

³⁶³ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 104.

³⁶⁴ CY country report.

³⁶⁵ IT country report.

³⁶⁶ Interview with EE public administration representative.

³⁶⁷ Interview with PT public administration representative.

building sites³⁶⁸. The Danish Immigration Service (SIRI) occasionally participates in inspections on social dumping (e.g. on construction sites, in restaurants). Its role during these inspections is to provide guidance on residence status and work permits³⁶⁹.

In relation to joint inspections, the Czech country report notes that the involvement of administrators from other Member States in joint inspections carried out in Czechia is not expressly regulated under Czech law.

Difficulties arising from decentralisation of the competent authorities may have an impact on cooperation. In Spain, there is no central register collecting data on the notifications that companies must communicate to one of Spain's 17 Autonomous Communities. In addition, there are differences in the way data are registered/collected (i.e. for statistical purposes) by each of the Autonomous Communities, with some considering nationality irrelevant to their statistical data³⁷⁰.

3.6.6 Other suggestions to enhance cooperation

As a general suggestion to ensure more efficient and effective cooperation between Member States, the Cypriot country report refers to the role of **capacity-building, enhanced awareness and dissemination of good practices**. Similar suggestions were made by the Lithuanian and Portuguese stakeholders, with the Lithuanians also recommending **joint training** of the competent persons of the Member States, involving all social partners³⁷¹. One Greek stakeholder suggested that competent authorities from countries with high numbers of sending/receiving posted third-country nationals could organise **study visits** under an EU exchange programme to discuss issues of common interest related to monitoring, controlling and enforcing the rights of posted third-country nationals³⁷².

On the **notification** obligation, one Czech stakeholder proposed the development of a uniform EU-wide online form to notify local authorities about a posted worker, which would harmonise the information notified³⁷³, while an Estonian stakeholder suggested that it would be easier if posted workers' declarations came through centralised database (e.g. IMI)³⁷⁴. Similarly, one Danish stakeholder suggested creating a register for posting companies, as well as ID cards for all posted workers³⁷⁵. The Spanish literature suggests setting up a single European system for companies to notify the extension of the deadline for considering the existence of a long-term posting that would be accessible to the competent authorities of all Member States³⁷⁶.

On **joint inspections**, one Hungarian stakeholder stated that an EU-wide legal framework on joint labour inspections would be welcome³⁷⁷.

On **access to and interconnection of information**, one Portuguese stakeholder suggested the possibility of a single tool or a form of data/information interconnection between existing systems,

³⁶⁸ Interview with DK public administration representative.

³⁶⁹ Ibid.

³⁷⁰ Interview with ES public administration representative.

³⁷¹ Interview with LT civil society organisation representative; interview with PT academic expert.

³⁷² Interview with EL public administration representative.

³⁷³ Interview with CZ civil society organisation representative.

³⁷⁴ Interview with EE public administration representative.

³⁷⁵ Interview with DK public administration representative.

³⁷⁶ Carrascosa, M.D. and Contreras, Ó., *Posted workers from and to Spain. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022.

³⁷⁷ Interview with HU public administration representative.

thereby avoiding the multiplication of requests and responses about the same situation in different portals/information systems³⁷⁸, while one Romanian stakeholder proposed the creation of an EU-level platform to facilitate collaboration between Member States on posting of third-country nationals specifically, accompanied by the creation of liaison offices between Member States to exchange information³⁷⁹. One Greek stakeholder suggested the creation of a transnational database in all EU languages, accessible to all liaison offices, containing information on the remuneration in all Member States. They noted that this would be very beneficial to facilitate cooperation and facilitate investigations into equal treatment of posted third-country nationals³⁸⁰.

French stakeholders stated that a harmonised tool on accidents in the workplace would be very beneficial to facilitate cooperation and investigations, as would access to company registers for information on companies established in other Member States³⁸¹. Similarly, a Hungarian stakeholder stated that they would welcome a central register on companies established in the EU³⁸², while a Danish stakeholder observed that it would be useful if there was flexible access to information about companies in other Member States, to assess whether they are real companies with activities in the Member State, or letterbox companies³⁸³. One Portuguese stakeholder suggested (but did not specify) the development of common access databases and information systems that would allow inspection services to consult the elements and documents necessary to verify the regularity of the establishment of companies and the hiring of workers³⁸⁴.

Good practices

The website of the Polish inspection authority includes a validation tool that allows anyone to check the validity of a PD A1 form³⁸⁵.

One Finnish stakeholders noted the potential of **ELA** to facilitate information exchange on phenomena and best practices, for example³⁸⁶. A French stakeholder complimented ELA's role in supporting the approach to multilateral cooperation, facilitating and speeding-up inspections, including with logistical support³⁸⁷. While noting that better cooperation between Member States could be improved with the exchange of information before and after the posting, Italian stakeholders suggested that ELA could play a more central role in the promotion of bilateral meetings between national authorities in the phase before the posting³⁸⁸. The Dutch stakeholders highlighted that ELA could be a helpful forum for policy-level discussion to address difficult issues regarding the posting of third-country nationals³⁸⁹.

Finally, in respect of the relevance of **informal communication** between national authorities, the Slovenian stakeholders suggested more one-on-one and in-person meetings³⁹⁰. The Dutch

³⁷⁸ Interview with PT public administration representative.

³⁷⁹ Interview with RO academic expert.

³⁸⁰ Interview with EL public administration representative.

³⁸¹ Interview with FR public administration representatives.

³⁸² Interview with HR public administration representative.

³⁸³ Interview with DK public administration representative.

³⁸⁴ Interview with PT academic expert.

³⁸⁵ Interview with CZ public administration representative.

³⁸⁶ Interview with FI public administration representative.

³⁸⁷ Interview with FR public administration representative.

³⁸⁸ Interview with IT public administration representative.

³⁸⁹ Interview with NL public administration representative.

³⁹⁰ Interview with SI public administration representative.

stakeholders reported that its bilateral Webex conferences between enforcing authorities have proven a very useful cooperation tool³⁹¹.

On the issue of lack of **specific information on posted third-country nationals**, one Finnish stakeholder pointed out that it would be useful to gather information on third-country nationals who come to Finland, and suggested there was a need to reflect on whether the information should flow from the sending Member State authorities or constitute an obligation for the posting undertakings³⁹².

3.6.7 Role of the countries of origin of third-country nationals

The majority of Member States do not involve third countries in any of the administrative formalities³⁹³.

The German country report states that the involvement of the third-country of origin of the posted third-country national should happen under the terms of existing social security agreements when the third-country national has a social security link with that country of origin, but notes that these agreements only bind the signatories. Dutch stakeholders pointed to the need for cooperation with third countries for the purpose of exporting social benefits³⁹⁴. This is not covered by the applicable EU regulations, however.

In Belgium, although third countries have not been contacted to date, one stakeholder mentioned the potential usefulness of asking questions about the third-country national's domicile in their country of origin, or their visa documents³⁹⁵. Similarly, an Austrian stakeholder mentioned that more information about third-country nationals from their countries of origin (education, qualifications, previous work experience, etc.) would be very helpful in ensuring their rights, going so far as to suggest including those data from the countries of origin in the IMI system³⁹⁶. One Sweden stakeholder stated that receiving Member States could initiate contact and exchange information directly with the country of origin³⁹⁷. A Bulgarian stakeholder went further, suggesting that the IMI system should be enlarged to include the competent authorities from third countries³⁹⁸.

The involvement of third countries appears especially relevant in certain contexts. Italian and Latvian stakeholders noted the useful cooperation with third countries in the context of the fight against labour exploitation and human trafficking³⁹⁹. Polish stakeholders observed that the lack of channels of exchange of information with third countries made it difficult to supervise the 'bogus posting industry', as the same people can set up different companies (including within Member States, for instance via special purpose vehicles, intermediaries, etc.), which are difficult for host countries to track without the involvement of third countries⁴⁰⁰.

Dutch and Polish stakeholders considered cooperation with third countries to be important in informing posted third-country national workers about their rights. They suggested establishing cooperation with third countries to create sources of information (preferably websites available in the workers' mother tongue) for workers planning to work in a Member State, covering their rights if they are posted in another

³⁹¹ Interview with NL public administration representative.

³⁹² Interview with FI public administration representative.

³⁹³ CYH, CZ, DK, EE, EL, FI, FR, HR, HU, IE, LT, MT, PT, RO, SE (interview with public administration representative), SI, SK.

³⁹⁴ Interview with NL public administration representative.

³⁹⁵ Interview with BE public administration representative.

³⁹⁶ Interview with AT public administration representative.

³⁹⁷ Interview with SE public administration representative.

³⁹⁸ Interview with BG public administration representative.

³⁹⁹ Interviews with IT, LV public administration representatives.

⁴⁰⁰ Interview with PL public administration representative.

Member State, and the competent authorities or contact points in cases of underpayment or unlawful working conditions⁴⁰¹.

Table 6: Summary of the challenges in cooperation between Member States

Summary of the challenges in cooperation between Member States
Differences in national legal frameworks and inspection landscapes in the Member States complicates the identification of the corresponding competent authority for a request for information or cooperation
<p>Specifically:</p> <ul style="list-style-type: none"> - Involvement of authorities with competence in the field of migration, which are normally not involved in the enforcement of posting of workers' rules. <p>More generally:</p> <ul style="list-style-type: none"> - Different competent authorities involved in the process of enforcement of the rules applicable to the posting of third-country nationals; - Different scopes of competence of the competent authorities for inspection in the Member States; - Differences in the range of investigatory powers and the way inspections are conducted.
Differences in national legal frameworks on posting of third-country national workers that complicate the exchange of information and potentially affect its efficiency
<p>Specifically:</p> <ul style="list-style-type: none"> - In order to verify if a posting is legal, inspection authorities in the host Member State have to check if the third-country national has a residence and work permit in the sending Member State, according to the rules of that Member State; - The applicability of bilateral agreements between the sending Member State and the country of origin may foresee particular conditions for the entry and residence of third-country nationals. <p>More generally:</p> <ul style="list-style-type: none"> - Specificities in national procedures, documentation or internal organisation of the authorities may lead them to request information that is specific to their own national regulations but it not easily understood by the corresponding Member State authorities.
Enforcement of administrative penalties/fines
<ul style="list-style-type: none"> - Procedural limitations, i.e. serving of documents and decisions; - Differences in court jurisdiction; - Differences in the sanctions foreseen at national level;

⁴⁰¹ Interviews with NL, PL public administration representatives.

Summary of the challenges in cooperation between Member States
<ul style="list-style-type: none"> - Lengthy procedure.
Exchange of data through dedicated platforms
<ul style="list-style-type: none"> - IMI system; - EESSI system.
Other constraints
<ul style="list-style-type: none"> - Communication and language barriers; - Workload of authorities; - Little or no direct contact between competent authorities; - Time gap between the facts and the request for cooperation.
National issues impacting cooperation
<ul style="list-style-type: none"> - Lack of or insufficient human resources; - Lack of preparation of competent staff; - Poor English language skills; - Internal distribution of competences, notably decentralisation of powers.

4.0 Overview of labour mobility flows of legal posted Third-country nationals in the EU and among the Member States

The collection of data on the posting of workers, particularly third-country nationals, is essential to understanding the reality and designing evidence-based policies. However, at EU level, it remains a challenge to collect comparable data on the mobility flows of legally posted third-country nationals within the EU and among the Member States. Prior research by HIVA (POSTING.STAT project) used national microdata and PD A1 data to track intra-EU posting flows. However, Member States collect this information in different ways, making it difficult to compare data between countries.

Nevertheless, the data available can provide an indication of the importance of posted third-country nationals and the current trends in movement from the country of origin to the Member State of residence and employment and to the Member State of posting. Although some Member States provide data including third-country nationals posted directly from outside the EU, this share is generally low: in Belgium, one of the largest net receiving countries, it constituted around 3% in 2021⁴⁰².

4.1 Statistical data of posted third-country nationals

The importance of posted third-country nationals appears to be on the rise within the EU. **Table 7** and **Table 8** present the available data on incoming and outgoing posted third-country nationals, respectively, for a selection of Member States since 2017. The figures suggest that the importance of posted third-country nationals is increasing, with an upward trend for most countries (which have data available over multiple years). In addition to some of the main receiving countries (Austria, Belgium, Germany, and the Netherlands), the figures show that Czechia saw a significant influx of posted third-country nationals in 2022. They also indicate that Spain, Poland and Slovenia are among the main sending countries of posted third-country nationals (confirmed by the HIVA project⁴⁰³).

Table 7: Incoming posted third-country nationals to Member States

Member State	2017	2018	2019	2020	2021	2022
AT			3,988	7,413	12,798	9,046
BE	15,000	20,000	26,000			
CZ						19,455
DE				17,833		
IT	3,562	3,888	5,043	1,093		
LT			1,752	1,410	3,139	

⁴⁰² De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 34.

⁴⁰³ Ibid.

Member State	2017	2018	2019	2020	2021	2022
LU		2,065	1,610	5,674		
NL			10,872			
SK			2,111	2,421		

Note: 'Number of posted workers' used for AT, BE, CZ, DE, IT, LU, SK; 'Notifications' used for LT, NL; DE figures only according to Article 12 Regulation (EC) No 883/2004. Some figures might include third-country nationals posted directly from outside the EU, but this share is generally negligible.

Sources: HIVA project; interviews with public administration representatives; Lens et al. (2022)

Table 8: Outgoing posted third-country nationals from Member States

Member State	2018	2019	2020	2021	2022
AT		942	2,373	2,722	1,732
EE			787		
ES			31,891		
FI				333	
HR				9,200	
PL	23,269	50,643	63,640	115,240	
SI	23,800	32,879	39,491	45,542	

Note: 'Number of posted workers' used for AT, EE, SI; 'Number of PDs A1' used for ES, FI, HR, PL; Some figures might include third-country nationals posted directly from outside the EU, but this share is generally negligible.

Sources: HIVA project; interviews with national administrations.

Table 9 presents the main nationalities of the posted third-country nationals in 19 Member States, for both incoming and outgoing workers. Ukraine and Bosnia and Herzegovina are most-represented, followed by Serbia and Belarus. Spain, France and Italy mainly process posted workers from Morocco.

As of 31 May 2022, over 97% of all incoming posted third-country nationals in Czechia were from Ukraine⁴⁰⁴. In 2021, 38% of the posted third-country nationals to Belgium originated from Ukraine and 17% from Belarus, representing a 75% and 125% increase, respectively, on 2020⁴⁰⁵. In Luxembourg, in 2020, over half of the posted third-country nationals were from Ukraine⁴⁰⁶. In 2021, Poland issued 115,240 PD A1s to outgoing posted third-country nationals, an 81% increase compared to 2020. Around

⁴⁰⁴ Interview with CZ public administration representative.

⁴⁰⁵ De Wispelaere, F., De Smedt, L., Muñoz, M., Gillis, D. and Pacolet, J., *Posted workers from and to Belgium. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 30.

⁴⁰⁶ Clément, F. and Hauret, L., *Posted workers from and to Luxembourg: facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 16.

80% were given to posted workers with a Ukrainian nationality⁴⁰⁷. Slovenia reported 45,452 outgoing posted third-country nationals in 2021, around two-thirds of whom were from Bosnia and Herzegovina and around 20% from Serbia⁴⁰⁸.

Table 9: Main nationalities of posted third-country nationals

Member State	Incoming	Outgoing
AT	Ukraine, Bosnia and Herzegovina, Serbia, Belarus	Bosnia and Herzegovina, Serbia, Turkey
BE	Ukraine, Brazil, Bosnia and Herzegovina, Turkey, Kosovo, Serbia, Belarus	
CZ	Ukraine	
DE	Turkey, Russia, Serbia, Switzerland, Belarus, Ukraine, Bosnia and Herzegovina	
EE		Russia, Ukraine
ES	Morocco	Morocco, Ecuador, Senegal
FI	Ukraine, Russia	
FR	Morocco, Ukraine, Brazil	
HR		Bosnia and Herzegovina, Serbia
HU		Serbia, Ukraine
IT		Morocco, Tunisia, Egypt
LT	Ukraine	
LU	Ukraine	
LV	Ukraine, Moldova	

⁴⁰⁷ Kielbasa, M., Szaraniec, M., Mędrala, M. and Benio, M.. *Posted workers from and to Poland. Facts and Figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 105-106.

⁴⁰⁸ Interview with SI public administration representative; Vah Jevšnik, M., Cukut Krilić, S. and Toplak, K.. *Posted workers from Slovenia. Facts and Figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 30-31.

Member State	Incoming	Outgoing
NL	Ukraine, Belarus, Turkey, Bosnia and Herzegovina, Serbia, Philippines	
PL		Ukraine, Belarus, Russia
PT		Brazil
SI		Bosnia and Herzegovina, Serbia, Kosovo, North Macedonia
SK	Ukraine, Serbia, Russia	

Note: Some Member States might include third-country nationals posted directly from outside the EU, but this share is generally negligible.

Sources: HIVA project; interviews with national administrations.

The main sectors in which posted third-country nationals are working within the EU are generally construction, (road freight) transport, and agriculture (see **Table 10**).

In Belgium, 53% of all incoming posted third-country nationals were working in the construction sector⁴⁰⁹. In Austria, in 2019, 30% of all incoming posted workers in the construction sector were third-country nationals, with 29% in the transport sector (two-thirds of whom were from Ukraine)⁴¹⁰. France reported 90,905 total postings for Ukrainians in the road freight transport sector in 2018⁴¹¹. In the Netherlands, in 2021, 38% of all notified employees in the road freight transport sector were third-country nationals, and 22% in other sectors combined (around half of all notified employees were third-country nationals in the transportation and storage sector, and the agriculture, forestry and fishing sectors). They generally held Ukrainian or Belarusian nationality⁴¹².

Table 10: Main sectors of posted third-country nationals

Member State	Sector
AT	Construction; road freight transport
BE	Construction; road freight transport; metal industry
DE	Construction, Road freight transport

⁴⁰⁹ Lens, D., Mussche, N. and Marx, I., *A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants*, International Migration, 2021, p. 15.

⁴¹⁰ Geyer, L., Premrov, T. and Danaj, S., *Posted workers from and to Austria. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 31.

⁴¹¹ Muñoz, M., *Posted workers from and to France. Facts and Figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 18.

⁴¹² Heyma, A., Bussink, H. and Vervliet, T., *Posted workers to the Netherlands: Facts and figures*, Leuven: POSTING.STAT project VS/2020/0499, 2022, pp. 24-25.

Member State	Sector
EE	Construction; manufacturing; shipbuilding; retail trade
ES	Agriculture
FI	Construction; industry; shipbuilding; agriculture
FR	Road freight transport; agriculture
HU	Agriculture; construction; IT and telecommunication; hospitality
IT	Construction
LT	Construction; road freight transport; manufacturing; administrative and service sector
LU	Construction; manufacturing; transport and storage
LV	Construction; road freight transport; fish processing; woodworking
MT	Mechanical; chemical
NL	Transport and storage; road freight transport; agriculture/forestry/fishing
PL	Road freight transport; transport and storage; construction; human health and social work
PT	Construction; hospitality
RO	Refining and petrochemicals; IT and telecommunication; Electronics
SI	Construction; road freight transport
SK	Industry; construction; manufacturing

Sources: HIVA project; interviews with national administrations.

Table 11 shows the main corridors of movement of third-country nationals between Member States. Poland and Lithuania are the main sending countries for Ukrainian and Belarusian posted workers, while Slovenia mostly posts Bosnian workers. Most of these posted workers go to western European countries, such as Austria, Belgium, France, and the Netherlands, which are the main receiving countries for posted third-country nationals in the EU.

In 2019, 75% of posted workers going from Lithuania to Austria were third-country nationals⁴¹³. In 2021, Belgium welcomed 12,460 posted Ukrainian workers from Poland, as well as 8,408 Ukrainian and 7,223 Belarusian posted workers from Lithuania. In addition, 4,308 Brazilian posted workers arrived from Portugal, representing 96% of all posted Brazilians in Belgium⁴¹⁴. Another important corridor includes Moroccan posted workers from Spain and Italy to France. In 2020, 11% of PD A1s issued abroad from Spain to five main receiving Member States (France, Portugal, Germany, Italy, Belgium) were given to outgoing posted third-country nationals, 4% of whom were Moroccan workers⁴¹⁵. 17% of posted workers coming from Spanish companies to France in 2019 had Moroccan citizenship, while over three-quarters of all Moroccan posted workers in France came from Spain. At the same time, 10% were originally from Ecuador and another 10% from Senegal⁴¹⁶. In 2021, Poland issued 42% of PD A1s (only Article 12 Regulation (EC) No 883/2004) to posted third-country nationals going to Germany, 21% to Belgium, and 19% to the Netherlands. The vast majority were issued to workers with Ukrainian nationality⁴¹⁷.

