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► **To cite this version:**

Marco Rocca, Frederic de Wispelaere. Posting of workers and the border of the labour market. European labour law journal, 2022, 14 (1), 10.1177/20319525221127715 . hal-03871074

HAL Id: hal-03871074

<https://hal.science/hal-03871074>

Submitted on 25 Nov 2022

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Posting of workers and the border of the labour market

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ABSTRACT

Drawing on research conducted by the authors in the framework of the POSTING.STAT research project, this article explores the legal fiction that posted workers do not, at any time, “gain access” to the labour market of a host State where they are in fact (temporarily) working. Hence, it analyses following question: at what point and under which circumstances are posted workers considered as working in a given Member State? To do so, it considers the use of the concept of “labour market” across the case law of the Court of Justice concerning posting workers, to identify the constitutive elements of the implicit definition adopted by the Court. This analysis is compared with economic/statistical assumptions applied when measuring employment in a country. From a statistical point of view, the labour market appears to be demarcated by the place of establishment of the employer, thus excluding work (i.e., services) carried out through non-established employers. Consequently cross-border labour mobility by the freedom to provide services do not fall within these boundaries and makes that posted workers are counted in the employment statistics of their Member State of origin. The approach to posted workers in the labour market of the host country is therefore not only a legal but also a statistical/economic fiction. Based on an empirical reality that shows a strong concentration of posted workers in certain sectors, Member States or regions, we argue that courts and legislators, but also national statistical offices, should reconsider this approach.

1 INTRODUCTION

More than 30 years ago, in its well-known decision in the *Rush Portuguesa* case, the Court of Justice of the EU (CJEU) distinguished the situation of posted workers from the one of “standard” mobile workers because the former “return to their country of origin after the completion of their work *without at any time gaining access to the labour market of the host Member State*” (our emphasis).¹ This statement elicited the somewhat indignant reaction of Pierre Rodière, who commenting the case wrote: “This must be a dream! Of course the French labour market is influenced by the fact that activities are performed in France while escaping its regulations” (our translation).² It was also a matter of numbers, continued Rodière: “Let’s imagine that a vast number of companies, established outside France, would easily obtain contracts for the provision of services in its territory and do so by

¹ CJEU, Case C-113/89, *Rush Portuguesa Lda v Office national d’immigration*, 27 March 1990, §15. See M. HOUWERZIJL and L. BERNTSEN, Posting of Workers: From a Blurred Notion Associated with ‘Cheap Labour’ to a Tool for ‘Fair Labour Mobility’?, in N. Lillie and J. Arnholtz (eds.), *Posted Work in the European Union. The Political Economy of Free Movement*, Routledge, 2020, 148.

² P. RODIERE, “Note sur arrêt du 27 mars 1990 société rush Portuguesa lda c. office national de l’immigration”, *Revue trimestrielle de droit européen*, 1990, vol. 26, no. 3, 637.

posting their workers. Would this have no impact on the French labour market? Maybe that is true for sixty people; what about a thousand or more?” (our translation).³

Thirty years later, a period characterised by heated debates around posting of workers, by several controversial court cases, and even by an amendment of the Posting of Workers Directive (PWD),⁴ this legal approach still lies at the heart of the legal framework for posting in the EU,⁵ not only in determining the terms and conditions of employment, but also where social contributions have to be paid.⁶ The idea that posting involves ‘workers without footprints’ who do not access the labour market of the host Member State (i.e., a cross-border labour market)⁷ has been labelled a ‘legal fiction’ by Hayes and Novitz.⁸ Therefore, the present article explores the relationship between the labour market of the host Member State and posted workers, looking both at the different ways in which the case law of the CJEU has dealt with this relationship and at the ways in which the labour market is defined (and its border identified) when dealing with the economic dimension of posting. The goal of our analysis is to compare how economic/statistical descriptions of labour markets and the law answer the question: at what point and under which circumstances are posted workers considered as working *in a given Member State*?

In exploring this question, we are driven by the finding that both approaches are in fact similar in the way they are currently settled: most posted workers are considered to be outside the labour market of the host Member State. We believe that recent empirical research on the impact of posting of workers on the labour market of the Host State⁹ call into question this assumption. Beyond its impact

³ *Ibidem*, 638.

⁴ Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. For an analysis of the amended Posting of Workers Directive see for instance, F. BJELINSKI and K. ŽERAVČIĆ, ‘Posted Workers in the EU: Lost Between Conflicting Interests and Single Market Objectives’, *Croatian Yearbook of European Law & Policy* 2020; D. CARTER, “Equal Pay for Equal Work in the Same Place? Assessing the Revision to the Posted Workers Directive”, *Croatian Yearbook of European Law & Policy* 2018; M. BOTTERO, “Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition”, *Bulletin of Comparative Labour Relations*, vol. 18, Kluwer, 2021; R. PATRU, ‘Discussions on New EU-Wide Regulations on the Posting of Workers - Special Consideration for Directive (EU) 2018/957 Amending Directive 96/71/EC on the Posting of Workers in the Framework of the Provision of Services’, *Juridical Tribune*, vol. 9, no. 1, 157.

⁵ See even recently, CJEU, Case C-626/18 *Poland v European Parliament and Council*, §117: “As regards the extent to which the situation of posted workers is said to be characterised by the fact that their stay in the host Member State is temporary *and that they are not integrated into the labour market of that State*” (our emphasis).

