

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

1. INTRODUCTION

The free movement of persons and services has brought many advantages for European citizens, businesses and the economies of Member States as a whole. Intra-EU mobile workers, including non-EU citizens that may legally reside and work in the Union, make up an essential part of the European workforce. They make an important contribution to our economies. In addition, free movement contributes to the competitiveness of the single market. This is something the Union should treasure.

But next to its advantages, labour mobility also brings challenges. This is also acknowledged by Enrico Letta in his report “Much more than a market”. As Letta states: “One of the downsides of free movement is that it can be used to undermine or evade existing labour standards and regulations in order to gain a competitive advantage over bona fide companies. Posted third country nationals (TCNs) are a vulnerable group who run a higher risk of unfair, unhealthy and unsafe working conditions.”

In that regard, we welcome that the mission letter for the Executive Vice-President for Social Rights and Skills, Quality Jobs and Preparedness, Mrs. Roxana Mînzatu, mentions the need for proper enforcement of labour mobility rules, with the support of the European Labour Authority (ELA). However, in our view, the ambition of the mission letter should be translated into more concrete actions to foster fair labour mobility in the EU. Therefore, we call upon the European Commission to come up with a concrete proposal to clarify the legal framework on the posting of TCNs.

Currently, there is no legislation specifically on the posting of TCNs. The posting of TCNs in the Union is mainly based on an interpretation of the freedom to provide services¹ in the *Van der Elst* judgement (C-43/93) and subsequent case law². The ECJ has based its judgements on the fact that “the matter relating to the posting of workers who are nationals of non-Member States in the framework of the cross-border provision of services has so far not been harmonized at European Union level³”.

According to the ELA-report on the posting of third country nationals⁴, the posting of TCNs from one Member State to another by cross-border service providers is a growing phenomenon across the whole EU. It appears as an alternative to the traditional avenues of migration to and between EU Member States. This phenomenon, and the consequences it brings, is an unforeseen side effect of the free movement of services following from EU case law and was not taken into consideration when designing the internal market. This case law is interpreted very differently across Member States.

This leads, as pointed out by Letta, to challenges for posted TCNs. Even though posted TCNs are covered by the posting legislation and the EU social security coordination laws, national legal frameworks regarding the conditions for the posting of TCNs beyond the requirements set out in EU legislation may vary considerably across Member States. TCNs are more likely to be exposed to social dumping, labour exploitation, poor or no social security coverage and similar phenomena. Due to cross-border issues, but also selected business models, national sanctions may be less effective, as

¹ As enshrined in Article 56 of the Treaty on the Functioning of the European Union.

² See ELA report referred to in footnote 4. The judgement in C-540/22 was handed down after the report. The judgement gives some clarification on possible control measures but it does not contribute to solving the fundamental challenge.

³ See for instance C-91/13 (Essent), paragraph 49.

⁴ <https://www.ela.europa.eu/en/news/cooperation-posting-third-country-nationals-ela-releases-new-report>.

In this report statistical information illustrating the growing numbers of posted TCNs can be found (page 91 and further).

they are practically difficult to enforce. This leads to a distortion of competition and puts companies playing fair at a disadvantage.

Moreover, it is difficult to reach this group of workers. Their right to stay in the Union will, on a practical level, very often depend on the continuation of their posting. TCNs are not always aware of their rights or in a position to invoke their rights. TCNs are often victim of unfair recruitment practices by intermediaries or temporary employment agencies.⁵ This is unworthy of the EU and at odds with our European values. Degrading situations do not belong here. We need to ensure decent working conditions for all workers. Consequently, concrete measures are needed to enable workers to enforce their rights. This requires that TCNs know their rights. Therefore, EU-wide advisory structures need to be set up in the Member States, close to the workers.⁶ Better information and counselling will enable posted workers to assert their rights. At the same time, it is necessary to intensify (cross-border) enforcement of labour mobility rules.

2. A clear legal framework on the posting of TCNs

There is a need for a **clear legal framework**, as also stated by Letta. This could be done by putting in place a new, specific, directive on the posting of TCNs. A new, specific, directive on the posting of TCNs is also suggested in the ELA-evaluation carried out by Belgium during its Presidency.⁷

Legal clarity about the conditions that have to be fulfilled in order to consider the posting of TCN workers as legal, is needed. An important question is whether TCNs are genuinely posted from the Member State in which they are employed to another Member State, or employed only with the intention of working in the other Member State. Another question is whether the “sending” service provider actually carries out activities in the Member State of first entry or is just a letterbox company and how this can be monitored. In this regard, concepts from the case law such as “**lawfully and habitually employed**”, “**carrying on their main activity**”, “**do not seek access to the labour market of the receiving Member State**” are not sufficient to impose enforceable requirements on the posting of TCNs and need to be clarified and codified.

A new, specific directive should at least include a clear definition of “lawfully and habitually employed” and address the temporary nature of posting. Additionally, the duration of the employment contract must exceed the period of posting. A synchronism of both is a strong indication for an abuse of the posting rules with the aim of circumventing the national labour migration rules.

We invite the European Commission to present an initiative for a **clear legal framework** on the posting of TCNs that would clarify under which conditions TCNs can be posted, and that includes guarantees for safeguarding of their rights together with strengthening their position to invoke their rights, and provides for effective control and enforcement measures. Providing legal clarity contributes to a level playing field among companies, combats social dumping and protects TCNs against abuse and exploitation while safeguarding the competitiveness of the single market. Measures to ensure the temporary nature of postings could also contribute to reducing the phenomenon of “brain drain” and prevent poaching of workers in the host country. Finally, a clear legal framework could facilitate enforcement of applicable legislations. A new directive would go hand in hand with increased focus on cross border enforcement (cooperation), supported by, inter alia, ELA⁸.

⁵ <https://www.adviesraadmigratie.nl/publicaties/publicaties/2024/03/13/adviesrapport-geen-derderangsburgers.-de-risicos-voor-gedetacheerde-arbeidsmigranten-en-de-nederlandse-samenleving>, on this website a summary in English “Third-class citizens by posting practices” is available.

⁶ Existing structures that already provide this support can be utilized.

⁷ https://belgian-presidency.consilium.europa.eu/media/nvenvc42/report_ela_eu2024be.pdf, page 123.

⁸ And through bilateral and multilateral agreements, aligned with the practices and preferences of Member States.