Table 11: Main corridors of posted third-country nationals

Sending Member State	Receiving Member State	Main nationality
AT	DE	Bosnia and Herzegovina, Turkey, Serbia
CZ	SK	Ukraine, Russia
DE	AT	Bosnia and Herzegovina, Turkey, Serbia
DE	FR	Bosnia and Herzegovina, Turkey, Serbia
DE	NL	Bosnia and Herzegovina, Turkey, Serbia
EE	FI	Ukraine, Russia
EE	FR	Ukraine
ES	FR	Morocco, Ecuador, Senegal
ES	PT	Brazil
HR	BE	Bosnia and Herzegovina
HU	SK	Serbia, Ukraine

⁴¹³ Geyer, L., Premrov, T. and Danaj, S., *Posted workers from and to Austria. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 30-31.

⁴¹⁴ De Wispelaere, F., De Smedt, L., Muñoz, M., Gillis, D. and Pacolet, J., *Posted workers from and to Belgium. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 31.

⁴¹⁵ Carrascosa, M.D. and Contreras, Ó., *Posted workers from and to Spain. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 34-35.

⁴¹⁶ Muñoz, M., *Posted workers from and to France. Facts and Figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 18-20.

⁴¹⁷ Kielbasa, M., Szaraniec, M., Mędrala, M. and Benio, M., *Posted workers from and to Poland. Facts and Figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 113-114.

Sending Member State	Receiving Member State	Main nationality
IT	DE	Morocco
IT	FR	Morocco
LT	AT	Ukraine
LT	BE	Ukraine, Belarus
LT	FI	Ukraine
LT	LV	Ukraine
LT	NL	Ukraine, Belarus
LT	SE	Ukraine
PL	AT	Ukraine, Belarus
PL	BE	Ukraine, Belarus
PL	DE	Ukraine
PL	FI	Ukraine, Russia
PL	FR	Ukraine
PL	LT	Ukraine
PL	LV	Ukraine
PL	NL	Ukraine, Belarus
PL	SK	Ukraine
PT	BE	Brazil
PT	FR	Brazil
SI	AT	Bosnia and Herzegovina, Serbia
SI	BE	Bosnia and Herzegovina, Kosovo

Sending Member State	Receiving Member State	Main nationality
SI	DE	Bosnia and Herzegovina
SI	FR	Bosnia and Herzegovina

Sources: HIVA project; interviews with national administrations

Table 12 shows the importance of third-country nationals as a share of total posted workers for a selection of Member States. Slovenia stands out, with a share of 60%, followed by western European countries such as the Netherlands (35%), Belgium (26%), France (23%) and Austria (22%). Germany only reported a share of 4.34% in 2020. The increasing shares for Belgium, France, Luxembourg and the Netherlands confirm the growing importance of posted third-country nationals in the EU.

Table 12: Posted third-country nationals as a share of total posted workers

Member State	2017	2018	2019	2020	2021
AT			22%		
BE				20%	26%
DE				4.34%	
ES				11%	
FR	16%	18%	21%	23%	
HR					11.5%
LU		8.0%	5.7%	19.4%	
NL				30%	35%
PL				17%	
SI				60%	

Note: Some figures might include third-country nationals posted directly from outside the EU, but this share is generally negligible.

Sources: HIVA project; interviews with national administrations.

4.2 Collection of statistics

More data becomes available each year, but as of yet there is no uniform method of collecting statistics on numbers of posted third-country nationals, either at national and European level. This creates difficulties in terms of the comparability of data and prevents a clear view of the actual situation of posted

third-country nationals within the EU. If Member States are to efficiently assess and monitor the posting of workers from outside the EU, they need to be able to exchange comparable information. However, the system of transferring PD A1 forms between countries continues to vary, as it is not ensured through the EESSI.^{418,419}

Several Member States do not compile sufficient detailed information on the posting of third-country nationals, including main receiving and sending countries such as Germany and Italy. Many Member States do not collect statistics in a digitalised and/or decentralised way, adding additional obstacles when trying to estimate the actual number of posted third-country nationals⁴²⁰. In 2020, around half of the Member States had implemented an online declaration system, while four had a postal system and three an email system⁴²¹. Certain methods that demonstrate good results also have limitations. For example, Belgium's LIMOSA system is one of the more extensive and accurate data collection sources on posted workers in the EU, but several exceptions apply within the system and declarations do not necessarily equate to actual employment^{422,423}.

Good practices

The Belgian LIMOSA⁴²⁴ system was set up in 2007 as a compulsory online system for the registration of service provision, where every employer wishing to post workers to Belgium must register their intention in advance. LIMOSA declarations must include the identification of the worker, their nationality, the identification of the company, the nature of the services performed during posting, the dates of the posted service, the place where the services are provided in Belgium, working hours, and identification data and contact details of the liaison person. The level of disaggregation of the information captures a more reliable picture of the reality of posting third-country nationals to Belgium, and the ensuing analysis allows for concrete conclusions on the application of the relevant framework, including migratory regulation⁴²⁵.

At EU level, posted workers are required to obtain a PD A1 from the sending country to attest that they are covered by its social security legislation. However, collection of data through the PD A1s presents some limitations: PD A1s are not used only for workers posted under the PWD⁴²⁶; multiple PD A1s can be issued to the same person in one year; a worker may apply for a PD A1 and use it more than once

⁴¹⁸ Member States should notify the posting operation by sending a Structural Electronic Document (SED), which has broadly the same content as the PD A1, to the host Member State.

⁴¹⁹ Biletta, I., Cabrita, J. and Gerstenberger, B., *Improving the monitoring of posted workers in the EU*, Eurofound, 2020, p.35.

⁴²⁰ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 111.

⁴²¹ Biletta, I., Cabrita, J. and Gerstenberger, B., *Improving the monitoring of posted workers in the EU*, Eurofound, 2020, p.17.

⁴²² Chakkar, S., De Wispelaere, F. and Struyven, L., *Détachement entrant et sortant dans les statistiques belges sur le marché du travail – Avec un focus sur la Région de Bruxelles-Capitale*, HIVA-KU-Leuven, 2020, p. 31; Lens, D., Mussche, N and Marx, I., *Arbeidsmigratie en -mobiliteit in België – Diverse stromen en uitdagingen*, CBS, 2020, p. 14 ; De Wispelaere, F., De Smedt, L., Muñoz, M., Gillis, D. and Pacolet, J., *Posted workers from and to Belgium. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, pp. 7, 21, 22.

⁴²³ BE had to reduce the amount of information collected because it was considered by the CJEU to restrict the free movement of services; Alsos, K. and Mette Ødegård, A., *Improving data collection about posting and information provision on conditions applicable for posted workers* (Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO); project VS/2016/0222), Fafo, 2018, p. 5.

⁴²⁴ Cross-Country Information System for Migration Research at the Social Administration (*Landenoverschrijdend Informatiesysteem ten behoeve van Migratie Onderzoek bij de Sociale Administratie*).

⁴²⁵ Lens, D., Mussche, N. and Marx, I., *Europe's ever expanding mobility patterns posting, third-country nationals and the single European labour market*, Working Paper no. 19.08, University of Antwerp - Herman Deleeck Centre for Social Policy, 2019, pp. 8ff.

⁴²⁶ Important discrepancies were noted in the numbers on posting of workers, due to the different scopes and notions of posted persons of Regulation (EC) No 883/2004 and the PWD (De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posting of workers - Collection of data from the prior notification tools - Reference year 2019*, Publications Office of the European Union, 2021, pp. 34 ff); De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posting of workers - Report on A1 Portable Documents issued in 2020*, Publications Office of the European Union, 2022, p. 17; Biletta, I., Cabrita, J. and Gerstenberger, B., *Improving the monitoring of posted workers in the EU*, Eurofound, 2020, p. 40.

during its validity period (thus appearing in the PD A1 statistics as one posting); their issuance is not a precondition to post a worker and the forms may be issued after the posting has started⁴²⁷. False PD A1s also distort the reality of posting⁴²⁸. In 2020, only six Member States (Belgium, Finland, Germany, Latvia, Malta, the Netherlands) could request a PD A1 through an online application. Pursuant to the Single Digital Gateway Regulation⁴²⁹, however, by 12 December 2023 at the latest, all Member States need to provide an option for the PD A1 to be requested online and issued in electronic format. All national procedures require at least the identification of the employer, the worker, and the planned duration of the posting. Some Member States ask for additional details, such as job description, working hours, and remuneration⁴³⁰.

In line with Article 9 (1) (a) of the Enforcement Directive, some Member States put in place an obligation for the service provider to provide specific information on the posting. The information that can be requested by the competent authorities is not harmonised⁴³¹ (see Section 3.2.1). Although the information requested by Member States usually comprises the necessary data for monitoring compliance, lack of harmonisation creates gaps in the comparison of available data⁴³².

Data at EU level from the prior notification tools implemented by Member States in line with Article 9(1)(a) of the Enforcement Directive started being collected since 2018 through a questionnaire sent to the Expert Committee on Posting of Workers (ECPW)⁴³³. Twenty Member States include information on the citizenship of the posted worker, but the data gathered are still insufficient to draw concrete conclusions⁴³⁴.

The Posting STAT project aimed to complement the data available at EU level 'by bringing together a consortium of universities and research centres from 10 different Member States in order to increase empirical evidence on intra-EU posting through the collection and analysis of national administrative (micro-data)'. The findings of that mapping of intra-EU posting were discouraging, as the data reported in the country reports revealed little more than the data already available at EU level⁴³⁵.

National stakeholders often point to the lack of financial/human resources as a reason for data collection issues. They are also aware of the need for efficient processing of electronic data and the fact that national registration systems may contain more valuable information that could be used⁴³⁶. A 2020 Eurofound report examined options on how to 'provide reliable and comparable information on the number, flow and working conditions of posted workers in the EU'. It suggested that a dual approach should be implemented: 'improvement of the scope and quality of data collected, and improvement of the coordination and data sharing among Member States'⁴³⁷.

⁴²⁷ Biletta, I., Cabrita, J. and Gerstenberger, B., *Improving the monitoring of posted workers in the EU*, Eurofound, 2020, pp. 3-4; De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posting of workers - Collection of data from the prior notification tools - Reference year 2019*, Publications Office of the European Union, 2021, p. 35.

⁴²⁸ Alsos, K. and Mette Ødegård, A., *Improving data collection about posting and information provision on conditions applicable for posted workers* (Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO); project VS/2016/0222), Fafo, 2018, p. 11.

⁴²⁹ Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012 (OJ L 295, 21.11.2018, pp.1-38).

⁴³⁰ Biletta, I., Cabrita, J. and Gerstenberger, B., *Improving the monitoring of posted workers in the EU*, Eurofound, 2020, p.16.

⁴³¹ Ibid., pp. 17ff.

⁴³² Alsos, K. and Mette Ødegård, A., *Improving data collection about posting and information provision on conditions applicable for posted workers* (Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO); project VS/2016/0222), Fafo, 2018, p. 15.

⁴³³ Biletta, I., Cabrita, J. and Gerstenberger, B., *Improving the monitoring of posted workers in the EU*, Eurofound, 2020, p.40.

⁴³⁴ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posting of workers - Collection of data from the prior notification tools - Reference year 2019*, Publications Office of the European Union, 2021, pp. 20-21.

⁴³⁵ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 111.

⁴³⁶ Biletta, I., Cabrita, J. and Gerstenberger, B., *Improving the monitoring of posted workers in the EU*, Eurofound, 2020, p. 40.

⁴³⁷ Biletta, I., Cabrita, J. and Gerstenberger, B., *Improving the monitoring of posted workers in the EU*, Eurofound, 2020, pp. 41-45.

5.0 Operational conclusions for application of EU law on posting of Third-country nationals

This section proposes a set of operational conclusions based on the findings of the Report, to assist in the practical implementation of EU law and CJEU case-law and to improve bilateral and multilateral administrative and operational cross-border cooperation and exchange of information, as well as the use of existing tools.

5.1 Enhancing the application of the legal framework

As analysed in Section 2 of the Report, the legal framework applicable to the posting of third-country national workers is composed of two large components: (i) EU law, including how it is interpreted by the CJEU and how it is transposed by the Member States, and (ii) beyond the minimum regulated by EU law and where the Member States retain competence, Member State law. Issue 1 deals specifically with the caselaw of the CJEU and the different interpretations thereof; Issue 2 deals with the national legal frameworks in the different Member States.

Issue 1: Diverging interpretations and application of EU law and CJEU case-law

The *Vander Elst* case (explained in Section 2.1 above) has been pivotal in the context of the posting of third-country national workers. In fact, although the EU legal framework applicable to posting of workers does not contain any specific provision on posting of third-country nationals, the CJEU has confirmed in the *Vander Elst* case that the possibility of **employers established in one Member State** to send their employees to perform economic activities in another Member State applies equally to workers who are third-country nationals.

The posting of third-country national workers is, however, in accordance with this decision from the CJEU, subject to the **lawful and habitual employment** of the posted third-country national in the sending Member State. These concepts have not been further developed by the CJEU in the *Vander Elst* case, other than the conclusion that the facts of the case did constitute such an instance of lawful and habitual residence - *in casu*, in Belgium, notably, as the workers were legally resident in Belgium, held Belgian work permits, were covered by the Belgian social security scheme (par. 3) and had valid employment contracts governed by Belgian law (par. 24).

In subsequent caselaw, the CJEU clarified that legislation imposing a requirement of prior existence of an employment contract of indefinite duration for at least six months⁴³⁸, at least one year's prior employment⁴³⁹ or an employment contract of indefinite duration⁴⁴⁰ is disproportionate to the objectives sought. In this regard, the CJEU noted that "the Court did not couple the concept of 'lawful and habitual employment' with a requirement of residence or employment for a certain period in the State of establishment of the service provider"⁴⁴¹.

⁴³⁸ CJEU, Judgment of the Court (First Chamber) 21 October 2004, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-445/03, EU:C:2004:655, pars. 32 and 44-45.

⁴³⁹ CJEU, Judgment of the Court (First Chamber) 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, C-244/04, EU:C:2006:49, par. 63; CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 50.

⁴⁴⁰ CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 50.

⁴⁴¹ CJEU, Judgment of the Court (First Chamber) 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, C-244/04, EU:C:2006:49, par. 55; CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 51.

In addition, the CJEU also implicitly referred to “habitual employment” as meaning that the posted workers are “carrying on their main activity in the Member State in which the service providing undertaking is established”⁴⁴².

As a consequence of the *Vander Elst* case, hosting Member States are **precluded from requiring a work permit** for the posted third-country national when these are lawfully and habitually residing in the sending Member State. This was reiterated in *Commission v. Luxembourg* (C-445/03), where the CJEU found that the obligation existing in Luxembourg whereby workers employed by an undertaking based in any other Member State and deployed to Luxembourg would need a work permit unduly restricted the service provider’s freedom to provide services.

The CJEU further reinforced the **freedom to provide services** by undertakings posting third-country national workers in subsequent caselaw, notably dealing with national legislation requiring the posted worker to apply for a residence permit in the host Member State. In *Commission v. Austria* (C-168/04), a national provision which had the practical result of imposing that the posted third-country national worker had to hold a visa or a residence permit in the host Member State, as it established an automatic refusal to issue an entry and residence permit in the event of the entry without a visa of a lawfully posted worker, was declared disproportionate⁴⁴³.

In alternative to the contentious procedures in place in national legislation analysed in *Commission v. Luxembourg*, *Commission v. Germany* (C-244/04) and *Commission v. Austria*, the CJEU held that an **obligation for the service provider to provide information** to the authorities in the host Member States showing that the situation of the workers concerned is **lawful** as regards matters such as **residence, work permit** and **social coverage in the sending Member State** would give, in a less restrictive but as effective a manner, the competent authorities in the host Member State a guarantee that the situation of the posted third-country national workers is lawful and that they are carrying out their main activity in the Member State where the service provider is established⁴⁴⁴.

The research conducted for the purpose of this Report did not reveal any Member State with practices in alleged breach of the *Vander Elst* caselaw, that is, imposing that the posted third-country national applies for a work permit in the host Member State. It did, however, reveal that, in practice, in what concerns the verification of the legality of residence and of the right to work, Member States take different approaches⁴⁴⁵.

In the context of *social security*, the CJEU clarified the notion of ‘**legal residence**’ under Regulation (EU) No 1231/2010 in the case *Balandin and others* (C-477/17), confirming that third-country nationals who *temporarily* reside and work in different Member States but are employed by a company established in one Member State would be covered by the Regulation.

In *Walltopia AD* (C-451/17), the CJEU clarified the **moment** from when an employee recruited with a view to being posted to another Member State must be regarded as having been subject to the legislation of the Member State in which his employer is established, within the meaning of Article 14(1) of Regulation (EC) No 987/2009, together with Article 12(1) of Regulation (EC) No 883/2004, as the moment ‘just before the start of his employment’. This is the case even if that employee was not an insured person under the legislation of that Member State immediately before the start of their employment, if, at that time, that employee had their residence in that Member State.

In conclusion, the CJEU has clarified some uncertainties in the existing legal framework in what concerns the posting of third-country nationals, based on the Treaties. However, the extension of the

⁴⁴² CJEU, Judgment of the Court (First Chamber) 21 October 2004, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-445/03, EU:C:2004:655, par. 46; CJEU, Judgment of the Court (First Chamber) 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, C-244/04, EU:C:2006:49, par. 41; CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 57.

⁴⁴³ CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 57.

⁴⁴⁴ CJEU, Judgment of the Court (First Chamber) 21 October 2004, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-445/03, EU:C:2004:655, par. 46; CJEU, Judgment of the Court (First Chamber) 19 January 2006, *Commission of the European Communities v Federal Republic of Germany*, C-244/04, EU:C:2006:49, par. 41; CJEU, Judgment of the Court (First Chamber) 21 September 2006, *Commission of the European Communities v Republic of Austria*, C-168/04, EU:C:2006:595, par. 57.

⁴⁴⁵ Section 3.3. above and the guidelines below.

posting rules to third-country nationals and, in particular, the specific requirements that apply to these, have also created a new set of challenges for Member States for the following reasons:

(i) the decision of a case by the CJEU is not always easily adaptable to other circumstances stemming from the Member States' legislation and practices and, as such, understandable and applicable by authorities in Member States not bound by the initial case;

(ii) the decision may still leave room for doubts and follow-up interpretation questions;

For example, the interpretation of the notion of 'legal residence' under Regulation (EC) No 1231/2010 still raises doubts within the Dutch relevant authorities, despite the CJEU's decision in *Balandin and others*, especially as it refers to residence in the territory of a Member State, regardless of it being the sending or the host Member State. Dutch stakeholders raised doubts as to the articulation with the rules of Article 13 of Regulation (EC) No 883/2004 to determine the social security legislation covering an employee working in more than one Member State. More specifically, stakeholders questioned whether the relationship between the employee and the employer in the sending Member State when this is a placement agency was sufficiently strong to fulfil the conditions of the connecting factor.

(iii) in practice, the application of CJEU's caselaw raises several issues that result from the intersection between the rules on posting and the rules on migration both at EU and at national level;

A recently introduced preliminary question by a Dutch court before the CJEU (C-540/22) deals with the question of whether it is justifiable that posted third-country nationals, after the expiry of the Schengen circulation right (90 days out of 180), must apply for a residence permit in the host Member State in addition to their residence permit in the sending Member State. Moreover, it questions also whether such residence permit in the host Member State may have a validity period irrespective of the duration of the provision of services and whether it can be limited to the duration of the work and residence permit in the sending Member State. The case was brought by Ukrainian nationals who work for a Slovak company and hold a temporary residence permit for employment in Slovakia and who have been posted to the Netherlands for a period of over 90 days, that is, the duration of the Schengen circulation right. Although Dutch authorities confirmed that no work permit was required, they granted a residence permit with a duration limited to the period of validity of the applicants' residence permit in Slovakia which was, however, shorter than the envisaged duration of the posting.

(iv) the verification of the fulfilment of the requirements applicable to the posting of third-country national workers by the host Member State may require an understanding of its authorities of the legal framework of the sending Member State. This is particularly challenging as, as explained in Section 2 above, Member States retain significant room for regulating the right to stay and work at national level, with different rules applying across the EU Member States (this is further analysed under Issue 2 below). Cooperation between Member States in this regard is essential. This shall be treated under Point 2 of the Operational conclusions below.