⁶ Posted workers remain covered by the legislation of the ‘sending’ Member State (Art. 12 of Regulation 883/2004 of 29 April 2004 on the coordination of social security systems), what is an exception to the *lex loci laboris* principle.

⁷ According to De Gijssel and Janssen, a ‘cross-border labour market’ exists if “the national labour markets of two adjacent countries are connected in a way that firms and/or workers of one country enter the labour market of the other country”. See P. DE GIJSEL and M. JANSSEN, “Understanding the Dutch-German cross-border labour market: are highly educated workers unwilling to move?” *Tijdschrift voor economische en sociale geografie*, 2000, vol. 91, no. 1: 62.

⁸ L. HAYES and T. Novitz, “Workers Without Footprints: The Legal Fiction of Migrant Workers as Posted Workers”, in B. RYAN (ed.), *Labour Migration in Hard Times: Reforming Labour Market Regulation*, Institute for Employment Rights, Liverpool, 2013. In a similar vein, Ines Wagner speaks of “workers without borders”, see I. WAGNER, *Workers without Borders - Posted Work and Precarity in the EU*, ILR Press, 2018.

⁹ Mainly based on statistical evidence collected in the framework of the POSTING.STAT research project. This project brought together a consortium of universities and research centres from 10 different Member States to increase the evidence basis through the collection and analysis of national microdata. The geographical scope of the project covered the six main ‘sending’ Member States (Germany, Poland, Italy, Spain, Slovenia and

in terms of policymaking, we argue that looking at both aspects together allows for a better understanding of the very meaning of the concept of “labour market” when this is used by legal actors. It is also worth stressing that, while our reflection focuses on posting of workers in the EU context, its relevance might extend to the whole legal organisation of temporary labour migration in the context of services. Indeed, the wording used in the Annex of the ‘General Agreement on Trade in Services’ (GATS) on the movement of natural persons supplying services under this agreement (GATS mode 4)¹⁰ shows strong similarities with the CJEU case law, stating that “This agreement is *not concerned with natural persons seeking access to the employment market of a Member*, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis” (our emphasis).¹¹

Furthermore, the question of deciding at what exact point a person has actually crossed a *legal* border is part of a broader reflection on the nature of modern borders. In the words of Ayelet Shachar, modern borders are “shifting”.¹² The fact of physically crossing a geographical border is less and less connected with legal consequences, as the legal border can expand or contract depending on the migration policy pursued by a given country (or regional bloc). While it does not manifest itself in the form of allowing or forbidding the access to a country, the shift of the border in the context of posting entails that workers who are physically performing their activities in a Member State are excluded from the application of its regulations, apart from the exceptions enumerated under the PWD, and, as per the words of the CJEU, assumed to be outside of its labour market. This tension between the spatial and the legal dimension of posting leads to what has been called the dis-embedding of labour markets, that is, the ability of firms of not applying (some or all) local norms and regulations.¹³

This approach has potentially strong implications on the “transnational social protection” of posted workers, covering initiatives of (group of) states, markets, civil society and social networks which provide for social protection across national borders.¹⁴ Moreover, it fosters differences in terms of transnational social protection with groups of mobile workers who make use of their freedom of movement under Article 45 TFEU (e.g., movers of working age, frontier workers, seasonal workers) and that are considered to be part of the labour market of the host Member State. After all, the consequence of this position of the CJEU is that the question of what protection under labour law can be invoked by posted workers must be answered in the light of the principles underlying the free movement of services, in particular the right of their employer to provide services temporarily in

Luxembourg) and the six main ‘receiving’ Member States (Germany, France, Belgium, Austria, the Netherlands and Luxembourg) of posted workers. For more information, see

<https://hiva.kuleuven.be/en/news/newsitems/posting-stat-enhancing-collection-and-analysis-national-data-on-intra-eu-posting>

¹⁰ The General Agreement on Trade in Services (GATS) is a treaty of the World Trade Organisation (WTO) that entered into force in 1995. All members of the WTO are parties to the GATS. Under the General Agreement on Trade in Services (GATS), services can be traded internationally in four different ways - known as the four modes. Mode 1: cross-border supply; Mode 2: by an established affiliate abroad; Mode 3: commercial presence; and Mode 4: presence of natural persons.

¹¹ https://www.wto.org/english/tratop_e/serv_e/8-anmvnt_e.htm

¹² A. SHACHAR, *The shifting border: Legal cartographies of migration and mobility*, Manchester University Press, 2020.

¹³ I. WAGNER and N. LILLIE, *European Integration and the Disembedding of Labour Market Regulation: Transnational Labour Relations at the European Central Bank Construction Site*, *Journal of Common Market Studies*, 2013, 1-17.

¹⁴ P. LEVITT, J. VITERNA, A. MUELLER and C. LLOYD, “Transnational social protection: setting the agenda”, *Oxford Development Studies* 2017, vol. 45, no. 1, p. 6. See also R. SABATES-WHEELER, ‘Social security for migrants: Trends, best practice and ways forward’, *ISSA Working Paper* 2009, no. 12, Geneva, ISSA.

another Member State without hindrance.¹⁵ In this legal context, the application of the labour law of the host country can be considered as a barrier to the exercise of the free movement of services. However, the CJEU did not exclude the possibility that posted workers might be subject to certain provisions of the labour law of the host Member State. The ramifications of this assumption extend beyond the application of labour and social rights. Indeed, the *legal* assumption that posted workers are not part of the labour market of the Host State, shows strong similarities with the *economic/statistical* assumption applied when measuring domestic employment in a country. Here too, posted workers are considered to be outside the labour market of the host country and are counted in the employment statistics of the country of origin. As we will show later in this article, this may lead to the misrepresentation of the size of economic sectors characterised by an important presence of outgoing or incoming posted workers.