The interpretation and application of the current EU legal framework on posting of third-country national workers must have into consideration the caselaw of the CJEU. However, as results from the above, almost thirty years after the decision in *Vander Elst* was issued, the CJEU's interpretation of the rules applicable to third-country national posted workers in light of the Treaties continue to raise questions and issues of interpretation and practical application impacting on the work of Member States' authorities dealing with third-country national posted workers⁴⁴⁶. Moreover, not only does the interpretation and application of the CJEU caselaw possibly differ between the national authorities in the different Member States, but authorities in the same Member State may also have different interpretations. This has an impact on the enforcement of the applicable rules and creates more space for abuse and circumvention, thus affecting the posting of third-country national workers.

⁴⁴⁶ Despite of the guidance provided by the Commission - *Practical Guide on Posting of Workers*, Directorate-General for Employment, Social Affairs and Inclusion, 2019, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ac7320a-170f-11ea-8c1f-01aa75ed71a1/language-en> - and guidance provided by other actors, such as the Guide for Mobile Workers in Europe issued by the European Trade-Union Confederation (ETUC) - Accessible here: <https://www.etuc.org/en/publication/guide-mobile-workers-europe-2022>

Within the limitations of the existing EU legal framework, one of the most suitable avenues to help solve such questions and issues include guidelines clarifying and reminding the applicable rules in accordance with the CJEU caselaw set out above.

Conclusion 1): Guidelines can be provided to Member States to ensure the correct application of EU law in this matter, including the requirements resulting from CJEU case-law. In line with the issues presented above, such guidelines could cover, among others, the following concepts and consider, as a basis for discussion, the non-exhaustive parameters and examples identified below.

The information provided in the table below is intended only to present the most relevant parameters stemming from EU law and CJEU caselaw and some **illustrative examples** of how the relevant concepts are interpreted and applied in the Member States. It does not constitute an exhaustive collection of Member States' laws and practices. Moreover, it should be noted that some of the issues presented below go beyond ELA's scope of competences, being, in any case, included below only for the purposes to give a fuller picture to the reader and to fully understand the difficulties that arise in the posting of third-country national workers.

Freedom to provide services and acceptable restrictions	
<i>Treaties provisions</i>	Articles 56 to 62 TFEU
<i>CJEU most relevant caselaw</i>	<i>Vander Elst</i> (C-43/93), <i>Commission v. Luxembourg</i> (C-445/03), <i>Commission v. Austria</i> (C-168/04), <i>Commission v. Germany</i> (C-244/04)
<i>CJEU parameters</i>	<p>Article 56 TFEU requires not only the elimination, against a person providing services who is established in another Member State, of all discrimination on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services [<i>Vander Elst</i> (C-43/93), <i>Commission v. Luxembourg</i> (C-445/03), <i>Commission v. Austria</i> (C-168/04), <i>Commission v. Germany</i> (C-244/04)]</p> <p>The Enforcement Directive recalls this principle of CJEU's caselaw in Recital 23, which states that "[I]n order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected with regard to posted workers, Member States should apply only certain administrative requirements and control measures to undertakings that post workers in the framework of the provision of services." However, such requirements and measures should pass the necessity and proportionality test put forward by the CJEU, that is, be justified by overriding reasons of general interest (namely, the effective protection of workers' rights), appropriate to achieve the objective pursued and not go beyond what is necessary to attain it, meaning that the "competent authorities cannot carry out their supervisory task effectively without the requested information and/or less restrictive measures would not ensure that the objectives of the national control measures deemed necessary are attained".</p>

	<p>As a result of the Vander Elst caselaw, host Member States are precluded from requiring a work permit for the posted third-country national <i>when these are lawfully and habitually working in the sending Member State</i> [Vander Elst (C-43/93)]. In subsequent caselaw, the Court clarified that the concept of 'lawful and habitual employment' is not coupled with a requirement of residence or employment for a certain period in the State of establishment of the service provider [Commission v. Germany (C-244/04); Commission v. Austria (C-168/04)].</p> <p>In its caselaw, the CJEU has identified the following non-acceptable restrictions to the freedom to provide services under the Treaties:</p> <ul style="list-style-type: none"> - Host Member States requiring a work permit for the posted third-country nationals who are lawfully and habitually working in the sending Member State [Vander Elst (C-43/93); Commission v. Luxembourg (C-445/03)] - Host Member States imposing a requirement of prior existence of an employment contract of indefinite duration for at least six months, at least one year's prior employment or an employment contract of indefinite duration [Commission v. Luxembourg (C-445/03), Commission v. Austria (C-168/04), Commission v. Germany (C-244/04)] - Host Member States automatically refusing to issue an entry and residence permit to a lawfully posted worker in the event of the entry without a visa in the host Member State [Commission v. Austria (C-168/04)] <p>On the other hand, the Court delineated what constitutes an acceptable restriction</p> <ul style="list-style-type: none"> - Obligation for the service provider to provide information to the authorities in the host Member State showing that the situation of the third-country national worker is lawful as regards residence, work permit and social coverage and showing that the third-country national worker is carrying out the main activity in the Member State where the service provider is established [Commission v. Luxembourg (C-445/03), Commission v. Austria (C-168/04), Commission v. Germany (C-244/04)]
MS interpretation / application	<p>Conditions for posting⁴⁴⁷</p> <p>In most Member States, the same general rules on posting, transposing and implementing the relevant EU legislation apply to posted third-country nationals. The interpretation of the CJEU concepts presented above appears mostly in connection with the verification of the conditions to waive the necessity of a work permit or to apply for a residence permit.</p>
	<p>Work permit</p> <p>As stated above, following the Vander Elst judgment, Member States are precluded from requiring that the posted third-country national worker applies and holds a work permit in the host Member State. This is, however, restricted to posted third-country</p>

⁴⁴⁷ For more information, please refer to Section 2.2.1 of the Report

national workers who are lawfully and habitually employed in the sending Member State.

Within these lines, different approaches are identified in the Member States, namely, the inclusion in the applicable national provision of an additional interpretative element (such as in Luxembourg, France and Italy), the specific reference to the lawfulness of the work situation of the posted third-country national worker in the sending Member State (as in Austria and in the Netherlands), the imposition of an obligation on the sending employer to confirm that the worker is legally employed, coupled with an explicit prohibition for service users to use work of posted workers when they know the worker is not legally employed in the sending Member State (Croatia). In many other Member States, the legislation is silent in this regard and national authorities rely on the assumption that the work permit in the sending Member State is valid (as Belgium). These approaches are further detailed below.

- **Luxembourg:** An undertaking established in another Member State of the Union may freely post its salaried workers, within the framework of the provision of services, to Luxembourg provided that the posted workers *have the right to work and reside* in the country in which the sending company is established for the duration of the posting (Article 49(1) of the [Law of 29 August 2008](#) on free movement of persons and immigration).
- **Austria:** Pursuant to Section 18 (12) [Foreign Workers Act](#), an additional working permit or residence permit is not required for third-country nationals posted to Austria by an employer established in another Member State provided that the posted third-country national worker is “duly admitted to employment in the state of the place of business beyond the duration of the posting or assignment to Austria and are lawfully employed by the posting enterprise”. Para. 2 adds as a condition that the Austrian wage and working conditions as well as the provisions of social security law must be complied with.
- **France:** Articles R 341-1-1 (b) and R 5221-2 2° of the Labour Code provide that third-country nationals posted to France from another Member State working regularly and habitually for an employer established in the territory of a Member State of the European Union are exempted from the requirement to hold a working authorization.
- **The Netherlands:** according to the [Implementation Decree regarding the Aliens Employment Act](#), third-country nationals posted from a Member State of the EU may fall under the exception to the general prohibition to work without a work provided that a set of conditions are met, including that the posted worker complies with the residence, work and social security obligations to be employed in the country where the employer is established (Article 4.6).
- **Croatia:** Article 20 of the [Law 128/2020](#) of 20 November 2020 on posting of workers establishes that “A third country national who is legally employed by a foreign employer established in the EU Member State, other EEA country or the Swiss Confederation, who is posted to perform work in the territory of the Republic of Croatia for the time period longer than 90 days, is obliged to regulate temporary stay for the purpose of work of a posted worker, in accordance with the special

	<p>regulation governing entry, stay and work of aliens in the Republic of Croatia.”. According to the ‘Information for workers posted to work in the Republic of Croatia’, this is interpreted as meaning that the posted worker does not need a work permit in Croatia. However, they must hold a work permit and residence permit in the State where their employer is established⁴⁴⁸.</p> <p>The employer is obliged to confirm in the posting declaration that the posted third-country national worker is legally employed according to the regulations of the State in which employer is established (Article 20(3) of the Law 128/2020). Moreover, the service user in Croatia shall not allow performance of the service, respectively use the work of a posted worker, if they knew or could have known that a posted worker is not legally employed in the state in which the employer is established (Article 20(4) of the Law 128/2020).</p> <ul style="list-style-type: none"> - Italy: Third country nationals legally employed by an employer established in one of the EU/EEA countries or Switzerland temporarily posted to Italy do not need to apply for a work permit. In this connection, article 27, para. 1-bis of <i>Testo Unico Immigrazione (TUI)</i>⁴⁴⁹ refers to the circumstance of the employee being “regularly paid” by the sending employer. In these cases, rather than requiring a work permit, it will suffice that the client of the contract on the basis of which the provision of services issues a communication, together with a declaration from the posting employer containing the names of the workers to be posted and attesting to the regularity of their situation with regard to residence conditions in the Member State where the employer is based. - Belgium: No work permit is required when an individual is posted from another Member State to Belgium. It is assumed that the work permit in the sending State is valid.
	<p>Residence permit</p> <p>The Vander Elst case refers indirectly to the right of residence of the third-country national worker in the sending Member State. Lawful employment cannot be dissociated from a regular situation regarding the right to stay of a third-country national in the space of the Union.</p> <p>While the Vander Elst clarified that the posted third-country national worker needs only a work permit in the sending Member State, the same does not apply for residence permits⁴⁵⁰. The right of residence of posted third-country national workers has, thus, to be verified both in the sending Member State, even if indirectly, in order</p>

⁴⁴⁸ *Ministarstvo rada, mirovinskog sustava, obitelji i socijalne politike*, Information for workers posted to work in the Republic of Croatia, available at: <https://mrosp.gov.hr/istaknute-teme/information-for-service-providers-performing-temporary-services-in-croatia-posted-workers-and-service-users-5932/5932> (27 June 2022).

⁴⁴⁹ *Decreto Legislativo 25 luglio 1998, n. 286* - Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero (Testo unico sull’immigrazione - TUI) 1998. Paragraph 1-bis was added by Art. 5, D.L. February 15, 2007, n. 10, as replaced by the relative conversion law (Law 6 April 2007, n. 46). See ‘L’ingresso in Italia Dei Lavoratori Stranieri’ (Assolombarda, Area Lavoro e Previdenza 2019) Dispensa No 03/2019 16–17 <https://www.assolombarda.it/servizi/lavoro-e-previdenza/documenti/dispensa-03-2019-l2019ingresso-in-italia-dei-lavoratori-stranieri> accessed on 20 June 2022. Consolidated version accessible here: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25:286>.

⁴⁵⁰ The CJEU will decide on this issue in case C-540/22.

to conclude that worker is lawfully employed, and in the host Member State, to cover the worker's stay during the provision of services.

From the perspective of the host Member State, several instances were identified where the lawfulness of the third-country nationals' residence in the sending Member State is considered in the moment of deciding on the issuance of a residence permit for the posted third-country national in the host Member State. Some illustrative approaches followed in Member States are further detailed below.

In this connection, it should be noted that, whereas few Member States do not impose any additional requirements regarding the right of entry and stay of posted third-country nationals in the host Member State, the majority requires an application for a **temporary residence permit or a *Vander Elst* visa**. Within the second group, while there is a clear majority exempting from the necessity to obtain the said permits/visas when the posting is shorter than 90 days (thus falling under a Schengen visa), a minority of Member States seems to impose such an obligation regardless of the duration of the posting⁴⁵¹.

- **Luxembourg:** Article 49 of the [Law of 29 August 2008](#) on free movement of persons and immigration applies for the posting of third-country nationals from another Member State. According to point 1) of the article, companies established in the EU or EEA may freely post workers to Luxembourg regardless of their nationality as long as the posted workers have a right to work and to live in the sending Member State for the duration of the posting.

Article 49(3) of the of the Law of 29 August 2008 on free movement of persons and immigration provides that for a posting lasting longer than 3 months, the worker is entitled ("de plein droit") to a residence permit on which it is specified "employee from a community service provider" (*titre de séjour pour salariés d'un prestataire de services*). The posted third-country national worker must apply for this residence permit at the Immigration Direction of the Ministry for Foreign and European Affairs (MAEE) within 3 months of their arrival, filling out a special form for that effect. As per Article 2 of the [Regulation of 5 September 2008 laying down the terms and conditions for the issue of a residence permit as an employed person](#), a certified copy of the passport and the working contract, among other documents, shall be attached to the request for a residence permit. The MAEE will check that the conditions are met and issue the residence permit. The residence permit will be valid for the duration of the posting and for the only employer, who made the application for the authorisation of posting. If the initial posting is extended, the third-country national posted worker must apply for the renewal of his/her residence permit, within the 2 months preceding the expiry date⁴⁵².

- **Germany:** Third-country national posted workers who only have a limited residence permit in the sending Member State are required to apply for a Vander Elst visa, regardless of the duration of the posting. For third-country national posted workers who hold an unlimited residence permit in the sending State, they

⁴⁵¹ Section 3.3. above.

⁴⁵² <https://guichet.public.lu/fr/entreprises/ressources-humaines/mobilite/detachement/detache-UE.html>.

are only required to apply for such a visa if the posting period lasts longer than 90 days within a 12-month period. The Vander Elst visa, which is not referred to in German legislation and is not a residence permit within the meaning of the relevant section of the Residence Act, is specific for posting and must be applied for at the relevant diplomatic missions abroad.

According to the '[Visa Handbook](#)' of the German Ministry of Foreign Affairs (point 2.2.2), it is irrelevant whether the third-country national in the first EU/EEA Member State has a national residence permit or only a national visa, provided that the residence title entitles him or her to pursue lawful employment there and that this is legally exercised. The Visa Handbook provides some guidance on the verification of 'legal employment' (see below).

The Ministry for Foreign Affairs, as the visa-issuing entity, cooperates with the Ministry for Internal Affairs – which is responsible for residence permits – to verify that the *Vander Elst*-rules are respected when it comes to posting of third-country nationals. This verification is done on the basis of the information submitted by the employers when notifying posted workers, i.e. through the declarations provided on the status of the posted worker.

- **Croatia:** In the case of a third-country national who is posted in the Republic of Croatia for the period over 3 months (90 days), such worker has to regulate his/her temporary stay for the purpose of work in accordance with the applicable legislation. The conditions for granting temporary stay in the Republic of Croatia are regulated by the [Aliens Act](#) (Zakon o strancima) (Official Gazette no. 133/20). Article 57 expressly foresees the granting of the right to stay in the Republic of Croatia to third country nationals who intend to stay for the purpose of working as posted workers.
- **France:** Articles R 341-1-1 (b) and R 5221-2 2° of the Labour Code provide that third-country nationals posted to France from another Member State working regularly and habitually for an employer established in the territory of a Member State of the European Union are exempted from the requirement to hold a working authorization. However, according to Article L 421-3 of the Immigration Code foreign posted workers shall be issued a temporary residence permit for a maximum duration of one year renewable. In a 2019 decision, the Council of State ruled that this requirement has been considered not to amount to a prior authorization to posting and is thus not contrary to the freedom to provide services.⁴⁵³
- **Romania:** third-country nationals posted to Romania require a long-stay visa for secondment (marked D/DT)⁴⁵⁴ – this type of long-stay visa is granted to third-state nationals in view of carrying out lucrative activities in Romania with a beneficiary of the provided services. The long-stay visa for secondment attests the third-state national's right to stay and work on the territory of Romania.⁴⁵⁵ For the purposes

⁴⁵³ Conseil d'Etat, 2^{ème} et 7^{ème} chambres réunies, 30 janvier 2019, n° 415818, available at : <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000038077333>.

⁴⁵⁴ See [eViza | Ministerul Afacerilor Externe \(mae.ro\)](#)

⁴⁵⁵ See <http://eviza.mae.ro/SupportingDocuments#simbolDDT>.

of obtaining the visa (which has to be requested from abroad), the following documents, among others, have to be provided: individual employment agreement, translated and notarised copy of the individual contract of employment, registered with the competent authorities from the respective Member State; and a residence permit issued by the state where the employer's headquarters are located, in original and in copy.

The visa allows entry and stay in Romania for a maximum of 90 days within a 6-month period, but it can be extended by obtaining a *residence permit*. Foreigners employed by legal entities established on the territory of one of the Member States of the European Union or the European Economic Area or on the territory of the Swiss Confederation, seconded to Romania, shall have their right of temporary residence extended, without being limited to the general validity period of 5 years, if they present, among others, a copy of the individual employment contract registered with the competent authorities of the Member State concerned, translated and legalised, and the valid residence permit issued by the State in which the employer is established, in original and copy.

- **The Netherlands:** For stays exceeding three months, a 'temporary regular residence permit in the context of cross-border service provision' is required (Art. 4.6 BuWav). Conditions to be eligible for this permit include the holding, by the posted worker, of a residence and work permit in the EU Member State where the employer is established. To demonstrate legal residence in the posting Member State, it is sufficient that the employee shows his or her residence and work permit from the country where the employer is based.
- **Ireland:** A non-EEA national who is lawfully resident and legally employed in another EU member state may be allowed to work on a temporary basis for that employer in Ireland without the need to obtain a work permit. Moreover, a residence permit is also not necessary, but the posted third-country national is required to hold an employment visa – the Van der Elst visa (short-term (up to 90 days) 'Stamp C' classification, or a longer-term (more than 90 days and up to one year) 'Stamp D' classification). In applying for a Van der Elst visa, the posted worker must supply, among others, the residence or ID card issued by the sending Member State⁴⁵⁶.
- **Cyprus:** third-country national workers posted to Cyprus do not need a residence and work permit (Section 18YΓ(2)(c) of the Aliens and Immigration Law (CAP.105)). However, prior to their arrival, national authorities will check that the third-country nationals have a residence and work permit in the sending Member State, notably to check that they are legally employed in the sending Member State and that they are approved by the [Civil Registry and Immigration Department](#).
- **Italy:** Third-country nationals legally employed by an employer established in one of the EU/EEA countries or Switzerland temporarily posted to Italy do not need to apply for a work permit. Rather than requiring a work permit, it will suffice that the

⁴⁵⁶ See <https://www.irishimmigration.ie/coming-to-work-in-ireland/what-are-my-work-visa-options/applying-for-a-long-stay-employment-visa/van-der-elst-visa/van-der-elst-policy-document/>.

	<p>client of the contract issues a communication, together with a declaration from the posting employer containing the names of the workers to be posted and attesting to the regularity of their situation with regard to residence conditions in the Member State where the employer is based.</p> <ul style="list-style-type: none"> - Belgium: If the third-country posted worker from another Member State intends to work and stay in Belgium for more than 90 days, they need to apply for a temporary residence permit. The residence permit will be issued if the posted worker provides all required documents, including a valid work permit in the other Member State (Art. 61/25-2 Aliens Act).
	<p>Administrative requirements⁴⁵⁷</p> <p>In line with the caselaw of the Court, the Enforcement Directive sets out, in Article 9, a list of administrative requirements and control measures that Member States may put in place in order to ensure effective monitoring of compliance with the obligations resulting from the Posting Directive and the Enforcement Directive. Member States may impose other requirements and measures, provided these are justified and proportionate.</p> <ul style="list-style-type: none"> ► Posting notification <p>In line with the caselaw of the Court and Article 9(1)(a) of the Enforcement Directive, all Member States require employers to notify the posting of workers at the latest on the day of commencement of the posting.</p> <p>Further to the notification obligation, the mechanism in place in Austria implies that the posting must be <i>confirmed</i>. The notification of posting is sent to the Central Point of Coordination at the Agency to Combat Fraud which is obliged to forward the notification to, among other entities, the Austrian Employment Service. The Austrian Employment Service is competent to issue a confirmation of posting (<i>Entsendebestätigung</i>). Pursuant to Article 18(12) of the Foreign Workers Act, para. 3, “[...] Within two weeks of receipt of the notification, the regional office of the Austrian Employment Service shall confirm to the enterprise and the client or employer using the work services that the requirements have been met (EU posting confirmation or EU transfer confirmation) <i>or, if they have not been met, shall prohibit the posting or secondment. Notwithstanding</i> the obligation to notify pursuant to section 19 (2) to (4) LSD-BG and other obligations under the AÜG, <i>employment may also be commenced without an EU posting confirmation or EU transfer confirmation if the requirements are met.</i>”</p> <p><i>Exemption from notification</i></p> <p>Some Member States provide exemptions to the notification obligation, such as in the case of short-term posting (as France and Lithuania) or of certain sectors of activity (as Belgium, the Netherlands and Czechia). See Section 3.2.1 of the Report.</p> <p><i>Type of information</i> contained in the posting notification:</p>

⁴⁵⁷ For more information, please refer to Section 3.2, Table 3 and Annex 2 of the Report.