A labour market refers to the supply of and demand for labour, in which workers provide the supply and employers provide the demand. Labour markets can be conceived as “external” or “internal”. The former indicates the (theoretical) market where the interaction between employers and employees leads to the exchange of labour power for remuneration, hence determining the price of labour. Labour markets can also be internal labour markets, covering the determination of the price of labour inside a given firm or undertaking,¹⁶ Considering how the CJEU in *Rush Portuguesa* referred to “gaining access to the labour market of the host Member State”, in the context of this article we are mainly concerned with the external labour market. From a European perspective, a distinction should also be made between the ‘single European labour market’ and the 27 individual national labour markets in the EU. As stated by Mussche et al.¹⁷ the single European labour market¹⁸ has traditionally been conceived exclusively in terms of the free movement of workers, not taking into account the free movement of services. The question arises to what extent this thinking has also determined the boundaries of local labour markets. In the case of intra-EU posting, this comes down to the question whether the supply of services in the host country can be equated with the supply of labour. Indeed, compared to other types of labour mobility, intra-EU posting is strongly employer-driven as it entirely depends on the decision of the posting undertaking to provide cross-border services. Consequently, the EU legal framework makes it so that posted workers enter the economy of the host country through the foreign service provider invoking Article 56 TFEU.

The rest of this article is structured as follows. *Section 2* explores several concepts and methods used by economists/statisticians to delineate ‘cross-border labour mobility’ as well as ‘the labour market’ of a country. This in the abovementioned perspective of identifying the borders of such market and how a mobile worker can ultimately fall inside or outside its scope. *Section 3* considers EU legislation and the case law of the CJEU, to assess how the law defines the various degrees of connection between a posted worker and the Host State labour market. Finally, *Section 4* presents our conclusions as to the possible ways in which the border of the labour market could be conceptualise in a way conducive to the improvement of the application of the legal framework for posting. In this context we will also sketch some possible consequences of the application of such an approach.

¹⁵ H. VERSCHUEREN, “Detaching binnen de Europese Unie: The story goes on”, *Revue de droit social / Tijdschrift voor sociaal recht*, no. 4, 2021, p. 646; P. davies, “Case C-346/06, Ruffert v. land niedersachsen [2008] irlr 467 (eCJ)”, *Industrial Law Journal*, vol. 37, no. 3, 2008, pp. 293–295.

¹⁶ M. DIAS-ABEY, “Determining the Impact of Migration on Labour Markets: The Mediating Role of Legal Institutions”, *Industrial Law Journal*, 2021, vol. 50, no. 4, 537.

¹⁷ N. MUSSCHE, V. CORLUY and I. MARX, ‘How posting shapes a hybrid single European labour market’, *European Journal of Industrial Relations* 2018, vol. 24, no. 2.

¹⁸ Although it is perhaps better to speak of 27 ‘cross-border’ labour markets.

2 IN OR OUT? LOOKING FOR THE BORDER OF THE LABOUR MARKET FROM A STATISTICAL POINT OF VIEW

Labour markets are subject to macro-economic changes (see for instance the impact of the financial and economic crisis in 2008, and more recently the impact of the COVID-19 pandemic). Delineating labour markets according to national borders prevents national economies from replying efficiently to these macro-economic changes. In essence, having intra-EU mobility allows national labour markets to balance labour supply and labour demand, by filling skill needs which cannot be satisfied at national level and by moving labour from a Member State where labour demand is low to a Member State where it is high. These movements, and hence corrections/changes, between labour markets can occur not only through typical forms of labour mobility but equally through the provision of services. Although the latter does not seem to be perceived as such, reflected in how this group is considered in national employment statistics, as analysed below, as well as, for example, in the economic theory regarding the capacity of labour mobility to cope with an economic shock.¹⁹

Roughly 10 million EU citizens of working age are living in another Member State than their Member State of citizenship, representing about 3.8% of the total working-age population in the EU.²⁰ However, cross-border labour mobility in the EU cannot be narrowed to persons of working age residing in a Member State other than the Member State of birth/citizenship. After all, the number of EU citizens working in another Member State increased significantly since the enlargement of the EU in 2004, not only through traditional channels of cross-border labour mobility but also through various forms of temporary cross-border labour mobility. All these forms reshaped the labour market of the countries of origin and of the host countries. Moreover, as stated by the United Nations Economic Commission for Europe (UNECE) the concept of ‘international labour mobility’ includes “all movements of natural persons from one country to another for the purpose of employment *or the provision of services*” (our emphasis).^{21,22} This comprehensive definition does not make a statement about the frequency and duration of the employment abroad nor it makes, from a European law perspective, a distinction between movements based on the free movement of workers (Article 45 TFEU), the freedom of establishment (Article 49 TFEU)²³ or the freedom to provide services (Article 56 TFEU).²⁴ Consequently, this term, and thus cross-border labour mobility in the EU, does not only cover ‘permanent’ cross-border mobility or cross-border commuting but also all types of ‘temporary’ cross-border labour mobility such as seasonal work, circular labour mobility and posting of workers. Highly mobile workers as well as workers on a business trip, i.e. workers who usually stay in another Member State for a (very) short period, also fall within the scope of this definition. Posting of workers

¹⁹ Economists tend to narrow the discussion on the role of labour mobility in the EU as an adjustment mechanism to mere labour migration. Yet, this seems to be one of the least suitable forms of labour mobility, in contrast to intra-EU posting (for more information, see e.g. F. DE WISPELAERE, *Intra-EU labour mobility as adjustment mechanism for the economic shock caused by the COVID-19 pandemic: wishful thinking or a serious option?*, *HIVA Working Paper 2020*).