The list of information to be declared by the sending employer included in Article 9(1)(a) of the Enforcement Directive is not exhaustive and most Member State request also the provision of information on the nationality of the posted worker (AT, DK, EE, EL, ES, FI, FR, HR, IE, IT, LU, LV, MT, NL, PL, RO, SE, SI, SK)⁴⁵⁸. Moreover, some Member States require the submission of information relating to the work and residence permit of third-country national posted workers in the sending Member State:

- **Austria:** According to Section 19 (3) [LSD-BG](#), the notification has to include, among others, the number, date of issue and copy of the work permit if requested by the sending Member State and the number, date of issue and copy of the residence permit if requested by the sending Member State;
- **Luxembourg:** Pursuant Article L. 142-2 of the [Labour Code](#), the posting undertaking must communicate to ITM, on its electronic platform, among others, a copy of the residence permit or of any residence certificate for third country nationals posted in the territory of Luxembourg;
- **Croatia:** the posting declaration should include information on the work permit of the third-country national posted worker in the sending State, including date of issue, the term of validity of work permit, competent body that issued the work permit, competent body that issued the valid stay permit in the state in which the foreign employer is established. Moreover, the employer is obliged to confirm in the posting declaration that the posted third-country national worker is legally employed according to the regulations of the state in which employer is established (Article 20(3) of the [Law 128/2020](#));
- **Ireland:** The Form of Declaration must include, if the worker is a non-EEA national, details of the Employment Permit held (if applicable);
- **Latvia:** the posting notification should contain a declaration ("certification") that the third-country national posted worker is legally employed by an employer in the EU/EEA;
- **Lithuania:** in addition to the posting notification, which has to be submitted by the sending employer, receiving Lithuanian employers hiring foreign employees including posted workers, must submit a report to the State Labour Authority before the beginning of the posting. The report is submitted electronically and contains information on the posted worker, including nationality and proof of legal stay in Lithuania.

► Documents that must be kept and made available by the employer

Building on Article 9(1)(b) of the Enforcement Directive, the legislation of some Member States requires that employers keep or make available documents relating to the posted worker, namely, when the posted worker is a third-country national, the work permit in the sending Member State (e.g. in France, as per Article R1263-1 of

⁴⁵⁸ See Table 3 above.

	<p>the Labour Code, and in Croatia, as per Article 21 of the Law 128/2020 of 20 November 2020 on Posting of Workers) or other information pertaining to the third-country nationals right to work (e.g. in Finland, statement on the grounds for the posted workers' right to work, under Sections 9 and 10 of the Act on Posting of Workers (447/2016)).</p> <p>In line with Article 4 of the Enforcement Directive, Member States' legislation include a list of elements that are checked for the purpose of determining whether an undertaking genuinely performs substantial activities (para. 2) and of those that are verified to assess whether a posted worker temporarily carries out work in a Member State other than the one where they normally work (para. 3). Some Member States go beyond the lists of elements foreseen in the Directive, as is the case of the Netherlands (Articles 6 and 7 of the Decree on Terms of Employment for Posted Workers in the European Union ('BagwEU')). In order to check these elements, some Member States, as is the case of France, require that the employer keeps documents pertaining to the exercise of a real and substantive activity by the employer in the country of establishment, including, the contract of employment with the worker (Article R1263-1 of the Labour Code).</p>
Lawful employment	
MS interpretation / application	<p>As mentioned above, the CJEU, in the Vander Elst case, precluded host Member States from requiring a work permit for the posted third-country national worker provided that they are <i>lawfully</i> and habitually <i>employed</i>.</p> <p>The concept of lawful employment does not appear frequently in Member States' legislation. While some national provisions only echo the concept (as in Austria), others associate it with an obligation (such as in Croatia and in Ireland). Moreover, whereas in some cases lawful employment is checked with the posting notification (as in Croatia), in others it is checked for the purposes of the issuance of a residence permit in the host Member State (as in Ireland). These approaches are further detailed below.</p> <ul style="list-style-type: none"> - Croatia: Article 20 of the Law 128/2020 of 20 November 2020 on Posting of Workers establishes that "A third country national who is legally employed by a foreign employer established in the EU Member State, other EEA country or the Swiss Confederation, who is posted to perform work in the territory of the Republic of Croatia for the time period longer than 90 days, is obliged to regulate temporary stay for the purpose of work of a posted worker, in accordance with the special regulation governing entry, stay and work of aliens in the Republic of Croatia.". This is interpreted as meaning that the posted worker does not need a work permit in Croatia. However, they must hold a work permit and residence permit in the State where their employer is established⁴⁵⁹. <p>The employer is obliged to confirm in the posting declaration that the posted third-country national worker is legally employed according to the regulations of the</p>

⁴⁵⁹ *Ministarstvo rada, mirovinskog sustava, obitelji i socijalne politike*, Information for workers posted to work in the Republic of Croatia, available at: <https://mrosp.gov.hr/istaknute-teme/information-for-service-providers-performing-temporary-services-in-croatia-posted-workers-and-service-users-5932/5932> (27 June 2022).

	<p>state in which employer is established (Article 20(3) of the Law 128/2020). Moreover, the service user in Croatia shall not allow performance of the service, respectively use the work of a posted worker, if he/she knew or could have known that a posted worker is not legally employed in the state in which the employer is established (Article 20(4) of the Law 128/2020).</p> <ul style="list-style-type: none"> - Germany: According to the 'Visa Handbook' of the German Ministry of Foreign Affairs (point 2.2.2), it is irrelevant whether the third-country national in the first EU/EEA Member State has a national residence permit or only a national visa, provided that the residence title entitles him or her to pursue lawful employment there and that this is legally exercised. - Austria: Pursuant to Section 18 (12) Foreign Workers Act, an additional work permit or residence permit is not required for third-country nationals posted to Austria by an employer established in another Member State provided that the posted third-country national worker is "duly admitted to employment in the state of the place of business beyond the duration of the posting or assignment to Austria and are lawfully employed by the posting enterprise". - Ireland: The posted third-country national worker, when applying for a Van der Elst visa, must supply a letter from the employer in the sending EU Member State which states, among other aspects, that the posted worker is legally resident and employed in the EU Member State where the employer is based and will be returning there on completion of the contract⁴⁶⁰.
Habitual employment	
EU Legal framework	<p>PWD</p> <p>Article 2(1): "For the purposes of this Directive, 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works."</p> <p>Recital 7: "Whereas the Rome Convention of 19 June 1980 on the law applicable to contractual obligations ⁽⁴⁾, signed by 12 Member States, entered into force on 1 April 1991 in the majority of Member States;"</p> <p>Recital 8: "Whereas Article 3 of that Convention provides, as a general rule, for the free choice of law made by the parties; whereas, in the absence of choice, the contract is to be governed, according to Article 6 (2), by the law of the country, in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or, if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract is to be governed by the law of that country;"</p>

⁴⁶⁰ <https://www.irishimmigration.ie/coming-to-work-in-ireland/what-are-my-work-visa-options/applying-for-a-long-stay-employment-visa/van-der-elst-visa/van-der-elst-policy-document/>

	<p>Enforcement Directive</p> <p>Article 4(3)(c): “In order to assess whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works, all factual elements characterising such work and the situation of the worker shall be examined. Such elements may include in particular:</p> <p>[...]</p> <p>(c) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 (Rome I) and/or the Rome Convention;”</p> <p>Regulation (EC) No 593/2008 (Rome I)</p> <p>Article 8(2): “To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.”</p> <p>Article 8(3): “Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.”</p>
CJEU parameters	<p>As mentioned above, the CJEU, in the Vander Elst case, precluded host Member States from requiring a work permit for the posted third-country national worker provided that they are lawfully and <i>habitually employed</i>. As per the CJEU caselaw, “habitual employment” can also be construed as meaning that the posted workers are “carrying on their main activity in the Member State in which the service providing undertaking is established”.</p> <p>As mentioned above, the Court of Justice has reiterated that the concept of ‘lawful and habitual employment’ is not coupled with a requirement of residence or employment for a certain period in the State of establishment of the service provider [<i>Commission v. Germany</i> (C-244/04); <i>Commission v. Austria</i> (C-168/04)].</p>
Further CJEU caselaw	<p><i>Caisse de retraite du personnel navigant professionnel de l’aéronautique civile (CRPNPAC) v Vueling Airlines SA and Vueling Airlines SA v Jean-Luc Poignant</i> (Joined Cases C-370/17 and C-37/18)</p> <p>Par. 57: “(...) it is clear from the Court’s case-law in relation to the determination of the law applicable to individual contracts of employment, for the purposes of Article 19(2)(a) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), that the work relationship of flight and cabin crew of an airline has a significant connection with the place from which they principally discharge their obligations to their employer. That place is the <i>place where or from which those persons carry out their transport-related tasks, where they return to after their tasks, receive instructions concerning their tasks and organise their work</i>, and the <i>place where their work tools are situated</i>, which may be the same place as</p>

	<p>their ‘home base’ (see, by analogy, judgment of 14 September 2017, <i>Nogueira and Others</i>, C-168/16 and C-169/16, EU:C:2017:688, paragraphs 60, 63, 69, 73 and 77).”</p>
<p>MS interpretation / application</p>	<p>In line with the CJEU caselaw, Member States should not condition the provision of services through posting in their territories to a certain period of prior residence or employment in the sending Member State.</p> <p>In this connection, the rules applicable in Finland merit specific attention (although a legislative reform is in course). According to Sections 40(1)(6) and 79(1)(4) of the Aliens Act, a worker, who is a <i>permanent</i> employee of a company operating in another Member State, has the right to perform gainful employment, namely posting, without a residence permit in Finland, provided that they hold a permit in the sending Member State entitling them to reside and work in that Member State. The permit should remain valid after the completion of work in Finland. These provisions have been interpreted in a way that it is required that the foreign worker must have a <i>permanent work contract</i>. In addition, it is considered that before arriving in Finland, the worker should normally have worked in the Member State that has issued a permit⁴⁶¹. A draft Government proposal amending Chapter 5 of the Aliens Act has been published. The provisions now included in Section 79(1)(4) of the Aliens Act would remain largely unchanged, but would be clarified on the basis of the case-law of the CJEU. Based on the draft proposal, it will be proposed to delete the word ‘permanent’ from the provision. Also, it would no longer be required that the permit in the other Member State is issued at least for one year, but it would remain necessary that the permit allows returning to the other Member State.</p> <p>Germany provides concrete guidance to national authorities on the term ‘habitual employment’ in line with the CJEU caselaw. France also provides guidance although not as extensive. Finally, it should also be noted that the Italian relevant provision refers to the element of payment. These approaches are further detailed below.</p> <ul style="list-style-type: none"> - Germany: For a Vander Elst Visa (applicable if posting to Germany is expected to last longer than 3 months within a period of 12 months or if the employee only has a temporary residence permit) to be issued, it is not required that the posted third-country national has been working in the sending Member State for a minimum period of employment. However, the posted worker must have a principal activity in the first Member State. <p>According to the ‘Visa Handbook’ of the German Ministry of Foreign Affairs (point 2.2.2), legal employment of a posted third-country national must be verified in the visa</p>

⁴⁶¹ [Government's proposal to the parliament to amend the Aliens Act and related laws and information obtained from a national stakeholder.](#)

procedure by presenting appropriate proof of the residence/employment permit for the State of establishment. The Visa Handbook provides several indicators regarding what can be considered 'legal employment':

- Legal employment can be assumed if the workers are employed by the service provider in compliance with the regulations resulting from the national provisions there;
- There are no requirements regarding any minimum period of employment in the first Member State;
- Legal employment is to be assumed when the posted worker has its main activity in the sending Member State. This is not considered to be the case if the period of validity of the residence and/or work permit in the first Member State were to correspond precisely to the period of posting to Germany⁴⁶²;
- Legal employment cannot be assumed also in the case that the employer does not carry out any business activity in the sending EU/EEA Member State⁴⁶³, for example, in cases of letter-box companies.

The Visa Handbook further clarifies that "[a]s a consequence of further ECJ rulings of 19 January 2006, Section 21 of the Employment Ordinance no longer provides for prior checks under employment law, minimum employment periods or simple notification obligations under employment law."⁴⁶⁴

- **France:** Article L.1262-1 Labour Code establishes as a condition for the posting that an employment contract between the employer and the posted worker exists and that this employment relation is maintained during the posting period (the same conditions applying to temporary placement agencies, pursuant Article L.1262-2), in line with Article 1(3) of the PWD.

The [Instruction on international posting to France](#) (Instruction relative au détachement international de salariés en France), adopted by the General Director of Employment (Directeur Général du Travail) in January 2019, which details the requirements which need to be fulfilled by an employer to lawfully post workers to France, mentions that the employee has to habitually work for the employer established abroad. Such working relationship should be established before the posting and lasts throughout the whole duration of the posting.

- **Italy:** Third-country nationals legally employed by an employer established in one of the EU/EEA countries or Switzerland temporarily posted to Italy do not need to apply for a work permit. In this connection, article 27, para. 1-bis of Testo Unico

⁴⁶² This is also stated in the Technical Instructions of the German Federal Employment Agency on Section 21 of the Employment Ordinance (*Verordnung über die Beschäftigung von Ausländerinnen und Ausländern (Beschäftigungsverordnung - BeschV)*) ('*Fachliche Weisungen der Bundesagentur fuer Arbeit*').

⁴⁶³ Idem.

⁴⁶⁴ P. 610.

	Immigrazione (TUI) ⁴⁶⁵ refers to the circumstance of the employee being “regularly paid” by the sending employer.
Legal residence for migration purposes	
<i>Guidance</i>	<p>Legal residence for migration purposes is relevant in the context of posting of third-country national workers as the caselaw of the CJEU establishes as a condition for posting in the framework of the freedom to provide services that the worker is ‘lawfully employed’ in the sending Member State. Lawful employment of third-country nationals cannot be dissociated from the verification of the lawful residence of the worker in the Member State of employment.</p> <p>What constitutes a ‘legal residence’ for migration purposes, be it in the sending or in the host Member State, must be determined in line with the national applicable framework, which is composed of:</p> <ul style="list-style-type: none"> - Provisions transposing the EU legal acquis on migration, composed of a set of Directives (namely, the Single Permit Directive, the Seasonal Workers Directive, the Directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer or the Council Directive on long-term residents)⁴⁶⁶; - National provisions on the right of entry and stay in each Member State, concerning aspects not regulated by EU law; - Bilateral agreements between a Member State and a third country regulating the entry and stay of nationals of that third country into the signing Member State. <p>The lack of harmonization in this regard gives rise to particular practical and interpretation issues that stem, to a great extent, from the miscomprehension of national authorities verifying the lawful nature of the residence or of the employment of the posted third-country national. This is addressed in Issue 2 below.</p>
Legal residence for social security purposes	
<i>EU legal framework</i>	<p>Regulation (EC) No 883/2004 on the coordination of social security systems and its implementing Regulation (EC) No 987/2009 provide a legal framework which determines in which Member State the posted worker is to be insured, specifically the conditions to be satisfied for the person to remain covered by the social security legislation of the Member State where they normally pursue an activity as an employed person. Regulation (EU) No 1231/2010 extends the coordination rules for social security laid down in Regulations (EC) No 883/2004 and 987/2009 to third-</p>

⁴⁶⁵ [Decreto Legislativo 25 luglio 1998, n. 286](#) - Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero (Testo unico sull’immigrazione - TUI) 1998. Paragraph 1-bis was added by Art. 5, D.L. February 15, 2007, n. 10, as replaced by the relative conversion law (Law 6 April 2007, n. 46). See ‘L’ingresso in Italia Dei Lavoratori Stranieri’ (Assolombarda, Area Lavoro e Previdenza 2019) Dispensa No 03/2019 16–17 <https://www.assolombarda.it/servizi/lavoro-e-previdenza/documenti/dispensa-03-2019-l2019ingresso-in-italia-dei-lavoratori-stranieri> accessed on 20 June 2022. Consolidated version accessible here: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25:286>.

⁴⁶⁶ For further information, please refer to Section 2.1.1 (b).

	<p>country nationals legally resident in the EU and in a cross-border situation.</p> <p>To the extent relevant and applicable, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community should also be considered.</p>
<i>CJEU parameters</i>	<p>The CJEU clarified the notion of ‘legal residence’ under Regulation (EU) No 1231/2010 in the case <i>Balandin and others</i> (C-477/17), confirming that third-country nationals who <i>temporarily</i> reside and work in different Member States but are employed by a company established in one Member State would be covered by the Regulation.</p> <p>In <i>Walltopia AD</i> (C-451/17), the CJEU clarified the moment from when an employee recruited with a view to being posted to another Member State must be regarded as having been subject to the legislation of the Member State in which his employer is established, within the meaning of Article 14(1) of Regulation (EC) No 987/2009, together with Article 12(1) of Regulation (EC) No 883/2004, as the moment ‘just before the start of his employment’. This is the case even if that employee was not an insured person under the legislation of that Member State immediately before the start of their employment, if, at that time, that employee had their residence in that Member State.</p>
<i>MS interpretation / application</i>	<p>- Germany: Regarding social security, <i>Deutsche Rentenversicherung</i> provides extensive guidance regarding Regulation (EU) 1231/2010. Pursuant point 3 of these guidelines, “Legal residence means that third-country nationals are legally present in the territory of an EU Member State (excluding Iceland, Liechtenstein, Norway and Switzerland) and <i>consequently have a temporary or permanent right of residence</i>. The legality of residence is determined by the applicable national law of the EU Member State concerned.” For procedures initiated by the (contact) institution of another EU Member State, it is assumed that this institution has checked the lawfulness of residence there.</p>
Temporary residence	
<i>MS interpretation / application</i>	<p>As mentioned above, most Member States require that the posted third-country national applies for a temporary residence permit or a <i>Vander Elst visa</i> to remain in the host Member State and provide services beyond the three months of the Schengen visa.</p> <p>In 13 Member States (Belgium, Czechia, Germany, Denmark, Estonia, Greece, France, Ireland, Luxembourg, the Netherlands, Poland, Sweden and Slovenia), the duration of the residence permit is limited to the period of the posting. The maximum duration of the residence permit differs across the Member States, ranging from 12 months (in Croatia and Slovenia) to five years (in Spain). In addition, some Member States do not provide for a maximum duration of the residence permit.</p> <p>However, in some Member States, the duration of the residence permit is further limited to the duration of the residence or work permit in the sending Member State. This is one of the</p>

questions referred by a Dutch court to the CJEU for a preliminary ruling (C-540/22, currently pending).

- **Germany:** As stated in the '[Visa Handbook](#)' of the German Ministry of Foreign Affairs (point 2.2.3), there is no upper limit for the characteristic of temporary posting. However, the Vander Elst visa is issued for the time of the services to be provided by the third-country national⁴⁶⁷. Moreover, the Handbook expressly states that if the residence permit expires in the sending Member State and the authorities have not yet decided on a corresponding application for an extension, it will be assumed that the third-country national continues to be legally employed in the first EU/EEA Member State. This is not the case, however, if the work permit expires⁴⁶⁸.
- **The Netherlands:** According to Article 3.58(1)(i) of the '[Vreemdelingenbesluit 2000](#)' and Part B5/3.1, the validity of the residence permit for the cross-border provision of services is limited to the duration of the work, with a maximum of two years. Moreover, in the case that gave rise to the request for a preliminary ruling presented by a Dutch court (C-540/22, currently pending), the State Secretary linked the period of validity of the residence permits granted to the duration of the validity of the residence permit in the sending Member State.
- **Ireland:** One of the conditions to apply for an Irish Van der Elst visa is that the "duration of permission to remain in the State in order to provide a service will never exceed the expiry date of the lawful residence of the employee in the sending EU country or the expiry date of the employee's passport"⁴⁶⁹.

Further to this, information provided by some Member State authorities also indicates that the duration of the residence or work permit in the sending Member State conditions the period of validity of the residence permit in the host Member State, without, however, providing further details (this is the case, e.g. of Sweden, Estonia, Malta)⁴⁷⁰. Moreover, some national authorities highlight the link between the condition that the worker is lawfully employed and the duration/validity of the residence or work permit in the sending Member State (this is the case for France, Luxembourg, Slovenia)⁴⁷¹.

Issue 2: Mutual learning and understanding of national legal frameworks between the Member States

As mentioned above, beyond the minimum requirements set out at EU level, Member States have the competence to regulate additional areas of law that are of relevance to posted third-country nationals, such as working conditions and labour rights, occupational health and safety requirements, or the right

⁴⁶⁷ Website of the German Customs Authority ([Zoll](#)).

⁴⁶⁸ Notwithstanding, it should be noted that the replies of the German NPC to a request submitted to the European Migration Network in 2020 indicates that the issuance of the Vander Elst visa is limited to the period of validity of the residence and work permit issued in the first Member State (answer to Q. 2) - European Commission, European Migration Network, 'Ad hoc query on 2020.35 posted workers, 30.09.2020, p.9, available at: https://www.emnnetherlands.nl/sites/default/files/2020-10/202035_posted_workers%20WIDER.pdf.

⁴⁶⁹ <https://www.irishimmigration.ie/coming-to-work-in-ireland/what-are-my-work-visa-options/applying-for-a-long-stay-employment-visa/van-der-elst-visa/van-der-elst-policy-document/>

⁴⁷⁰ See European Commission, European Migration Network, 'Ad hoc query on 2020.35 posted workers, 30.09.2020, p.9, available at: https://www.emnnetherlands.nl/sites/default/files/2020-10/202035_posted_workers%20WIDER.pdf.

⁴⁷¹ Idem.

to reside and work in the home Member State. As posting implies the application of more than one legal order, the differences in the national legal frameworks pose specific challenges.

Firstly, it complicates the exchange of information between the competent authorities and potentially reduces its efficiency. Authorities from one Member State may request information that is not easily understood by the receiving authority because of differences in national procedures, documentation or internal organisation (e.g. the specific social security benefits available to a worker in the Member State, documents required, etc.). Although the single national websites that are accessible via the Your Europe Portal already contain some relevant information, they are intended to inform citizens and businesses, posted workers and employers, on the applicable terms and conditions of employment and do not necessarily contain comprehensive information that could facilitate cooperation between authorities.

Secondly, in the case of third-country national posted workers, the issue is exacerbated by the fact that national legal frameworks on migration also apply, with quite distinct rules on the right of entry and right to stay in the sending and host Member States. As the posting of third-country national workers requires that they have a residence and work permit in the sending Member State, inspection authorities in the host Member State may have to navigate the rules of that other Member State to understand whether the posting complies with all of the legal requirements. Given that Member States retain significant room for regulating the right to stay and work at national level, and with different rules applying across the EU Member States, this entails cumbersome work for inspection services, particularly when the competent authorities don't have competence on migratory matters.

For example, Portugal has a special regime of residence authorisation for the exercise of subordinated professional activity which is exempt from obtaining a residence visa. Third-country nationals should present an 'expression of interest' to the immigration authority, which exempts them from the need to obtain a residence visa to work in Portugal, provided that they have an employment contract or promise of employment contract, or have a proven employment relationship (among other conditions). However, the Portuguese authorities report that this regime hinders posting, as some Member States do not accept the 'expression of interest' as a valid ground for staying and exercising a professional activity.

In Poland, citizens of Ukraine, Belarus, Moldova, Armenia and Georgia can work without having to obtain a work permit if they are legally residing in Poland, based on so-called 'declarations on entrusting work to a foreigner'. This status is sometimes misunderstood by officials of other countries, who question the right to work of third-country national workers posted to their country from Poland.

Slovenia concluded bilateral agreements with Bosnia and Herzegovina in 2013 and with Serbia in 2019, providing a special work permit for work in Slovenia. Other third-country nationals are required to obtain a work permit and a residence permit. Although citizens from those third countries are required to be employed by the same employer in Slovenia during the first year of employment, they can be immediately posted by that employer to another Member State. The expedited Slovenian residence and work permit for citizens from the Western Balkans have raised difficulties in the administrative cooperation with Member States where these third-country nationals are frequently posted.

Conclusion 2): Information exchange on the applicable legal regimes on posting and regimes intersecting with posting, specifically, in the case of posted third-country nationals, on the right of entry and work, should be further encouraged.

In order to facilitate competent authorities' access to the relevant information, two complementary avenues could be considered:

- Development of an up-to-date information tool for competent authorities, encompassing a description of the national legal framework on posting of workers, including the national framework on enforcement, possibly with links to the applicable legislation translated into English⁴⁷². It should include information specific to the posting of third-country national workers, namely the relevant rules on the right to stay and work. The information provided would be the responsibility of the relevant Member State, but could follow a common structure developed with the assistance of ELA and the European Commission, within the context of the Posting 360 mutual learning and understanding multi-annual programme to be launched in 2023. National liaison officers could be encouraged to update the information on a regular basis, e.g. biannually⁴⁷³. Member States would also be requested to notify any changes to the contact information or internal organisation.
- The development of a practical handbook for competent authorities, on enforcement of the applicable rules on posting of workers and cooperation between Member States could help to navigate the different legal frameworks. This tool could target more practical or specific situations identified as bottlenecks in the cooperation between Member States. A handbook could contain practical examples of situations that could occur and how they can be addressed.

5.2 Administrative cooperation

Cooperation and exchange of information between Member States is essential to the implementation, application and enforcement of the applicable rules on the posting of workers in the EU. Cooperation primarily consists of replying to requests for information from the competent authorities in other Member States and carrying out checks, inspections and investigations (as per Article 6(2) of the Enforcement Directive; also Article 4(2) Revised PWD).

Pursuant to Article 21 of the Enforcement Directive, administrative cooperation and mutual assistance between the competent authorities of the Member States shall be implemented through the IMI system, established by Regulation (EU) No 1024/2012⁴⁷⁴. In addition, exchange of information and mutual assistance between two Member States with significant flows of posted workers is often also regulated in bilateral agreements or organised in practical arrangements between the competent authorities of those Member States, as per Article 21(2) of the Enforcement Directive. Examples of such cooperation can include the support of ELA and via liaison officers, joint inspections, regular meetings and joint activities, such as workshops, capacity-building training, and participation in bilateral or multilateral projects and networks (see Section 3.5.1). The usefulness of informal cooperation has also been highlighted (see Section 3.5.2). Administrative cooperation in the context of social security takes place through the EESSI.

⁴⁷² European Justice Portal could constitute a relevant model, available at: <https://e-justice.europa.eu/home?action=home>

⁴⁷³ Similar to the approach followed for other online tools for the exchange of information, e.g. EU ETS Registry.

⁴⁷⁴ Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation') (OJ L 316, 14.11.2012, pp. 1-11).

The research revealed that many of the issues emerging in the context of cooperation between Member States concerning third-country nationals affect posted workers in general. However, some specific issues were also identified:

- ▶ Need to access information on the accuracy of the identity of the third-country national;
- ▶ Need to check if the worker has the right to reside in the sending country, including possible expiry, non-renewal or withdrawal of that status;
- ▶ Need to check if the worker has the right to work in the sending country;
- ▶ Need to verify for how long the third-country national was residing and working in the sending Member State prior to posting;
- ▶ Applicable social security regime;
- ▶ Proof of professional qualifications.

The conclusions on administrative cooperation thus cover avenues to improve cooperation by (i) facilitating the identification of the relevant 'counterpart' authority in the requested Member State; (ii) improving use and diversifying cooperation tools; and (iii) promoting cooperation and exchanges activities.

Issue 3: Differences in inspection landscapes in the Member States

Each Member State remains competent for defining the institutional landscape of authorities responsible for addressing the issues raised by the posting of third-country national workers in their territory. As a consequence, the Member State competent authorities best suited to respond to a request for information may not always be easily identifiable by the authorities of the requesting State. This is reinforced in the case of posted third-country nationals, where immigration authorities may also need to be involved. The internal organisations in the Member States may also vary, resulting in additional difficulties in identifying the right addressee for the cooperation or information request. This may be a consequence of decentralisation in certain Member States, or differences between the domestic and the other Member State's distribution of competences, investigatory powers or the way inspections are carried out.

For example, in Belgium, supervision on fair and decent work is also possible via the social security agencies, while in Germany, it is done via the fiscal authorities.

The Spanish legislation grants inspectors the power to request workers' identification documents, but other Member States require police intervention.

In some Member States, specific sectoral counterparts need to be involved, for instance posting in the road transport sector. In Austria, the *Bauarbeiter Urlaubs- und Abfertigungskasse* (BUAK) is specifically competent for enforcing the rules on posting of workers in the construction sector.

In Spain, the central government does not have competence for employment. The competence for receiving notifications for postings rests with the AA.CC. However, the competence for social security systems belongs to the central government.

In Belgium, the granting and issuing of work permits is the responsibility of the regional authorities.

Stakeholders remain concerned about the identification of the right 'counterpart' in another Member State, despite of the existence of two relevant tools:

- The IMI directory: in the context of administrative cooperation and mutual assistance under the Enforcement Directive via the IMI system, requesting authorities may consult the IMI directory of competent authorities, which is intended to help the requesting authority to identify the competent addressee;
- The Your Europe Portal⁴⁷⁵: this provides the identification and contact details of the national liaison offices, as well as the links to the single national websites which should contain the information on the terms and conditions of work for posted workers and the contact information of the local authorities. The Portal is designed to inform employers and workers and does not necessarily contain the information needed by the authorities. In line with Article 5 of the Enforcement Directive, the information that should be provided on the national websites does not cover the migration angle relevant to posting of third-country national workers.

Conclusion 3): Exchange of information between Member States on the relevant competent authorities in the context of posting of third-country national workers should be regular. This should include information on the immigration authorities where these need to be involved. Such information should cover both information on the scope of their powers as well as the relevant contact information.

In order to facilitate the identification of each Member State's competent authorities for the different issues emerging in the context of posting of third-country nationals, an easily updateable *directory* is being developed which will include the identification of the competent authorities in each Member State, the scope of their powers and the relevant contact information. The information included in this directory will need to be regularly updated, which could be ensured via a questionnaire to be filled out by national liaison officers (e.g. biannually) in view of confirming the information and by requesting Member States to notify any changes to the contact information or internal organisation.

Issue 4: Insufficiently efficient use of cooperation tools

As mentioned above, administrative cooperation and mutual assistance between the competent authorities of the Member States shall be implemented through the IMI system. While stakeholders pointed to the added value of the IMI system in the exchange of information between Member States, they noted several aspects that could benefit from improvement (see Sections 3.5.1 and 3.6.3 above).

Issues identified pertain to the personal scope of IMI, material scope and articulation with EESSI, type of information requested and how it is requested, and other issues impacting the efficiency of the platform. From the analysis of the issues identified by the experts it becomes clear that some result from a failure to understand or apply the relevant rules on the functioning of the system and to explore its full potential.

One particular issue regards the access to the IMI of other competent authorities in the national legal order with competences in the context of posting of third-country national workers (e.g. immigration or police authorities) in view of ensuring that cooperation requests are dealt with within the applicable deadlines. In this connection, it should be noted that access to the IMI system is coordinated at Member State level and, as such, the expansion of access to the IMI to other competent authorities could be considered internally. In alternative, internal cooperation should be ensured between the authorities participating in the IMI and other authorities relevant in the context of posting of third-country nationals not linked to the IMI to promote the quick flow of information between the competent authorities and, thus, the reply to the cooperation request.

Moreover, on the concerns regarding the lack of efficient cooperation, it should be noted that the Enforcement Directive establishes rules on time limits and on the procedures to follow in case of difficulty

⁴⁷⁵ Available at: https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm

meeting a request by the requested authority or in case of persisting problems in the exchange of information or a permanent refusal to supply information (Article 6 of the Enforcement Directive).

Relevant initiative

ELA has already undertaken specific actions to improve cooperation through the posting of workers and road transport modules in the IMI system between national authorities as part of its IMI-PROVE Programme, a Mutual Learning and Understanding Programme (MLUP). The IMI-PROVE programme, established in cooperation with the European Commission, targets reinforced cooperation and mutual assistance between Member States through more effective use of the IMI system⁴⁷⁶.

In addition, a wider use of digital tools or its diversification can also contribute to make access to relevant information easier and quicker, as well as cooperation swifter. Some good practices may even be identified as warranting wider dissemination as apt to resolve issues affecting horizontally enforcement and cooperation in the Member States.

Good practice

The website of the Polish inspection authority includes a validation tool that allows anyone to check the validity of a PD A1 form⁴⁷⁷.

During the COVID-19 pandemic, Dutch authorities promoted videoconference meetings with enforcing authorities from other Member States to discuss issues arising in the host or sending Member State in relation to posting of workers⁴⁷⁸.

Conclusion 4): In order to ensure efficient cooperation and exchange information concerning posted workers, as stipulated in the PWD and the Enforcement Directive, a closer consideration and application of the rules applying to IMI is essential. The potential of the platform should also be further explored.

In the context of ELA's *IMI-PROVE mutual learning and understanding multi-annual programme* launched in 2022, particular attention could be devoted to the topic of posting of third-country nationals, i.e. requests on relevant information for the enforcement of the applicable rules in such cases.

In addition, the use of digital tools for the exchange of information should be improved and supported. The promotion of good practices, in particular those apt to resolve issues affecting horizontally enforcement and cooperation in the Member States, is warranted.

Issue 5: Practical issues or problems arising specifically in the context of cooperation between two or more Member States

In the context of cooperation between two or more Member States, in particular, those with a significant inbound/outbound relationship, concrete practical issues or problems often arise. Targeted bilateral or multilateral exchange initiatives may constitute an important tool directed at solving such issues, help to

⁴⁷⁶ Available at: <https://www.ela.europa.eu/en/news/european-labour-authority-ela-together-european-commission-launched-imi-prove-programme>

⁴⁷⁷ Accessible at: <https://www.zus.pl/pracujacy/pracujacy-w-ue-eog-szwajcarii/usluga-potwierdzenia-autentycznosci-zaswiadczen-a1>.

⁴⁷⁸ Interview with NL public administration representative.

facilitate contact between competent authorities, open communication channels, and educate authorities from other Member States on the functioning of inspectorates. Such exchanges could, for instances, provide an opportunity to explain why some documents are needed, to ask questions, and to translate and explain legal concepts interpreted differently by the various national authorities.

For example, the French national liaison bureau highlighted an instance where it had questions on the nature of ‘civil contracts’ (regulated by civil law, rather than labour law, and subject to lower social security contributions or minimum wages) entered into with third-country nationals in Poland before they were posted to France. This information was provided by their counterparts in Poland so as to help the liaison bureau to understand the nature of these contracts and how to carry out the relevant inspections.

Good practices

Belgian and Portuguese representatives of the competent authorities organised a workshop where they communicated in a more informal manner and exchanged up-to-date information on who to contact in case of questions or document requests.

The cooperation between the Labour Inspectorate for the Control of Social Protection Laws in Brussels and the Regional Directorate for the Economy, Employment, Labour and Solidarity (Hauts-de-France et Grand Est), in France is based on exchanges within the framework of immersion courses, which allow Belgian and French agents to cross the border to observe their peers and inspection practices for several days. These internships promote exchanges of practice between France and Belgium. In September 2020, a conference was held to present the Franco-Belgian arrangement and the planning of concerted or joint actions in the following sectors of activity: forestry, transport, construction, cleaning in air transport, and industrial maintenance.

Austria promotes monthly meetings with Germany, Poland and Slovenia, in which the competent bodies of the sending Member States are informed about all payments to posted workers of the Holiday and Severance Pay Insurance Carrier for Construction Workers to ensure that the rights of the posted third-country national are respected.

Finnish authorities conduct regular meetings on applicable legislation with the Estonian social security institution, as well as case handler meetings with the other Nordic institutions.

Specifically considering the challenges of posting of third-country national workers, such exchanges could clarify the conditions under which third-country nationals have the right to work and stay in the host country, as well as assisting in the detection of fraud and abuse cases (false identity documents, falsified employment contracts, non-existent EU companies, false residence permits, etc.), and the identification of accommodation-related issues.

In addition, such exchanges could also provide the forum for the exchange of good practices which constitute an important tool for competent authorities to learn from each other and consider the approaches taken by their counterparties in other Member States to issues similar to the ones identified domestically.

Given the additional complexity in relation to posted third-country nationals – which requires a thorough understanding of their status in the sending Member State – as well as language difficulties in communicating with third-country national workers, joint or concerted inspections may constitute a

relevant tool for more effective inspection operations. Joint and concerted inspections may also have a learning effect through the exchange of good practices on the ground.

Good practices

In May 2022, a week of joint actions between the Bulgarian Labour Inspectorate and relevant structures in Germany was held in the federal state of North Rhine-Westphalia, as part of the Work Programme for Partnership between the Ministries of Labour of Bulgaria and Germany. Joint inspections were carried out in the meat processing industry and in the cleaning and construction sectors.

Conclusion 5): Measures should be taken at national level to further encourage exchange of information and good practices between Member States, particularly those with significant outbound/inbound flows, notably by promoting exchange activities on posting of third-country national posted workers.

5.3 Enforcement

Issue 6: Challenges hindering performance of inspection functions by national inspectorates

National inspectorates face different challenges that hinder the performance of their functions in relation to posted third-country nationals. These include lack of human resources, lack of preparation or knowledge of national authorities and difficulties faced by inspectors on the field (primarily language barriers).

Good practices

The FKS within the German Customs Administration, which is responsible for the enforcement of the AEntG, announced the recruitment of 121 additional staff in 2021⁴⁷⁹.

In France, the questionnaires used for investigations are translated into different languages and interpreters for the relevant languages are present during inspections. For example, in relation to an inspection of workers posted from Spain, Arabic interpreters were present, as the nationality of workers was previously identified on the declarations posted through the SIPSI platform.

Conclusion 6): The provision of specific training, also through the use of the various capacity building opportunities offered by ELA, to competent authorities on the topic of posting of third-country nationals, including other authorities than the enforcement authorities, e.g. immigration authorities or authorities issuing PD A1 forms, should be encouraged. The specific guidelines and materials prepared to support the correct application of the EU legal framework could be used in this regard.

⁴⁷⁹ De Wispelaere, F., De Smedt, L. and Pacolet, J., *Posted workers in the European Union. Facts and figures*, Leuven: POSTING.STAT (project VS/2020/0499), 2022, p. 104.

Moreover, staff exchanges and secondment schemes between national authorities, also facilitated by ELA, particularly between those with significant outbound/inbound flows, could also be promoted. In addition, the potential offered by ELA in terms of facilitation and support to concerted and joint inspections at cross border level should be exploited in full.

Finally, sufficient resources should be dedicated to the enforcement of the legislation on the posting of third-country nationals.

5.4 Other conclusions

5.4.1 Awareness-raising

Issue 7: Posted third-country nationals' lack of awareness of their rights in the context of posting

Posted third-country nationals' lack of awareness of their rights in the context of posting stems largely from language barriers in accessing the relevant information. This leaves them more vulnerable to abuse and less likely to submit complaints on breaches of their rights and the applicable rules.

Access to information on the applicable terms and conditions of employment is a concern in the PWD and Revised PWD and the Enforcement Directive (see Section 2.1.2), which focus on making the information generally available through the single national website, as well as in the DPTWC. The national websites on posting may be accessed via the Your Europe Portal⁴⁸⁰.

The ELA's WG on Information undertook an exercise where the European Commission, Member States and European-level social partners reviewed the single official national websites to identify best practices and suggest improvements. Preliminary results showed that 'while most of the websites have been set up as provided in Article 5 of the Directive, many websites go further as regards the scope of information presented and languages covered'⁴⁸¹. Nevertheless, shortcomings identified include difficulties with finding the websites through search engines and difficulties in finding specific information, particularly on collective agreements⁴⁸².

Issue 8: Employers' lack of awareness on the rules on posting of workers

Employers also face difficulties in accessing the relevant information on the applicable rules on posting workers, including third-country nationals, to other Member States and thus ensuring compliance. The information available to employers is also provided on the single national websites, but the same issues apply, e.g. difficulty accessing information on collective agreements.

Relevant initiative

⁴⁸⁰ Available at: https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm

⁴⁸¹ European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')*, 2019, p. 6, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:426:FIN>

⁴⁸² Alsos, K. and Mette Ødegård, A., *Improving data collection about posting and information provision on conditions applicable for posted workers* (Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO); project VS/2016/0222), Fafo, 2018, p. 15.

ELA supports Member States in the translation of national information into the mother tongue of third-country nationals.

Good practices

The Estonian Police and Border Guard Board organises sessions for the employers of third-country national workers, including posted workers, to inform them about the applicable rules and regulations⁴⁸³.