²⁰ E. FRIES-TERSCH, E. HASSAN, M. JONES, and L. SIOLAND, *Annual Report on Intra-EU Labour Mobility 2021*, Network Statistics FMSSFE, on behalf of DG EMPL.

²¹ UNECE, *Measuring International Labour Mobility*, Geneva, 2018

²² However, as pointed out by Martin: “GATS Mode 4 discussions often seem to be divorced from much of the international labor migration that is occurring.” See P.L. MARTIN, *GATS, Migration, and Labour Standards, Discussion Paper DP/165/2006*, Geneva, International Institute for Labour Studies, 2006.

²³ For our discussion, the freedom of establishment is relevant in the specific context of self-employed persons moving to a different Member State to establish there their activity.

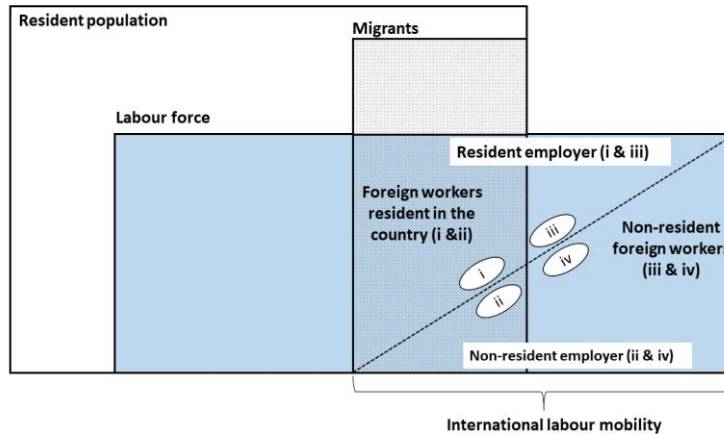
²⁴ We refer to the freedom to provide services inasmuch as it covers the activity of posting of workers.

represents one of the main channels of temporary labour mobility in the EU: based on 2019 data from the prior notification tools, it can be estimated that there were around 2 million posted workers and 5.8 million postings in the EU.²⁵ However, quantifying the extent of all these forms of temporary cross-border labour mobility, which is an extremely challenging task,²⁶ is beyond the scope of our ambitions for this article. For the purposes of the present article, our aim is limited to identifying which forms of cross-border labour mobility are counted in the employment statistics of the host country. This as an indicator of how broad or narrow the labour market of a given country is delineated in economic/statistical terms.

Three parameters are crucial in defining and measuring the forms of cross-border labour mobility: 1) the place of residence of the mobile worker, 2) the place of establishment of the employer, and 3) the place of employment of the mobile worker. The combination of the place of residence of the mobile worker with the place of establishment of the employer yields four groups (see Figure 1):

- I. foreign workers resident in the host country who have an employment relationship with an employer established in the host country (e.g. the ‘EU mover’);
- II. foreign workers resident in the host country who have an employment relationship with an employer not established in the host country (e.g. long-term posting);
- III. non-resident foreign workers who have an employment relationship with an employer established in the host country (e.g. frontier workers or seasonal workers);
- IV. non-resident foreign workers who have an employment relationship with an employer not established in the host country (e.g. short-term posting or business trips).

Figure 1 Measuring the domestic concept of employment: cross-border labour mobility in relation to the place of residence of the population and the place of establishment of the employer



Source Adjusted figure based on UNECE, *Measuring International Labour Mobility*, Geneva, 2018; STATISTICS AUSTRIA, ‘Labour Mobility’, *UNECE Working Paper Series on Statistics*, 2017.

One would assume that the place of employment of the worker has the upper hand in deciding in which country the worker is employed from a statistical point of view. However, this is not the case in practice. The place of establishment of the employer is currently decisive in determining which forms of cross-border labour mobility are or are not included in the employment statistics of a given country.

²⁵ F. DE WISPELAERE, L. DE SMEDT and J. PACOLET, *Posting of workers - Collection of data from the prior notification tools - Reference year 2019*, Network Statistics FMSSFE, on behalf of DG EMPL.

²⁶ E.g., “National statistical systems have difficulties providing information on short-term movements, especially if both workers and employers are non-residents in the compiling country.” See STATISTICS AUSTRIA, ‘Labour Mobility’, *UNECE Working Paper Series on Statistics*, 2017.