In Estonia and Finland, inspectors distribute information flyers in multiple languages to both workers and employers during inspections at construction sites.

In 2018, the Polish Labour Inspectorate Counselling Centre launched a helpline in Ukrainian and Russian for foreigners that provides legal advice on employment of third-country nationals. This has reportedly already had a positive impact on the number of complaints lodged by third-country national workers.

The Dutch Labour Authority provides forms to submit complaints in several languages (English, Bulgarian, Romanian, Polish, Portuguese, Czech, Spanish).

Conclusion 7): The implementation of measures to ensure that posted third-country national workers have access to the relevant information on their labour rights should be encouraged. This also applies to the exchange of best practices.

In this regard, some initial examples of Member States' good practices in tackling specific challenges in relation to the application of the EU rules on posting of third-country nationals are presented in this report. To ensure a more-encompassing gathering of best practices, such best practices could be compiled into a booklet or in other information materials directed at competent authorities, presented at WG meetings and workshops, or other training activities. This should complement other initiatives by ELA to gather and compile good practices.

Finally, awareness-raising campaigns targeting third-country national posted workers and employers could be organised, focusing in particular on the most relevant sectors of activity employing posted third-country nationals or areas where issues have already been detected.

Conclusion 8): The accessibility and usefulness of the information provided on the single national websites should be regularly assessed. ELA's assistance in assessing and improving national websites should be considered. In this connection, measures to increase its visibility and quality could be considered and adopted, as appropriate.

⁴⁸³ Cukut Krilić, S., Toplak, K. and Vah Jevšnik, M., 'Posting of Third-Country Nationals: A Comparative Study', ZRC SAZU in *Con3Post – Posting of Third Country Nationals. Mapping the trend in the construction sector* (project VP/2018/011/0019), 2020, p. 50.

5.4.2 Collection of Data

Issue 9: Lack of comprehensive and comparable data across the EU

No uniform method of data collection on third-country national posted workers exists at EU level, compromising the comparability of the data gathered by Member States.

The lack of collection of comprehensive data on posted third-country national workers (e.g. intra-EU typical work patterns, usual types of fraud, main issues encountered during inspections, main practical issues relating to enforcement of sanctions), notably location of the companies and third-country national posted workers, compromises competent authorities' understanding of the underlying realities in certain industries, as well as their ability to adopt evidence-based policies, enforce the applicable rules, cooperate with competent authorities from other Member States, and effectively tackle fraud and undeclared work⁴⁸⁴.

Good practice

Belgium's LIMOSA system was set up in 2007 as a compulsory online system for the registration of service provision, with every employer wishing to post workers to Belgium required to register their intention in advance. This system gathers comprehensive information on the posting, including the nationality of the posted worker, the identification of the company, the nature of the services performed during posting, the dates of the posted service, the place where the services are provided in Belgium, and working hours. The level of disaggregation captures a more reliable picture of the reality of posting of third-country nationals to Belgium, and the subsequent analysis allows concrete conclusions to be drawn on the application of the framework in place, including migratory regulation⁴⁸⁵. In the construction and cleaning sectors, data provided in Limosa are matched by the inspection authorities with data in 'checkinetwork'⁴⁸⁶, allowing the Belgian authorities to determine whether the information provided in Limosa matches the actual work in these sectors by the posted worker.

Conclusion 9): The existing national methods of collection of the relevant data on the posting of third-country nationals should be reassessed and measures should be taken, where appropriate, to ensure that the information collected is appropriate and sufficient for enforcement purposes and for policy-making. A systematic data collection of data on posting of third-country nationals – and posting in general – on the EU level is desired to obtain the necessary comparable data. The European Labour Authority can provide assistance and logistical support in systematising data collection on the EU level. Coordination with the Administrative Commission for the coordination of social security systems would be required when it comes to data related to the application of Regulations 883/2004 and 987/2009.

⁴⁸⁴ Alsos, K. and Mette Ødegård, A., *Improving data collection about posting and information provision on conditions applicable for posted workers* (Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO); project VS/2016/0222), Fafo, 2018, pp. 9, 14.

⁴⁸⁵ Lens, D., Mussche, N. and Marx, I., *Europe's ever expanding mobility patterns posting, third-country nationals and the single European labour market*, Working Paper no. 19.08, University of Antwerp - Herman Deleeck Centre for Social Policy, 2019, pp. 8 ff.

⁴⁸⁶ 'Checkinetwork' is the online registration system of presence at a work site in specific sectors in Belgium, such as the construction sector and the cleaning sector. The information is automatically transferred to the social inspectorate.

Annex 1. Obligations stemming from EU legislation applicable to posted TCNs

NB: The following table summarizes the obligations which stem from EU legislation and which are applicable to posted TCNs. It has to be noted that the notion of “employer’s obligations” has to be understood considering the nature of Directives which cannot by themselves create obligations for individuals without prior transposition by Member States⁴⁸⁷. As a result, “employer’s obligations” covers obligations that will, following transposition into national law, be imposed on employers.

Member State and employer obligations stemming from EU legislation applicable to posted TCNs		
<i>Obligations / Provisions</i>	<i>Subject matter</i>	<i>CJEU case law</i>
<p>Prohibition of discrimination in provision of services within the EU, proportionality and justification of obstacles to the freedom to provide services</p> <p>Articles 56 to 62 TFEU</p>	<p>Member States’ obligation: Article 57 TFEU specifies that the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals. The freedom to provide services includes the right of a service provider established in a Member State to temporarily post workers (including legally staying and working third country nationals) to another Member State in order to provide a service.</p>	<p>In <i>Vander Elst</i> (C-43/93), the CJEU established in 1994 the principle that host Member States may not impose administrative formalities or additional conditions (e.g. requiring a work permit) on posted workers who are TCNs when they are lawfully employed by a service provider established in another Member State.</p> <p>Similarly, in <i>Commission v. Luxembourg</i> (C-445/03) was at stake a rule whereby all service providers deploying non-EU personnel in Luxembourg should have their personnel obtain an individual working permit or, alternatively, have a collective working permit issued for them. Such permit was conditioned to the existence of an employment relationship of unlimited duration for at least six months before the posting took place. This rule only concerned the right to work and applied on top of any entry requirements to which workers were already subject. The CJEU found that the objectives of the legislation in question, i.e. the social welfare of non-EU workers and the stability of the Luxembourg</p>

⁴⁸⁷ Judgement of 26 February 1986, *Marshall / Southampton and South-West Hampshire Area Health Authority*, C-152/84, EU:C:1986:84, §48.

Member State and employer obligations stemming from EU legislation applicable to posted TCNs		
		<p>labour market could be equally attained through a system of simple declaration, instead of an authorisation requirement. Being unnecessary to the attainment of the above objectives the measure in question unduly restricted the service provider's freedom of movement. It clearly stems, therefore, that TCNs may work in a Member State without having the required working permit, as long as such work is provided in the framework of an employment contract with an undertaking based in any other Member State.</p> <p>The first case referred to the CJEU concerning posting of workers (<i>Rush Portuguesa</i> (C-113/89)): the CJEU states that “Community law does not preclude Member States from extending their legislation or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does the Community law prohibit Member States from enforcing those rules by appropriate means”. This statement was to form the core of the PWD.</p> <p>Subsequently, in <i>Säger</i> (C-76/90), the CJEU also clarified that not only discriminatory measures could amount to unlawful restrictions to the free movement of services, but also “...any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services” (e.g. provision of services subject to the issue of administrative licence for which the possession of professional qualifications is required) (§12).</p> <p>The CJEU further established that restrictions of the free movement of services can be accepted only if justified by overriding reasons of public interest (e.g., the social protection of workers in the construction</p>

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		industry) and if they are proportional (that is, the measure is suitable for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it). The CJEU has scrutinised national measures in cases concerning requirements to have a representative on the territory (Joined Cases C-369/96 and C-376/96 <i>Arblade</i> and C-319/06, <i>Commission v Luxembourg</i>), requirements to obtain a permit from the authorities in the host Member State (<i>Säger</i> C-76/90), requirements to make a declaration to the host Member State's authorities before posting (C-515/08, <i>Santos Palhota</i>) and requirements to keep and maintain social documents on the territory of the host Member State (<i>Joined cases C-369/96 and C-376/96 Arblade</i>).
<p>Obligation to correctly identify posted workers</p> <p>Article 2</p> <p>PWD</p>	<p>Member States' obligation: For the purposes of the PWD, 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works. The definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.</p> <p>If a TCN is legally residing and working in a Member State, the employer can post that worker to another Member State under the same conditions as a Union citizen. As far as the terms and conditions of employment are concerned, the PWD apply fully to such workers.</p> <p>This Directive applies to all drivers in the road transport sector for goods or passengers. A driver is not considered to be posted, which means that they have no posting declaration to make via the new European portal, in the following cases:</p>	<p>According to the rulings in the cases of <i>Gebhard</i> (C-55/94) or <i>Schnitzer</i> (C-215/01) the temporary nature of the service provision in the host country has to be determined in light of not only the duration of the service but also other aspects, such as regularity, periodical or continuous nature. Thus, in the context of complex projects, such as in the construction sector, the temporary provision of services may last several years. According to the <i>Schnitzer</i> ruling, an activity carried out on a permanent basis or at least without foreseeable limits in its duration, does not fall within the freedom to provide services. It also has to be added that the legal concept of "limited period of time" may vary depending on the specific legal framework (i.e., social security coordination, taxation, provision of services or labour, etc.).</p> <p><i>In FNV v Van den Bosch</i> (C-815/18), the CJEU states that the PWD is applicable to the transnational provision of services in the road transport sector. The CJEU affirms that a worker who provides very limited services in the territory of the Member State, to which that worker is sent, cannot be regarded as 'posted' because there is no sufficient connection</p>

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<p>Directive (EU) 2020/1057</p>	<ul style="list-style-type: none"> - When carrying out bilateral operations (bilateral transport of goods); - When transiting through a Member State without loading or unloading goods. 	<p>to this Member State. This applies to a driver who, in the course of goods transport by road, merely transits through the territory of a Member State. The same would also be true of a driver carrying out only cross-border transport operations from the Member State where the transport undertaking is established to the territory of another Member State or vice versa.</p> <p>In the <i>Rapidspeed</i> case (C-428/19), the CJEU ruled that the PWD must be interpreted as applying to the transnational provision of services in the road transport sector. Due to the existence of a sector-specific Directive, the PWD Directive applies to the road transport sector subject to the existing specific rules enshrined in Directive (EU) 2020/1057.</p> <p>In <i>Dobersberger</i> (C-16/18), the CJEU excluded workers performing on-board services on international trains from the PWD's scope of application due to the lack of connection with the Member States crossed by the international trains.</p>
<p>Obligation to ensure equal treatment in relation to terms and conditions of employment</p> <p>Article 3(1) PWD</p> <p>(as amended by the Revised PWD)</p>	<p>Employer's obligation: The terms and conditions of employment that the host Member State must grant to posted workers include:</p> <ul style="list-style-type: none"> (a) maximum work periods and minimum rest periods; (b) minimum paid annual leave; (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; 	<p>By the <i>Laval</i> (C-341/05) and <i>Commission vs. Luxembourg</i> (C-319/06) rulings, the CJEU ruled that the hard-core labour rights enumerated in the PWD are not to be considered as minimum floors but should be considered as an exhaustive list of rights that must be respected by the posting companies.</p> <p>In <i>Sähköalojen ammattiliittory case</i> (C-396/13), the CJEU ruled that categorising workers in different pay groups, which are universally binding and transparent in a collective agreement, must also be applied to posted workers.</p>

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(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination;

(h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;

(i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

Note: The Directives list the elements of the law of the host Member State that apply to posted workers but do not harmonise their substance. It is therefore up to the Member State, for example, to determine the level and the constituent elements of remuneration and to decide whether and how national law regulates all the terms and conditions of employment listed in Article 3(1).⁴⁸⁸

⁴⁸⁸ Practical guide on posting

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<p>Obligation to ensure compliance with the principle of “equal pay for equal work”</p> <p>Article 3(1) PWD (as amended by the Revised PWD)</p>	<p><u>Member States’ obligation:</u> The concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with Article 3(8).</p> <p>The host Member State does not have the obligation under the Enforcement Directive to provide information on the actual remuneration to be paid.</p>	
<p>Obligation to ensure access to information</p> <p>Article 3(1) PWD (as amended by the Revised PWD) and Article 5 of the Enforcement Directive</p>	<p><u>Member States’ obligation:</u> Pursuant to Article 3(1) PWD, Member States shall publish the information (and guarantee it is accurate and up to date) on the terms and conditions of employment, in accordance with national law and/or practice, without undue delay and in a transparent manner, on the single official national website referred to in Article 5 of Directive 2014/67/EU, including the constituent elements of remuneration as referred to in the third subparagraph of this paragraph and all the terms and conditions of employment in accordance with paragraph 1a of this Article.</p> <p>According to Article 5(1) of the Enforcement Directive, host Member States shall create and maintain an updated single national website containing the information on the terms and conditions of employment applicable to workers posted to their territory (including any collective agreement</p>	

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Article 1(9) of
Directive (EU) 2020/1057

that meets the conditions to be applied to posted workers). This information must be made generally available free of charge, in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means and in formats and in accordance with web accessibility standards that ensure access to persons with disabilities.

Moreover, Article 5(2) notably requires Member States to (a) indicate clearly, in a detailed and user-friendly manner and in an accessible format on a single official national website and by other suitable means, which terms and conditions of employment and/or which parts of their national and/or regional law are to be applied to workers posted to their territory; and (b) take the necessary measures to make generally available on the single official national website and by other suitable means information on which collective agreements are applicable and to whom they are applicable, and which terms and conditions of employment are to be applied by service providers from other Member States in accordance with Directive 96/71/EC, including where possible, links to existing websites and other contact points, in particular the relevant social partners.

Terms and conditions of employment are made available in an accessible and transparent way to transport undertakings from other Member States and to posted drivers. This should include, where relevant, those terms and conditions of employment laid down by collective agreements that are generally applicable to all similar undertakings in the geographical area concerned. The relevant information

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	should, in particular, cover the constituent elements of remuneration rendered mandatory by such instruments.	
<p>Application of more favourable terms and conditions of employment</p> <p>Article 3(7) PWD, first sentence</p>	<p>Article 3(7) provides that the previous paragraphs of the provision do not prevent the application of terms and conditions of employment that are more favourable to posted workers.</p>	<p>In <i>Laval</i> (C-341/05) and <i>Rüffert</i> (C-346/06), the CJEU held that Article 3(7) protects posted workers where the sending state's labour law is more protective than that of the host state: in other words, posted workers should not suffer a reduction in their terms and conditions of employment as a result of the posting.</p> <p>Regarding what is to be considered as terms and conditions of employment that are more favorable to posted workers, in <i>Rüffert</i> (C-346/06), the CJEU also held that a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement in force at the place where those services are performed, is not a term and condition of employment more favorable to workers within the meaning of article 3(7).</p> <p>In <i>Sähköalojen ammattiliitto</i> (C-396/13), the CJEU held that “the rules for categorising workers into pay groups, which are applied in the host Member State on the basis of various criteria including the workers’ qualifications, training and experience and/or the nature of the work performed by them, apply instead of the rules that are applicable to the posted workers in the home Member State. It is only where a comparison is made between the terms and conditions of employment, referred to in the first subparagraph of Article 3(7) of Directive 96/71, applied in the home Member State and those in force in the host Member State that the</p>

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		categorisation made by the home Member State must be taken into account when it is more favourable to the worker.” (par. 43).
<p>Determination of what is included in remuneration</p> <p>Article 3(7) PWD, second sentence (as amended by the Revised PWD)</p>	<p>Member States’ obligation: Article 3(7), second sentence, provides that allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting. Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.</p>	<p>In <i>Sähköalojen ammattiliitto</i> (C-396/13), the CJEU recalled that “according to the Court’s settled case-law, allowances and supplements which are not defined as being constituent elements of the minimum wage by the law or practice of the Member State to whose territory the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return for that service, on the other, cannot, under the provisions of Directive 96/71, be considered to be elements of that kind (judgments in <i>Commission v Germany</i>, C-341/02, EU:C:2005:220, paragraph 39, and <i>Isbir</i>, EU:C:2013:711, paragraph 38).” (par. 36).</p> <p>In this case, the Court has decided that the daily allowance at issue in the proceedings and the compensation for daily travelling time, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour’s duration, must be regarded as part of the minimum wage of posted workers. On the other hand, the coverage of the cost of those workers’ accommodation and an allowance taking the form of meal vouchers provided to the posted workers were not regarded as part of their minimum wage.</p> <p>Moreover, in <i>Rapidsped</i> (C-428/19) the CJEU concluded that “the second subparagraph of Article 3(7) of Directive 96/71 must be interpreted as meaning that a daily allowance, the amount of which varies according to the duration of the worker’s posting, constitutes an allowance specific to the posting and is part of the minimum wage, unless it is paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board or lodging, or unless it corresponds to an allowance which alters the relationship between the</p>

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		service provided by the worker, on the one hand, and the consideration which he or she receives in return, on the other.” (par. 54).
Article 3(10) PWD (as amended by the Revised PWD)	Member States’ obligation: The PWD shall not preclude the application by Member States, in compliance with the Treaties, to national undertakings and to the undertakings of other Member States, on the basis of equality of treatment, of terms and conditions of employment on matters other than those which are laid down by law, regulation or administrative provision, and/or by collective agreements or arbitration awards in the case of public policy provisions.	The CJEU ruled in <i>Laval</i> (C-341/05) that Member States are not totally free to use the public policy clause of Article 3(10) of the PWD to introduce further rights. Such action is not allowed if it restricts the freedom to provide services. Therefore, stricter requirements can only be imposed on the companies by the Member States if these requirements are justified and proportionate. The right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services which is not justified in the case where the collective agreement at issue goes beyond the minimum standards that the posting employer is obliged to observe..
Obligation to provide the posted worker with information about the employment relationship Article 3 and 4 DTPWC	Employer’s obligation: Member States shall ensure that employers are required to inform workers in writing or by electronic means of the essential aspects of the employment relationship (the list is provided in Article 4(2)).	
Obligation to provide the posted worker with additional information Article 7	Employer’s obligation: Member States shall ensure that employers of posted workers are required to give them in writing, before the worker’s departure, information on:	

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DTPWC	<ul style="list-style-type: none"> - the country or countries in which the work abroad is to be performed and its anticipated duration; - the currency to be used for the payment of remuneration; - where applicable, the benefits in cash or kind relating to the work assignments; - information as to whether repatriation is provided for, and if so, the conditions governing the worker's repatriation. <p>In addition, the posted worker shall be notified of:</p> <ul style="list-style-type: none"> - the remuneration to which the worker is entitled in accordance with the applicable law of the host Member State; - where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging; - the link to the single official national website developed by the host Member State. <p>This obligation exists in addition to the requirement to inform workers on the essential aspects of their employment relationship, including the identity of the social security institutions receiving the social contributions.</p>	
Obligation to apply labour law of the host Member State in case of long-term posting	<p><u>Employer's obligation:</u> Where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings guarantee, on the basis of</p>	

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Article 3(1a) PWD (as amended by the Revised PWD)	equality of treatment, workers who are posted to their territory, all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out.	
Obligation to extend the posting period when a motivated notification is submitted Article 3(1a) PWD (as amended by the Revised PWD)	<u>Member States' obligation:</u> Member State where the service is provided shall extend the period of 12 months to 18 months when the service provider submits a motivated notification. The extension cannot be subject to an authorisation procedure (it is a “notification”, not a “request”), but Member States may require that service providers give reasons for the extension.	
Obligations in relation to replacement of posted workers Article 3(1a) PWD (as amended by the Revised PWD)	<u>Employer's obligation:</u> The duration of a posting is deemed to be the effective cumulative duration of different posting periods during which one or several posted workers carry out the same task at the same place on behalf of their employer. This means that if a worker is posted for 12 months and the employer then sends another worker to do the same job at the same place for another 12 months (replacing the first posted worker), then the employer must apply all the applicable terms and conditions of employment laid down in the labour law in the host Member State to the second posted worker. However, considering the possibility to extend the 12 months period to 18 months, where the service provider submits a motivated notification, in such cases, the second worker will be considered as a long-term posted worker subject to all the applicable terms and conditions of	

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	employment in the Member State of posting if he/she is posted for a period longer than this 6-month extension (overall, 18 months).	
Obligation to ensure equal treatment of posted temporary agency workers Article 3(1b) PWD (as amended by the Revised PWD)	Employer's obligation: The same conditions applicable to national temporary employment agencies shall also apply to those cross-border agencies hiring out workers. The employer (the temporary agency) must guarantee to posted temporary agency workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC on temporary agency work, i.e., in principle at least those that would apply if they had been recruited directly by the user undertaking to occupy the same job. Member States may also require that, in addition to the provisions of Article 5 of Directive 2008/104/EC, posted temporary agency workers benefit from any more favourable terms and conditions that apply to temporary agency workers at national level.	In <i>Rush Portuguesa</i> (C-113/89), the CJEU held that an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries out activities which are specifically intended to enable workers to gain access to the labour market of the host Member State. This special link with the labour market of the host Member State justifies that workers posted through temporary work agencies benefit from the principle of equal treatment.
Cooperation and mutual administrative assistance between Member States		
<i>Obligations / Provisions</i>	<i>Subject matter</i>	<i>CJEU case-law</i>
Obligation to cooperate Article 4 (2) PWD (as amended by the Revised PWD)	Member States' obligation: Member States' competent authorities shall work in close cooperation and provide each other with mutual assistance without undue delay in order to facilitate the implementation, application and enforcement in practice of the PWD and the Enforcement Directive.	

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Article 6 of the Enforcement Directive	<p>Such cooperation shall in particular consist in:</p> <ul style="list-style-type: none"> - replying to reasoned requests for information from competent authorities (e.g., information on the transnational hiring-out of workers, and in tackling manifest abuses or possible cases of unlawful activities, such as transnational cases of undeclared work and bogus self-employment linked to the posting of workers) and - in carrying out checks, inspections and investigations with respect to the situations of posting. <p>It may also include the sending and service of documents.</p> <p>Mutual administrative assistance shall be provided free of charge.</p>	
<p>Obligation to cooperate during inspections</p> <p>Article 7 of the Enforcement Directive</p>	<p><u>Member States' obligation:</u> During the period of posting of a worker to another Member State, the inspection of terms and conditions of employment to be complied with according to the PWD is the responsibility of the authorities of the host Member State in cooperation, where necessary, with those of the Member State of establishment. The Member State of establishment of the service provider shall continue to monitor, control and take the necessary supervisory or enforcement measures. The Member State of establishment of the service provider shall assist the Member State to which the posting takes place to ensure compliance with the conditions.</p>	
<p>Obligation to designate competent authority and liaison</p>	<p><u>Member States' obligation:</u> Member States must nominate competent authorities and liaison offices through</p>	

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office for administrative cooperation and to communicate their contact details Article 4 (1) and (4) PWD and Article 3 of the Enforcement Directive	<p>which the administrative cooperation and/or exchange of information regarding the posting of workers takes place.</p> <p>Member States must communicate the contact details of the competent authorities and/or liaison offices to the Commission and to the other Member States.</p>	
Obligation to ensure data protection Article 3 of the Enforcement Directive	<p><u>Member States' obligation:</u> Member States must ensure data protection of exchanged information and the legal rights of natural and legal persons when designating the competent authorities. Member States shall remain ultimately responsible for safeguarding data protection and the legal rights of affected persons and shall put in place appropriate mechanisms in this respect.</p>	
Obligation to develop, facilitate and promote information exchange Article 8 of the Enforcement Directive	<p><u>Member States' obligation:</u> Member States shall, with the assistance of the Commission, take accompanying measures to develop, facilitate and promote the exchange between officials in charge of the implementation of administrative cooperation and mutual assistance as well as monitoring the compliance with, and enforcement of, the applicable rules. Member States may also take accompanying measures to support organisations that provide information to posted workers.</p>	
Obligation to use the IMI system for administrative cooperation Article 21(1) of	<p><u>Member States' obligation:</u> The administrative cooperation and mutual assistance between the competent authorities of the Member States shall be implemented through the Internal Market Information System (IMI),</p>	

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Enforcement Directive Article 1(11) of Directive (EU) 2020/1057	established by Regulation (EU) No 1024/2012. Operators need to use the public interface of the IMI to submit posting declarations (Road transport posting declaration portal).	
Obligation to inform the Commission of the bilateral agreements/ arrangements concerning administrative cooperation and mutual assistance Article 21(2) and (3) of the Enforcement Directive	<u>Member States' obligation:</u> Member States shall inform the Commission of the bilateral agreements or arrangements concerning administrative cooperation and mutual assistance between their competent authorities as regards the application and monitoring of the terms and conditions of employment applicable to posted workers, in so far as these agreements or arrangements do not adversely affect the rights and obligations of the workers and undertakings concerned. The text of those bilateral agreements should be generally available. In the context of bilateral agreements or arrangements, competent authorities of the Member States shall use IMI as much as possible. In any event, where a competent authority in one of the Member States concerned has used IMI, it shall where possible be used for any follow-up required.	
Monitoring, control and enforcement		
<i>Obligations / Provisions</i>	<i>Subject matter</i>	<i>CJEU case law</i>
Obligation to monitor, control and enforce the obligations laid	<u>Member States' obligation:</u> Host and sending Member States are responsible for the monitoring, control and enforcement of the obligations laid down in the PWD and the Enforcement Directive and shall take appropriate	

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<p>down in the PWD and the Enforcement Directive</p> <p>Article 5 PWD</p> <p>(as amended by the Revised PWD)</p> <p>Obligation to put in place appropriate and effective checks and monitoring mechanisms</p> <p>Article 10 of the Enforcement Directive</p> <p>Article 2, point (13) of Directive (EU) 2020/1057</p> <p>Article 1(11) last paragraph of Directive (EU) 2020/1057</p>	<p>measures in the event of failure to comply with the Directives.</p> <p>Member States' obligation: Member States shall ensure that appropriate and effective checks and monitoring mechanisms provided in accordance with national law and practice are put in place and that the authorities designated under national law carry out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions laid down in the PWD and Enforcement Directive and thus guarantee their proper application and enforcement.</p> <p>Checks at the premises of undertakings and roadside checks regarding compliance with the working time rule on average maximum weekly working time, breaks and night work.</p> <p>Article 1(11) of Directive 2020/1057 provides for a closed list of administrative requirements and control measures that may be imposed by Member States on operators and on drivers with regard to checking compliance with the posting rules:</p> <ul style="list-style-type: none"> - submitting a posting declaration; - operator to ensure that the driver has at his or her disposal in paper or electronic form and an obligation for the driver to keep and make available when requested at the roadside (a copy of the posting declaration submitted via IMI; 	

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	<p>evidence of the transport operations taking place in the host Member State; the tachograph records and in particular the country symbols of the Member States in which the driver was present when carrying out international road transport operations or cabotage operations)</p> <ul style="list-style-type: none"> - sending copies of documents after the posting at the request of the competent authorities 	
<p>Obligation to adopt measures to prevent and sanction any abuse and circumvention of the rules applicable to posted workers</p> <p>Article 4 of the Enforcement Directive</p>	<p><u>Member States' obligation:</u> In order to check whether a worker qualifies as a posted worker, Member States must make an overall assessment, taking into account all factual elements. For example, in order to determine whether an undertaking genuinely performs substantial activities in the Member State from which the posting takes place, Member States may take into account, in particular:</p> <ul style="list-style-type: none"> - the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions, etc. - the place where posted workers are recruited and from which they are posted; - the place where the undertaking performs its substantial business activity and where it employs administrative staff; - the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, 	

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newly established undertakings and SMEs.

In order to assess the **temporary nature** of the activity carried out by the posted worker, Member States may assess, in particular:

- whether the work is carried out for a limited period of time in the host Member State;
- whether the posting takes place to a Member State different from the country where the worker habitually carries out his or her work;
- whether the posted worker returns to or is expected to resume working in the home Member State;
- whether travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
- any previous periods during which the post was filled by the same or by another posted worker.

Article 5 PWD
(as amended by the Revised
PWD)

The elements are indicative factors in the overall assessment and should therefore not be considered in isolation. Each case will still have to be judged on its particular merits and the fight against not genuine situations will still highly rely on the measures adopted by the Member States in their national legislation or the interpretation by the national courts.

Where it is established that an undertaking is improperly

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	or fraudulently creating the impression that the situation of a worker falls within the scope of the PWD, the Member State where the work is carried out must ensure that the worker benefits from the relevant national law and practice and is in any case not subject to less favourable conditions than those applicable to posted workers.	
<p>Obligation to impose penalties for infringements</p> <p>Article 5 PWD (as amended by the Revised PWD) and Article 20 of the Enforcement Directive</p> <p>Article 5(1) of Directive (EU) 2020/1057</p>	<p>Member States' obligation: Member States must have in place penalties applicable in the event of infringements of national provisions adopted pursuant to the PWD and Enforcement Directives and must take all the necessary measures to ensure that they are implemented and complied with (e.g. ensure that adequate procedures are available to workers and/or workers' representatives for the enforcement of obligations under these Directives). The penalties provided for shall be effective, proportionate and dissuasive.</p> <p>Member States must provide for a system of specific sanctions in the transport sector regarding consignors, freight forwarders, contractors and subcontractors which commission the performance of cross-border transport services to transport undertakings, when those transport services involve infringements of the national provisions.</p>	<p><i>NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld</i> (C-205/20): first, CJEU held that Article 20 of the Enforcement Directive, in so far as it requires the penalties provided for therein to be proportionate, has direct effect and may thus be relied on by individuals before national courts against a Member State which has transposed it incorrectly. Secondly, the Court found that the principle of the primacy of EU law must be interpreted as imposing on national authorities the obligation to disapply national legislation of which a part is contrary to the requirement of proportionality of penalties laid down in Article 20 of the Enforcement Directive only to the extent necessary to enable the imposition of proportionate penalties. The case relates to a series of previous decisions of the CJEU declaring several elements of the Austrian sanctioning regime for the breach of record-keeping obligations relating to the posting of workers as being disproportionate.</p> <p>In <i>Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei</i> (joined cases C-64/18, C-146/18, C-140/18 and C-148/18), the CJEU ruled that EU law precludes penalties for infringements of formal obligations such as obtaining permits and retaining payroll documents:</p> <p>- which cannot be less than a predefined minimum amount;</p>

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		<ul style="list-style-type: none"> - which can be imposed cumulatively for each employee without a maximum; - which are supplemented with an additional amount of 20% for litigation costs; and - which, in the event of failure to pay the fine, can lead to imprisonment. <p>According to the Court, national legislation imposing such serious penalties for infringements of administrative obligations in the context of cross-border provision of services is disproportionate and therefore an unjustified obstacle to the freedom to provide services. The High Administrative Court has set guidelines for the national judiciary on how to deal with the CJEU's findings. It stated that minimum fines as regulated by law are to be disregarded, and that there should be one overall fine for the total offence in its entirety, and not a fine per worker concerned.</p>
<p>Entitlement to impose administrative requirements and control measures</p> <p>Article 9 of the Enforcement Directive</p>	<p><u>Employer's obligation:</u> Member States may impose administrative requirements and control measures necessary in order to guarantee the respect of the 'core labour rights' during postings, namely:</p> <p>a) to make a simple declaration to the responsible national competent authorities in order to allow factual controls at the workplace (the so-called 'Posted Worker Notification'; 'PWN');</p> <p>b) to keep or make available and/or retain copies of the employment contract or an equivalent document relevant to the assignment, including payslips, time-sheets and proof of</p>	<p>Access to relevant information is, according to the CJEU, a key prerequisite for the national control of posting undertakings (<i>Commission v Germany</i>, C-490/04). In <i>Arblade</i> (Joined cases C-369/96 and C-376/96), the CJEU stated that undertakings established in another Member State have to comply with the rules of the Member State of the establishment. If they also have to draw up and maintain social documents according to the rules in the host Member State they are subject to additional economic and administrative burdens, which constitute a restriction of the free movement of services.</p> <p>In <i>Commission v Germany</i> (C-490/04), the CJEU established that an obligation to translate social documents to the language spoken in the</p>

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	<p>payment of wages during the posting, as well as after the period of posting at the request of the authorities;</p> <p>c) to provide a translation of the retained assignment related employment documents;</p> <p>d) to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices;</p> <p>e) an obligation to designate a contact person, if necessary, acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State.</p> <p>The list of requirements is indicative and non-exhaustive, allowing the Member States to choose the preferred control measures - or even introduce new ones as long as they are justified and proportionate.</p> <p><u>Member States' obligation:</u> Member States shall ensure that the procedures and formalities relating to the posting of workers pursuant to this Article can be completed in a user-friendly way by undertakings, at a distance and by electronic means as far as possible.</p> <p>Member States shall communicate to the Commission and inform service providers of any measures that they apply or that have been implemented by them.</p>	<p>host Member State constituted a restriction on the freedom to provide services, due to additional administrative burdens. On the other hand, without translated documents, the monitoring executed by the national authorities would be extremely difficult or nearly impossible to carry out. The restriction could therefore be justified.</p> <p>In <i>Arblade</i> (Joined cases C-369/96 and C-376/96) and <i>Finalarte</i> (Joined cases C-49/98, C-50/98, C-52/98 – C-54/98 & C-68/98 – C-71/98), the CJEU held that it is the responsibility of the authorities in the host Member State to make the final proportionality test.</p> <p>The existence of the practical challenges related to compliance with Posted Worker Notification (PWN) requirements was acknowledged by the CJEU which in cases <i>Čepelnik</i> (C-33/17) and <i>Maksimovic</i> (joined cases C-64/18, C-140/18, C-146/18 and C-148/18) has analysed the admissibility of certain national measures aiming at protecting posted workers and combating social security fraud. In both cases, the CJEU has identified that the national measures as a restriction of the freedom to provide services.</p> <p>In <i>Čepelnik</i> (C-33/17), CJEU ruled that <i>Article 56 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the competent authorities can order a commissioning party established in that Member State to suspend payments to his contractor established in another Member State, or even to pay a security in an amount equivalent to the price still owed for the works in order to guarantee payment of the fine which might be imposed on that contractor in the event of a proven infringement of the labour law of the first Member State.</i></p>

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		<p>In <i>Maksimovic</i>, CJEU ruled that <i>Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides, in respect of non-compliance with labour law obligations in relation to obtaining administrative permits and keeping records on wages, for fines to be imposed:</i></p> <ul style="list-style-type: none"> - which may not be lower than a predefined minimum amount; - which apply cumulatively in respect of each worker concerned and without an upper limit; - to which is added a contribution to court costs of 20% of the amount of the fines if the appeal against the decision imposing those fines is dismissed, and - which are replaced by custodial sentences in the event of non-payment.
<p>Obligations related to cross-border enforcement of financial administrative penalties and/or fines</p> <p>Articles 13-19 of the Enforcement Directive</p>	<p><u>Member States' obligation:</u> Member States shall inform the Commission through IMI which authority or authorities, under its national law, are competent for the administrative transmission and reception of requests.</p> <p>The provisions provide that the decision by the competent authority of one Member State to impose a penalty on a service provider be notified to the addressee and recovered by the competent authority of the Member State where the provider is currently located.</p>	
Social security coordination		

Member State and employer obligations stemming from EU legislation applicable to posted TCNs		
<i>Obligations / Provisions</i>	<i>Subject matter</i>	<i>CJEU case law</i>
Social security coordination for TCNs Article 1 of Regulation (EU) No 1231/2010	<p>In the area of social security coordination, TCNs are covered by Regulation (EU) No 1231/2010, provided that they are legally resident (legally staying and working) in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State, and therefore they can be considered posted under the social security coordination rules under the same conditions as EU nationals.</p> <p>Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 shall apply to TCNs who are not already covered by those Regulations solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.</p>	<p>In <i>Balandin and Others</i> (C-477/17), the CJEU ruled that “<i>third country nationals, such as those at issue in the main proceedings, who temporarily reside and work in different Member States in the service of an employer established in a Member State, may rely on the coordination rules laid down by Regulations No 883/2004 and 987/2009 in order to determine the social security legislation to which they are subject, provided that they are legally staying and working in the territory of the Member States</i>“. The notion of legal residence has been interpreted by the Court as meaning that TCNs should have a temporary or permanent residence in the sending Member State to qualify for the rights derived from the provisions of Regulation No 883/2004 in a second Member State. To rely on Regulation (EU) No 1231/2010 TCNs do not necessarily have to fully satisfy TCN strict residence permit requirements of the other Member State provided that they are allowed to move to the other Member State and their presence on the national territory of the other Member State complies with its national legislative requirements for entry and stay which might depend on the nature of the posting. The duration of TCNs’ presence on the national territory and the fact that their center of interest remains in a third country are not relevant to establish whether they are legally residing in the territory of a Member State.</p>
Obligation to ensure equal treatment in relation to social security Article 4 of Regulation (EC) 883/2004	<p>Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits (sickness benefits, maternity and paternity benefits, invalidity benefits, old-age benefits, survivor benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, family benefits, pre-retirement benefits) and be subject to the same</p>	

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	obligations under the legislation of any Member State as the nationals thereof.	
Obligation to ensure the principle of unicity of the applicable legislation Article 11(1) of Regulation (EC) 883/2004	Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only.	
Obligation to determine the legislation applicable in case of posting Articles 12 and 16 of Regulation (EC) 883/2004	<p>In principle a worker must be registered with social security in the country in which he actually carries out his activities (Regulation (EC) No 883/2004, Article 11(3)(a)). However, the Regulation allows for a temporary exception from the principle of the country of employment. In concrete terms, this pertains to the articles on posting:</p> <p>According to Article 12(1), a posted worker remains insured in the sending state for up to 24 months, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.</p> <p>Also self-employed persons can be considered as posted pursuant to Article 12(2), when they normally pursue their activity in a Member State and go to pursue a similar activity in another Member State, provided the anticipated duration of such activity does not exceed 24 months.</p> <p>Derogations from the rules on applicable legislation (e.g. as regards posting), for instance, to allow posting to take place</p>	<p>Issues arise in regard to the distinction between posting and ‘persons normally pursuing an activity in two or more Member States’ (Article 13 of Regulation 883/2004). Article 14(7) of Regulation (EC) No 987/2009 clarifies that the duration of the activity in one or more other Member States (whether it is permanent or of an ad hoc or temporary nature) is decisive for the purpose of this distinction.</p> <p>In ‘<i>Walltopia</i>’ AD (C-451/17), the CJEU ruled that Article 14(1) of Regulation (EC) No 987/2009 together with Article 12(1) of Regulation (EC) No 883/2004 must be interpreted as meaning that an employee recruited with a view to being posted to another Member State must be regarded as having been <i>‘just before the start of his employment ... already subject to the legislation of the Member State in which his employer is established’</i>, within the meaning of Article 14(1) of Regulation No 987/2009, even if that employee was not an insured person under the legislation of that Member State immediately before the start of his employment, if, at that time, that employee had his residence in that Member State, which is for the referring court to ascertain.</p>

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	<p>also if a worker has not been insured in the sending state for at least one month or to extend the period of posting beyond 24 months, can be agreed by social security institutions of the involved countries under Article 16. Conditions for applying this provision, are left to Member States' discretion. Article 16 only commits Member States to taking decisions 'in the interest of certain persons or categories of persons'.</p> <p>The corresponding implementing provisions are contained in Regulation (EC) no. 987/2009, Articles 14 to 21.</p>	
<p>Obligation to determine the legislation applicable in case of pursuit of activities in two or more Member States</p> <p>Article 13(1) of Regulation (EC) 883/2004</p>	<p>1. A person who normally pursues an activity as an employed person in two or more Member States shall be subject:</p> <p>(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or</p> <p>(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:</p> <p>(i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer;</p> <p>or</p> <p>(ii) to the legislation of the Member State in which the registered office or place of business of the undertakings or</p>	

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	<p>employers is situated if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State; or</p> <p>(iii) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence; or</p> <p>(iv) to the legislation of the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence.</p>	
<p>Notification obligation</p> <p>Article 15(1) of Regulation 987/2009</p>	<p><u>Employer's obligation:</u> A posting undertaking which posts a worker to another Member State, or in the case of a self-employed person the person himself/herself, must contact the competent institution in the sending Member State and whenever possible this should be done in advance of the posting.</p> <p><u>Member States' obligation:</u> The authority shall check that the conditions stated by Article 12 of Regulation No 883/2004 are complied with and issue the A1 form 'preferably in advance' to confirm that the legislation of its country remains applicable for social security purposes. It</p>	<p>Based on CJEU case law, specifically the <i>Banks and Others</i> case (C-178/97), the A1 form may be issued even after the expiry of the posting period and may have retroactive effect.</p> <p>In <i>Alperind GmbH and Others</i> (C-527/16), the CJEU confirms the binding and retroactive effect of the PD A1. However, an exception is possible in cases of fraud or abuse of rights (in <i>Altun and Others</i> (C-359/16)). The CJEU stated that national courts may, in cases of fraud, disregard social security certificates issued to workers posted within the EU however this possibility is subject to strict conditions.</p>

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	shall also make the form available to the relevant authorities of the host Member State.	
<p>Obligation to provide information to posted workers and employers</p> <p>Article 19 of Regulation 987/2009</p>	<p><u>Member States' obligation:</u> The competent institution of the Member State whose legislation becomes applicable pursuant to Title II of the basic Regulation shall inform the person concerned and, where appropriate, his employer(s) of the obligations laid down in that legislation. It shall provide them with the necessary assistance to complete the formalities required by that legislation.</p> <p>At the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of the basic Regulation shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.</p> <p>The attestation referred to in the previous paragraph is the Portable Document A1, which is a document valid throughout the EU. This attestation certifies that the social security legislation applicable to the holder, for instance in case of a worker who comes within the scope of the special rule for posted workers up to a specific date. It should also indicate, where appropriate, under what conditions the worker comes within the special rules for posted workers. It also proves that there is no obligation to pay contributions in the other Member States in which the activity is pursued.</p>	

Member State and employer obligations stemming from EU legislation applicable to posted TCNs		
<p>Obligation to cooperate between institutions</p> <p>Article 20 of Regulation 987/2009</p>	<p><u>Member States' obligation:</u> The relevant institutions shall communicate to the competent institution of the Member State whose legislation is applicable to a person pursuant to Title II of the basic Regulation the necessary information required to establish the date on which that legislation becomes applicable and the contributions which that person and his employer(s) are liable to pay under that legislation.</p> <p>The competent institution of the Member State whose legislation becomes applicable to a person pursuant to Title II of the basic Regulation shall make the information indicating the date on which the application of that legislation takes effect available to the institution designated by the competent authority of the Member State to whose legislation that person was last subject.</p>	
<p>Obligations of the employer</p> <p>Article 21 of Regulation 987/2009</p>	<p><u>Employer's obligation:</u> An employer who has his registered office or place of business outside the competent Member State shall fulfil all the obligations laid down by the legislation applicable to his employees, notably the obligation to pay the contributions provided for by that legislation, as if he had his registered office or place of business in the competent Member State.</p> <p>An employer who does not have a place of business in the Member State whose legislation is applicable and the employee may agree that the latter may fulfil the employer's obligations on its behalf as regards the payment of contributions without prejudice to the employer's underlying obligations. The employer shall send notice of</p>	

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	such an arrangement to the competent institution of that Member State.	