Indeed, in the ‘domestic concept’²⁷ of employment as defined by the ‘system of national accounts – SNA 2008’^{28,29} and the ‘European system of national and regional accounts - ESA 2010’³⁰, the territory of the ‘resident production unit’ (i.e., ‘the resident employer’) is the criteria for counting employment. Consequently, employment in a country as defined by the ‘domestic concept’ includes (only) those persons who were paid during the reference period by an employer established in that country. So only the forms of labour mobility under *groups I and III*, that is, those who have an employment relationship with a resident employer, will be added to the group of local workers. As a result, employment provided by (non-) resident workers on behalf of non-resident employers, and thus covering labour mobility by the freedom to provide services (*groups II and IV*) is not taken into account.³¹ Therefore, the flow of incoming and outgoing flows of posted workers does not have any impact on the calculation of employment, neither in the sending Member State nor in the receiving Member State. Posted workers continue to be counted in the Member State where the employer is located (i.e., the ‘sending’ Member State), despite the fact that they are actually working in another Member State (i.e., the ‘receiving Member States’) at that moment. This “methodological nationalism” prevents to fully grasp the reality of cross-border labour markets.³²

Compared to other types of labour mobility, intra-EU posting is strongly employer-driven as it mainly depends on the decision of the posting undertaking to provide cross-border services.³³ In that regard, intra-EU posting is closely linked to the export of services as this may require the physical presence of posted workers. ESA 2010 defines ‘employees’ as “persons who, *by agreement*, work for a resident institutional unit and receive remuneration for their labour”. In case of posting of workers there is no employer-employee relationship, and thus no employment contract, with the ‘client’ established in the host country. As a result, these workers will be counted as employees in the country in which the employer is established. Their activities will be considered as imports of services by the country in which the work is being done, and as exports of services in the country in which the posting undertaking is established. These activities, based on a service contract, fall under *GATS mode 4* and refers to the presence of persons in the territory of another country for the purpose of providing a

²⁷ There are two employment concepts depending on the geographical coverage: resident persons in employment (i.e. the so-called national concept of employment) and employment in the resident production unit irrespective of the place of residence of the employed person (i.e. domestic concept). The difference between them corresponds mainly to the net number of cross-border workers.

²⁸ EC, IMF, OECD, UN and WORLD BANK, *System of National Accounts 2008, 2009*.

²⁹ National accounts provide information to analyse economies and their development over time. They contain a wide range of statistics describing an economy in various ways. For instance, it includes detailed employment statistics (definition from EUROSTAT).

³⁰ EUROPEAN COMMISSION, *European Systems of accounts – ESA 2010*, Luxembourg: Publications Office of the European Union, 2013.

³¹ Nor does it take into account activities where no services are provided, such as ‘business trips’ (excluded from the application of the PWD). Which is probably the largest form of temporary employment in another State: in 2019 around 25 million cross-border trips for professional reasons were counted in the EU (based on Eurostat data [tour_dem_ttw]).

³² Irrespective of whether statistics are available to map this. Indeed, producing comprehensive and comparable statistics on temporary labour mobility remains very challenging.

³³ See for instance T. KRINGS, A. BOBEK, E. MORIARTY, J. SALAMOŃSKA, and J. WICKHAM. Large-scale migration in an open labour market: the Irish experience with post-2004 labour mobility and the regulation of employment standards. In M. Bernaciak (ed.), *Market Expansion and Social Dumping in Europe*, Routledge, 2015, 25-42.

service.³⁴ As stated by Howe and Owens³⁵ “When a contract for the delivery of a service by a provider in one country to a consumer in another country also entails the workers of the provider moving into the other country for the period in which they will produce and deliver the service, this might ordinarily be characterised as an example of a temporary migration of the worker *who will be participating in the labour market of the country in which they work*. Yet this is not how such movements, and the labour of these global service delivery workers tend to be conceptualised in trade agreements.” (our emphasis)

From the point of view of employment statistics, as discussed above, the labour market appears to be demarcated by the place of establishment of the employer, thus excluding work (i.e., services) carried out through non-established employers. This boundary might be too narrow if we want to have a reliable view on the number of persons working in a country (and thus are in the labour market in that country) at any given moment. This could be unrelated to whether or not the employer is established there. Under the current definition, employment in certain (labour-intensive) sectors, such as construction and road freight transport, that are highly dependent on incoming posted workers might be significantly underestimated. In contrast, countries that have a high number of outgoing posted workers may overestimate the actual level of employment in certain (labour-intensive) sectors. Therefore, it has been argued that labour mobility by the provision of cross-border services also needs to be taken into account when calculating total domestic employment of a country (by taking into account the ‘net balance’ of incoming and outgoing posted workers).³⁶ That this would be very useful becomes clear from below statistical evidence for the construction sector.³⁷

On average, employment by the posting of workers represents only a fraction of total employment in the EU.³⁸ Nonetheless, in several labour-intensive and price-sensitive sectors of activity, intra-EU posting constitutes an important form of employment. This is mainly the case in the construction sector. For instance, posted workers represent about one-fifth of the employment (domestic concept) in the Belgian construction sector.³⁹ In some regions in France, posted workers account for 8% of the total workforce employed in the construction sector.⁴⁰ Furthermore, the construction sector in Austria and Germany has a high number of incoming posted workers. Finally, about one in three workers employed by a Slovenian construction company are posted to another Member State.⁴¹

³⁴ See also UNECE, *Background Note on GATS Mode 4 Measurement*, Geneva, 2006; J. MAGDALEINE and A. MAURER, “Measuring GATS Mode 4 Trade Flows”, *WTO Staff Working Paper 2008*, ERSD-2008-05.

³⁵ J. HOWE and R. OWENS, “Temporary Labour Migration in the Global Era: The Regulatory Challenges.” in J. HOWE and R. OWENS (eds.), *Temporary Labour Migration in the Global Era*, Oxford: Hart Publishing, 2016.

³⁶ See UNECE, *The Impact of Globalization on National Accounts*, Geneva, 2011; STATISTICS AUSTRIA, ‘Labour Mobility’, *UNECE Working Paper Series on Statistics*, 2017. F. DE WISPELAERE, “Improving the Monitoring of Posted Workers in the EU: Towards an Exhaustive Approach of Employment Statistics”, *CESifo Forum 2022*, vol. 23, no. 3, 29.

³⁷ This is also the case for road freight transport as posting rules are applicable, *inter alia*, to cabotage (i.e. road transport by a motor vehicle registered in a country performed on the national territory of another country). The so-called ‘cabotage penetration rate’ is an indicator used to assess the extent of cabotage within the national transport markets in the EU. It is defined as the share of cabotage transport in total national transport of a country. In 2020, the highest cabotage penetration rates were recorded in Luxembourg (19.9 %), Germany (9.9 %), Austria (9.2%), Belgium (9.2 %) and France (8.2 %) (Eurostat data).

³⁸ Based on the number of Portable Documents A1 issued under Art. 12 Regulation 883/2004 or on the number of notifications made in the prior declaration tools of the host Member States.

³⁹ F. DE WISPELAERE, L. DE SMEDT, M. MUNOZ, D. GILLIS and J. PACOLET, *Posted workers from and to Belgium*, POSTING.STAT, 2022.

⁴⁰ M. MUNOZ, *Posted workers from and to France*, POSTING.STAT, 2022.

⁴¹ M. VAH JEVŠNIK, S. CUKUT KRILIĆ and K. TOPLAK, *Posted workers from Slovenia*, POSTING.STAT, 2022.

Therefore, the actual number of construction workers employed in Slovenia is much lower than what the available employment statistics suggest.

3 POSTING AND THE BORDER OF THE LABOUR MARKET - THE LEGAL PERSPECTIVE

Having presented the way in which in which the “labour market” is defined or, rather, in which its borders are drawn when compiling employment statistics for the EU Member States, we turn to EU legislation (3.2) and to the case law of the CJEU (3.1). Confronting the approach of EU law and CJEU’s decision with the previous analysis is pivotal to understand whether “the law”, when it refers to the “labour market” uses an autonomous legal definition or is influenced by empirical ones.

In light of this goal, we will only focus on specific parts of each decision and piece of legislation, notably the ones directly related to the way in which they conceptualise the relationship (or lack thereof) between posted workers and the Host State. Therefore, we will not discuss these documents in detail, also in light of the existence of a vast literature on the legal aspects of posting of workers.

3.1 THE COURT AND THE BORDER OF THE LABOUR MARKET

In *Rush Portuguesa* the CJEU distinguished the situation of posted workers from the one of free movement of workers. The latter was considered to entail a risk of disruption of the labour market of the Host State,⁴² because of the important differentials in wages other labour costs between the new and the old Member States, and hence covered by transitional measures of the Act of Accession of Portugal.⁴³ This risk was underpinned by the disparity in socio-economic conditions between the new Member States of the 1980s, which joined Italy as the main sources of intra-EU (at the time, intra-EEC) cross-border labour mobility.⁴⁴ The focus on the “disruption” of the labour market seems to suggest an (implicit) understanding of access to the labour market as the situation in which the entry of a worker in the Host Member State can have an impact on the said market.

Twenty years later, the CJEU had to assess the application of transitional measures restricting the access to the free movement of workers for the citizens of a new Member State in the *Vicoplus* decision.⁴⁵ The posting situation at stake in this case was one of provision of manpower by a temporary work agency. Interestingly, the Court had anticipated this scenario in *Rush Portuguesa*, where it had stated that the activity of (pure) provision of manpower would have been different from a “classic” provision of services, inasmuch as the former activity would be “specifically intended to enable workers to gain access to the labour market of the host Member State”.⁴⁶ The decision in *Vicoplus* follows this same approach. Notably, the Court affirmed that the justification underpinning the equivalence between posting via temporary work agencies and access via free movement of workers was that these posted workers would be assigned “to a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking”.⁴⁷ First, this decision

⁴² *Rush Portuguesa*, §14.

⁴³ Article 216 of the Act of Accession.

⁴⁴ See R. GUMBRELL-MCCORMICK and R. HYMAN, In search of global labour Markets, *Journal of Industrial Relations*, 62, 2, 2020, 10.

⁴⁵ CJEU, Joined Cases C-307/09 to C-309/09, *Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo, Olbek Industrial Services sp. zoo v Minister van Sociale Zaken en Werkgelegenheid*, 10 February 2011.

⁴⁶ *Rush Portuguesa*, §16.

⁴⁷ *Vicoplus*, §31.

consecrated the distinction between, on the one hand, the scenarios of posting to perform a specific service and intra group posting⁴⁸ and, on the other, the posting by a temporary employment undertaking.⁴⁹ Second, in this decision the CJEU shifts the (implicit) understanding of labour market from the external dimension to the internal one. This is visible in the reference to a post “*within the user undertaking*” which would otherwise be occupied by “a person employed by *that undertaking*”. This shift allows the Court to operate the distinction between the various scenarios of posting. In light of the discussion in Section 2, it is puzzling to shift the focus to the impact on the internal labour market, when the transitional measures of the Act of Accession are meant to avoid “disturbances of the labour market”,⁵⁰ which clearly are related to the external dimension.