Annex 2. Overview of administrative requirements for the posting of TCNs

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
AT	<ul style="list-style-type: none"> - Notification posting of workers to AT (regardless of the nationality). to a central authority. - Information contained in the notification includes, among other, the nationality of the posted worker, information on the worker's working permit, and residence permit. - The central authority forwards the notification to the Austrian Health Insurance Carrier, the Holiday and Severance Pay insurance and the Austrian Employment Service. - In case of control, the employer has to provide (in German or English) at the place of employment: the PD A1, the confirmation of notification of posting, the employment contract, the confirmation of working times. - Changes to information contained in the posting notification must be notified immediately. - Appointment of a liaison person. - Appointment of a legal representative. 	<ul style="list-style-type: none"> - The posting employer must obtain a PD A1 for the posted worker; in case of control, the employer has to present the PD A1. - Posting notification to AT (regardless of the nationality). - Information contained in the notification: social insurance number of the posted worker, information of the social insurance carrier. 	
BE	<ul style="list-style-type: none"> - Prior notification of the posting (LIMOSA). - The online registration does not apply to workers in the international transport sector for passengers and goods, workers 	<ul style="list-style-type: none"> - The posting employer must obtain a PD A1 for the posted worker; The 	<ul style="list-style-type: none"> - TCN posted worker must make a declaration of arrival to the municipal administration of the

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<p>attending meetings with a closed attendee list, specialised technicians required to carry out urgent maintenance, athletes, artists with an international reputation (if the stay does not exceed 21 days per quarter), scientists participating in a scientific programme (if the stay does not exceed three months per calendar year).</p> <ul style="list-style-type: none"> - Information contained in the online registration includes among others, identification data of the worker, planned start and end dates of the posting. - The confirmation of posting following the online registration has to be kept by the worker throughout the whole posting period. - Designation of a liaison person. - Specific requirements apply to the meat and construction sectors; <ul style="list-style-type: none"> o For employers posting workers in establishments subject to approval and active in the meat industry, a presence registration is required. o For employers posting workers in the construction sector, a declaration for building, attendance registration and presence registration must be submitted depending on the amount of the contract. - Exemption from submitting certain Belgian documents (individual account and wage/salary statement) for 12 months. - But the equivalent documents in the sending State have to be provided to the Belgian labour inspector. Obligation to present 	<p>employer must provide information on the applicable social security legislation before the posting.</p>	<p>place where he resides in Belgium, within three working days of his entry into Belgium (for EU citizens the declaration has to be made within ten days).</p> <ul style="list-style-type: none"> - Every posted worker needs to be identifiable based on their national identification number from their country of origin or from Belgium once they register in a Belgian municipality.

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	certain document to the labour inspector regarding remuneration, working conditions and employment (in English, French, Dutch or German): copy of the employment contract, information on the currency to be used for remuneration (including benefits in cash or kind), time sheets, proof of payment of the wages).		
BG	<ul style="list-style-type: none"> - Prior notification of the posting. - Information contained in the notification includes among other, information relating to the worker, beginning and end of the posting.. - Obligation to present document to the labour inspectorate: labour contracts, proof of the working time, proof of payment of wages. - Designation of a liaison person. - Designation of a representative. 	- PD A1.	
CY	<ul style="list-style-type: none"> - Prior notification of posting (regardless of the nationality of the posted worker). - Information contained in the notification includes, among other, date of beginning and end of the posting, information on the posted worker. - Changes to information contained in the posting notification must be notified within 15 days. - Before the posting, the residence and working permit of TCNs is verified and approved by the Civil Registry and Immigration 	<ul style="list-style-type: none"> - Prior notification of posting (regardless of the nationality of the posted worker). - Information contained in the notification: information on the sending employer, legal representative of the sending employer, legal representative of the receiving employer, 	

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<p>Department.</p> <ul style="list-style-type: none"> - The Ministry of Labour and Social Insurance may assess the veracity of the information provided in the notification of posting. - Provide information to the inspector in case of control. - Designation of a liaison person. - Designation of a representative. 	<p>place(s) where the services will be provided, information on the undertakings to whom the services will be provided, date of beginning and end of the posting, type of service provided, information on the posted worker.</p> <ul style="list-style-type: none"> - A complementary declaration has to be submitted within 15 days from the occurrence of a change in any of the above information. - The Ministry of Labour and Social Insurance may assess the veracity of the information provided in the notification of posting. 	
CZ	<ul style="list-style-type: none"> - Prior notification of posting (regardless of the nationality of the posted worker) unless the posted worker is an employee in international transport. - Changes to information contained in the posting notification must be notified within ten days. 	<ul style="list-style-type: none"> - Request by the employer of the PD A1. - PD A1 are issued by the Czech authority upon application by the 	<ul style="list-style-type: none"> - If the posting exceeds three days, the posted worker should report his presence to the Police.

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<ul style="list-style-type: none"> - Collection of data on posted workers by the receiving employer such as the address of the worker in the country of residence, number of travel documents, type and place of work, date of beginning and end of the posting. - The receiving employer needs to have a copy of the employment contract translated in Czech. 	<p>employee and the employer together with a verified copy of the employment contract, a verified copy of the PD A1 if this certificate was issued, a verified copy of the contractual documents on the basis of which services are provided in CZ and abroad.</p>	
DE	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the notification includes, among others information relating to the TCN. - Changes to information contained in the posting notification must be notified immediately. - Employers active in the construction sector are required to contribute to the special leave scheme established at national level unless if they are already paying contributions to a similar fund in the sending State with which recognition agreements have been concluded (Belgium, Denmark, France, Italy and Austria). 	<ul style="list-style-type: none"> - PD A1 have to be sent to the Pension Insurance Data Centre which is also storing the certificates for control purposes. 	
DK	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the notification includes among others, information relating to the posted worker (including citizenship). 	<ul style="list-style-type: none"> - PD A1. 	

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<ul style="list-style-type: none"> - Changes to information contained in the posting notification must be notified within the first weekday after the change. - The residence or work permit of TCN posted workers must be sent to the Danish Agency for International Recruitment and Integration if the posting lasts longer than 3 months. 		
EE	<ul style="list-style-type: none"> - Prior notification of the posting. - Information contained in the notification includes, among others, information relating to the posted worker (including citizenship), expected duration of the posting.- Obligation to present documents at the request of the labour inspector (employment contract, PD A1, working time schedule, payslip, residence permit). - Designation of a representative. 	- PD A1.	- Registration of short-term employment by the Police and Border Guard Board.
EL	<ul style="list-style-type: none"> - Prior notification of the posting. - Information contained in the notification includes, among other, expected duration of the posting, information on the posted worker (including citizenship). - Changes to information contained in the posting notification must be notified within 15 days. - Obligation to present documents at the request of the labour inspector. - Designation of a liaison person. - Designation of a representative. 	- PD A1.	- Registration of their residence if the posting lasts more than three months.

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
ES	<ul style="list-style-type: none"> - Prior notification of the posting. - Information contained in the notification includes, among other, the expected start and end of the posting, information on the posted worker (including citizenship). - Designation of a representative. - Designation of a liaison person. 	<ul style="list-style-type: none"> - PD A1. 	<ul style="list-style-type: none"> - Employers are required to keep and present in case of control the document proving the legality of the work of TCN. - Employers posting workers in the construction sector are required to register on the Registry of Accredited Companies in the region where the receiving employer is located.
FI	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the notification includes, among other, information about the posted worker (including citizenship). - For the construction sector: information about the builder. - For the road transport sector for posting based on a subcontract: the number of the Community license issued to the transport operator, details of the transport manager, personal data of the driver, date of beginning of the driver's employment contract and the legislation governing the contract, the planed starting and ending dates of the shipment, details of the vehicles used, details on the type of service (goods, passengers, international transport, cabotage). - Obligation to have a representative in Finland except if the posting lasts maximum ten working days or if the posting in the road 	<ul style="list-style-type: none"> - PD A1 or the worker needs to be insured by the Finnish social security legislation. 	<ul style="list-style-type: none"> - Application for a tax number if the work is conducted on construction site or on a shipyard. - Tax number is issued only after the worker has been given a Finnish personal ID.

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<p>transport is based on a subcontract.</p> <ul style="list-style-type: none"> - Obligation to keep available during the posting information in the posting company, information on the posted workers, statement of the employment conditions, statement on the grounds for the posted workers' right to work, working hours register, payment calculation and receipt of paid wages. - Changes to information contained in the posting notification must be notified immediately. 		
FR	<ul style="list-style-type: none"> - Prior posting notification (applicable regardless of the nationality). - The prior notification does not apply: for posting of maximum 90 days within 12 consecutive months for artists, athletes, referees, team supporting or linked to the work of athletes, apprentices in a situation of temporary mobility. - Information contained in the posting notification includes, among other,, information relating to the posting worker (including citizenship). - Designation of a representative in France. - Contribution of employers activity in the construction and entertainment sectors to the paid leave funds set up for these professions. - Employers in the construction sector must also contribute to additional funds (the bad weather insurance fund and the national fund for enterprises in public work). 	<ul style="list-style-type: none"> - PD A1. 	<ul style="list-style-type: none"> - For the construction sector: the employer must request a BTP permit and declare each worker with the organisation managing the permits.

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<ul style="list-style-type: none"> - Companies in the construction sector established in DE, AT and IT are exempt from this requirement but they must declare the affiliation of their workers to national funds. - Obligation to present documents to the Labour Inspector (effective payment of workers, timesheets, attestation of equivalent medical exam in the sending country, documents showing the real and substantial activity of the company in the sending State). 		
HR	<ul style="list-style-type: none"> - Prior posting notification. - Changes to information contained in the posting notification must be notified within three days. - Information contained in the posting notification includes, among other, date of beginning and end of the posting, number of workers posted to HR and number of posted TCNs, information on the posted worker (including citizenship), if the posted worker is a TCN working in the sending State based on a work permit information must be provided about the work permit and the sending employer must confirm the legality of the employment of the TCN. - Presenting documents to the labour inspector by the person designated. This includes for TCNs work permits or documents proving that the TCN is legally employed in the sending State. - Designation of a liaison person in HR. 	<ul style="list-style-type: none"> - PD A1. 	<ul style="list-style-type: none"> - S1 form to be requested from the healthcare authority in the sending State to enable the worker to have access to healthcare during the stay in HR.
HU	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the posting notification includes among 	<ul style="list-style-type: none"> - When the posted worker is sent from Hungary, the employer has to supply 	

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<p>others the expected number of posted workers, planned duration of the posting.</p> <ul style="list-style-type: none"> - Declaration and reporting obligations of the sending employer. - Designation of a liaison person. - Designation of a representative. 	<p>data to determine the legislation applicable: information on the sending employer, information on the posted worker, identification number of the sector of activity, information on the receiving company, planned duration of posting.</p> <ul style="list-style-type: none"> - The Hungarian sending employer has to provide a statement showing that: the employee was eligible for healthcare services for at least 30 consecutive days immediately before the posting, it guarantees to keep the posted worker employed during the posting period, it guarantees to fulfil contribution obligations during the posting period, it guarantees that the employee is posted for reasons other than to 	

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
		<p>replace a worker previously posted, guarantees to provide employment to the worker following the period of posting...</p> <p>- The sending employer has to disclose information to provide that it is engaged in significant economic activities in HU.</p>	
IE	<ul style="list-style-type: none"> - Prior posting notification. - Information contained in the posting notification includes among other, anticipated number of posted workers, planned duration of posting, information relating to the worker (including citizenship) if the worker is a TCNs details of the employment permit if applicable. - Keep information on the posted worker at one place and make the documents available in case of control (payslips, contract of employment, terms of employment, time sheets, proof of payment of wages). - Designation of a liaison person. 	- No additional rules applicable for TCNs.	- Registration with the Irish immigration authorities within 90 days .
IT	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the posting notification includes among other, information on the posted worker (including citizenship), 	- PD A1.	

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<p>duration of the posting.</p> <ul style="list-style-type: none"> - Changes to information contained in the posting notification must be notified within five days. - Designation of a liaison person. - Keep information relating to the employment contract, pay slips, proof of the payment of wages... - Designation of a representative. - Exchange of information for workers posted from IT through a module which links the employer and the public authorities (start date of the employment relationship, date of termination of employment, type of contract, working hours, collective agreement applied, wage, social security institution...) 		
LT	<ul style="list-style-type: none"> - Prior notification of posting if the posting is longer than 30 days or if the worker is active in the construction sector. - Information contained in the notification includes among other, information about the posted worker - Lithuanian employers hiring foreigners must submit a report to the Employment Service and the State Labour Inspectorate before the starting date of the posting. - Information contained in the report: information relating to the Lithuanian company, information on the posted foreigner (including citizenship), information about the posting, guarantees applying to posted workers (maximum duration of work, duration of rest, 	<ul style="list-style-type: none"> - PD A1. 	<ul style="list-style-type: none"> - Registration of residence by the local authorities.

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<p>vacation, wages...)</p> <ul style="list-style-type: none"> - Changes to information contained in the posting notification must be notified within one working day. - For the transport sector: before the posting carriers must submit a posting declaration to the Member State to which the driver will be posted, carriers must register posted driver in the IMI system. - During the posting drivers must have a copy of the declaration of posting, a proof of transport operation carried out in the receiving Member States and tachograph records. - Designation of a representative. 		
LU	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the notification includes among other, expected duration of posting, information about the posted worker (including citizenship), copy of the residence permit or residence certificate for TCNs. - Designation of a representative in LU. - Designation of a liaison person. 	- PD A1.	- Registration of TCNs within three days at the municipality of residence (for EU citizen the obligation to register only apply when the duration of the posting exceeds three months whereas for TCN posted workers this obligation applies regardless of the duration of the posting).
LV	<ul style="list-style-type: none"> - Prior notification of the posting. - Information contained in the posting notification includes among other, information relating to the posted worker (including citizenship), anticipated duration of posting. 	- PD A1.	

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<ul style="list-style-type: none"> - Designation of a representative. - Presenting documents during inspections. 		
MT	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the posting notification includes among other, anticipated number of posted workers, information relating to the posted worker (including citizenship), anticipated duration of posting. - Making available documents in case of inspection. - Designation of a liaison person. 	<ul style="list-style-type: none"> - PD A1. 	
NL	<ul style="list-style-type: none"> - Prior notification of posting. - The notification specifies that the posted worker is a TCN. - Designation of a liaison person. - Obligation to have certain documents available at the workplace: contracts, payslips, summaries of working hours, PD A1, proof of payment. - Obligation to provide information to the Labour Authority. 	<ul style="list-style-type: none"> - Keeping available evidence of the contribution of social security of the posted worker. 	
PL	<ul style="list-style-type: none"> - Prior notification of the posting. - Information contained in the posting notification includes among other, date of posting, information relating to the posted worker (including citizenship). 	<ul style="list-style-type: none"> - PD A1. 	

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<ul style="list-style-type: none"> - Changes to information contained in the posting notification must be notified within seven days. - Designation of a liaison person. - Keep document relating to the employment - Provide documents relating to the employment of the posted worker in case of control. 		
PT	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the posting notification includes among other, information relating to the posted worker, expected duration of the posting. - Keep copies of employment contract, proof of payment, record of working time... - Designation of a liaison person. - Provide required documents in case of control. 	<ul style="list-style-type: none"> - PD A1. - If the posting lasts longer than 24 months, the sending employer must ask an exception agreement for the posted worker to remain subject to the legislation of the sending State (demonstration that the work in PT is only temporary). 	<ul style="list-style-type: none"> - Declaration of entry should be submitted to national authorities within three days after entering PT.
RO	<ul style="list-style-type: none"> - Prior notification of the posting. - Information contained in the posting notification includes among other, information relating to the posted worker (including citizenship) anticipated duration of the posting. - Changes to information contained in the posting notification must 	<ul style="list-style-type: none"> - PD A1. - Information which have to be submitted in order to obtain the PD A1 include the certificate regarding the contribution for the last 	

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<p>be notified within five days.</p> <ul style="list-style-type: none"> - Designation of a liaison person. - Designation of a representative. 	<p>12 months issued by the Country Pension House.</p>	
SE	<ul style="list-style-type: none"> - Prior posting notification. - Information contained in the posting notification includes among other, information relating to the posted worker (including citizenship), - Changes to information contained in the posting notification must be notified within three days. - Obligation to present documents in case of control. - Designation of a liaison person. 	<ul style="list-style-type: none"> - PD A1 must be submitted to the Social Insurance Agency. 	
SI	<ul style="list-style-type: none"> - Legal requirements to be posted to SI: valid A1 form, in the last three years the employer has not been issued with a fine for an infringing provision on posting of workers in SI, the services provided are within the scope of activities for which foreign employers are registered in their home country, the services are provided in one of the permitted ways and evidenced by a signed posting agreement. - Prior notification of posting. - Information contained in the posting notification includes among other, certificate of registration of the commencement of posting, number of posted workers, duration of the posting, information 	<ul style="list-style-type: none"> - PD A1. 	<ul style="list-style-type: none"> - Registration of their temporary residence.

MS	Employment-related administrative requirements	Social-security related administrative requirements	Other administrative requirements
	<p>about the posted workers (including citizenship).</p> <ul style="list-style-type: none"> - Documents relating to posting should be kept at the place of posting (employment contract, payslips, attendance records...) - Designation of a liaison person. 		
SK	<ul style="list-style-type: none"> - Prior notification of posting. - Information contained in the posting notification includes among other, estimate number of posted workers, information relating to posted workers (including citizenship), dates of beginning and end of posting, place of work. - Keeping at the place of work an employment contract or other documents confirming the employment relationship (record of the working time, evidence of the wages paid...) - Obligation to provide the documents to the labour inspectorate upon request. - For workers posted in the field of road transport, a uniform form is available online. - For posted workers in the field of road transport, obligation to keep during the posting: copy of the notification of posting, document confirming that the transport services are performed in SK, tachograph records. - Designation of a liaison person. - Notification of the end of the posting. 	<ul style="list-style-type: none"> - PD A1. 	<ul style="list-style-type: none"> - TCNs must report their entry on the territory within three working days and specify the start, location and expected duration of the stay. - Employer is obliged to notify the authorities of the beginning and the end of the posting of workers within seven working days from the date of commencement of the posting. - In case of TCN, the notification must be accompanied by a copy of the employment contract and the documents authorizing his entry on the territory of SK.

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