In more recent years, the CJEU has also identified two categories of posted workers which are further removed from (the labour market of) the Host State. These decisions denied the application of the whole legal framework for posting of workers to the situation at stake. However, they remain relevant for our discussion as they allow us to further delineate the (implicit) understanding of the labour market border which underpins the reasoning of the Court. The first of these cases is the *Bundesdruckerei* decision,⁵¹ which dealt to a situation where the provision of services would have been provided digitally, hence without the presence of the workers on the territory of state where the party receiving the services was based. In this case the Court linked the lack of justification for the application of the posting rules to these workers to the fact that they would not be exposed to the cost of living of the Host State during the performance of the service.⁵² This is evidently a different criterion to assess the link with a given Member State, although it is important to remember that this was used not to trace the border between posting and “standard” free movement of workers, but between posting and not posting.

Confronted with yet another different scenario, in the *Dobersberger* case,⁵³ and in the subsequent decision in *Van den Bosch Transporten*,⁵⁴ the Court denied the applicability of posting of workers rules to workers lacking a “sufficient connection” with the territory of the Host State.⁵⁵ The criteria to assess the existence of such a connection were identified more clearly in the *Van den Bosch Transporten* decision, although they remain rather broad, covering a) the characteristics of the provision of services, and b) the nature of the activities carried out by that worker.⁵⁶ Again, it is worth repeating that in these cases the CJEU was dealing with the distinction “posting/not posting”. Still, in introducing criteria related to the specific activity of the worker, the Court further distances its approach from the one based on the situation of the Host State. Notably, if what it matters to decide whether or not the given worker has a sufficient link with the Host State are the characteristics and nature of their work, then it goes without saying that the potential disruption to the labour market of the said State, or the fact that the workers in question are exposed (or not) to a higher cost of living fade into the

⁴⁸ PWD, Article 1(a) and 1(b).

⁴⁹ PWD, Article 1(c).

⁵⁰ *Vicoplus*, §34.

⁵¹ CJEU, Case C-549/13, *Bundesdruckerei GmbH v Stadt Dortmund*, 18 September 2014.

⁵² *Bundesdruckerei*, §34.

⁵³ CJEU, Case C-16/18, *Michael Dobersberger v Magistrat der Stadt Wien*, 19 December 2019. See A. IOSSA, Posting Highly Mobile Workers: Between Labour Law Territoriality and Supply Chains of Logistics Work—A Critical Reading of *Dobersberger*, *Industrial Law Journal*, 51, 1, 2022, 138–165; M. ROCCA, Marco Rocca, One train! (but different working conditions) – CJEU 19 December 2019, C-16/18 (*Michael Dobersberger v Magistrat der Stadt Wien*), *Arbeidsrechtelijke Annotaties*, 3, 2020, 50-71.

⁵⁴ CJEU, Case C-815/18, *Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV*, 1 December 2020.

⁵⁵ *Dobersberger*, §31.

⁵⁶ *Van den Bosch Transporten*, §§46-47.

background. As stated by Iossa and Persdotter⁵⁷ “the territorial connection between the work performed and the territory of the country in which the service was provided - rather than the possibility to gain access to the national market by the company established in another Member State - was identified by the CJEU in *Dobersberger* as the decisive criterion to determine the applicable labour law regime under the scope of cross-border posting and therefore under the scope of cross-border provision of services”.

The previous considerations all have in common the focus on the situation of posted workers in the Host State. To this one might add the decisions of the Court of Justice where workers were not “pulled in” the labour market of the Host State, but instead “pushed out” the one of the Home State. This was notably the case in the *Team Power Europe* decision, where the Court concluded that a temporary work agency “which carries out its activities of assigning temporary agency workers exclusively or mainly to user undertakings established in a Member State other than that in which it is established” could not rely on the provisions of the social security coordination Regulation⁵⁸ concerning posting of workers.⁵⁹ The consequence in that case was the inclusion in the social security system of the Host State. One might extrapolate from this that an insufficient link with the Home State on the employer’s side, makes it more likely that a mobile worker will be found to have a stronger link with the Host State.

3.2 THE PWD AND THE BORDER OF THE LABOUR MARKET

In closing this review, it is worth to consider how EU legislation on posting refers to the relationship between posted workers and the Host State. The starting point is the original PWD adopted in 1996, which is however silent on the issue. While the *Rush Portuguesa* decision is often considered among the events which kickstarted the negotiations on the PWD,⁶⁰ the statement of the CJEU concerning the lack of access of posted workers to the labour market of the Host State was not included in the legal text or the Recitals. Interestingly, the 2014 Enforcement Directive⁶¹ does include a reference to the labour market of the Host State, inasmuch as the *demands* of said market should be taken into account when determining the “most relevant languages” into which to translate information to be made available to posting undertakings and their workers.⁶² Since these “demands” are mentioned together with the concept of labour market, this appears to be a suggestion that posting of workers is being framed as providing the supply of labour to meet these demands in the Host State. Also, the same legal instrument contributes to the argument we made in closing the previous paragraph, notably the situation in which posted workers will be found to have a sufficient link with the Host State because of the weakness of the link with the Home State of their employer. This is the case under Article 4(2) concerning the determination of whether the posting employer performs “substantial activities” in the Home State. However, the criteria included under this article, aimed at fighting

⁵⁷ A. IOSSA and M. PERSDOTTER, “Cross-Border Social Dumping as a ‘Game of Jurisdiction’ - Towards a Legal Geography of Labour Relations in the EU Internal Market”, *JCMS: Journal of Common Market Studies* 2021.

⁵⁸ Art. 12 of Regulation 883/2004 of 29 April 2004 on the coordination of social security systems.

⁵⁹ CJEU, 3 June 2021, C-784/19, *Team Power Europe*, para. 66.

⁶⁰ See E. KOLEHMAINEN, The Directive Concerning the Posting of Workers: Synchronizations of the Functions of National Legal Systems, *Comparative Labor Law & Policy Journal*, 20, 1998, 71–104.

⁶¹ 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’).

⁶² Article 5(1)(c) of Directive 2014/67/EU.

against the phenomenon of so-called “letterbox companies”,⁶³ focus exclusively on the posting undertaking itself, hence referring to its activities and not to the labour market as such.

Coming to the recent reform of the PWD, Verschueren⁶⁴ concludes that Directive 2018/957 does not deviate from the case law of the CJEU in affirming that, in principle, posted workers are no part of the labour market of the host Member State and that, for this reason, they cannot be fully compared to workers in that Member State. This was also stated in the CJEU judgments in reply to Hungary and Poland’s request to annul Directive 2018/957 by pointing out that the rights of posted workers continue to differ from the rights of workers who are part of the host country’s labour market.⁶⁵ Indeed, it appears that the revised Posting of Workers Directive still only recognises in certain cases the link between posted workers and the labour market of the host country. This only concerns long-term posted workers⁶⁶ and posted temporary agency workers.⁶⁷ Concerning the former, Recital 9 of Directive 2018/957 explicitly justifies the application of “all the applicable terms and conditions of employment which are laid down in the Member State [by law or collective agreements which are applicable to posted workers]”⁶⁸ on the basis of “the link between the labour market of the host Member State and the workers posted for such long periods”.

This change adds a further element to the (implicit) definition of labour market which underpins the legal framework for posting of workers. Indeed, it seems that duration of a posting might entail, after a certain threshold (notably, 12 or 18 months), the emergence of a stronger link with the labour market, which places posted workers in a situation which is closer (though not quite identical) to the free movement of workers. On this point, it is worth noting that the specific rules for long term postings apply also to workers sent to replace another posted worker, so that the replacement itself does not “reset the clock” for their application. This once again entails a shift in the assessment of the relationship between the labour market and the posted worker. In the case law outlined above it was the situation of the individual worker which entailed their connection (or lack thereof) with the Host State and its labour market. By encompassing workers sent in replacement of a posted worker, the new rule suggests that it is the duration of the posting *operation*, and not of the stay of the individual worker, which entails a stronger link with the labour market.⁶⁹ In light of this we argue that the relationship of posting of workers with a specific labour market should be defined by looking at the

⁶³ See A. LO FARO, “Posting from a letterbox: transnational mobility of workers, social dumping and the economic fundamental freedoms’ veil”, in A-C. Hartzén, A. Iossa and E. Karageorgiou, *Law, Solidarity and the Limits of Social Europe*, Edward Elgar, 2022, 22-42.

⁶⁴ H. VERSCHUEREN, “Detaching binnen de Europese Unie: the story goes on”, *TSR/RDS 2021*.

⁶⁵ Case C-620/18 *Hungary v European Parliament and Council* and Case C-626/18 *Poland v European Parliament and Council*.

⁶⁶ See recital 9: “Posting is temporary in nature. Posted workers usually return to the Member State from which they were posted after completion of the work for which they were posted. However, in view of the long duration of some postings and *in acknowledgment of the link between the labour market of the host Member State and the workers posted for such long periods* (our emphasis), where posting lasts for periods longer than 12 months host Member States should ensure that undertakings which post workers to their territory guarantee those workers an additional set of terms and conditions of employment that are mandatorily applicable to workers in the Member State where the work is carried out.”

⁶⁷ See recital 12: “Directive 2008/104/EC of the European Parliament and of the Council gives expression to the principle that the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job. That principle should also apply to temporary agency workers posted to the territory of another Member State.”

⁶⁸ Article 3(1a) of the revised Posting of Workers Directive.

⁶⁹ This element was specifically challenged by the Polish government in its action for annulment but was confirmed by the Court of Justice in Decision C-626/18 *Poland v European Parliament and Council*, §§124-129.

broader structural presence of posted workers in such a market and to their role in fulfilling labour demand therein. We will come back to this in the next Section.

4 CONCLUSIONS

The legal regulation of posting of workers the case law of the Court of Justice is grounded on several legal fictions, where undefined non-legal concepts underpin a range of policy choices. The stated “temporariness” of posting, the fact that these workers are assumed to return to the Home State after the completion of the service, or that their work is “habitually” carried out in the Home State, all participate to these fictions. All these characteristics, assumed by the law but often detached from the empirical reality, underpin the central policy choice regulating working conditions of posted workers, namely the fact that these are still regulated by the Home State regulations, apart from a closed list of exceptions provided by the PWD.

This article explores one of these fictions, namely the idea that posted workers do not, at any time, “gain access” to the labour market of a host State where they are in fact (temporarily) working. Hence, it analyses the following question: at what point and under which circumstances are posted workers considered as working in a given Member State? To do so, it considers the use of the concept of “labour market” across the case law of the Court of Justice concerning posting workers, to identify the constitutive elements of the implicit definition adopted by the Court. The legal analysis includes insights from recent cases dealing with the “sufficient connection” of short-term posted workers with a given Member State (*Dobersberger, FNV Transporten*), where the court has articulated a category even further removed from the (implicit) labour market of the Host State. This analysis is compared with economic/statistical assumptions applied when measuring employment in a country. From a statistical point of view, the labour market appears to be demarcated by the place of establishment of the employer, thus excluding work (i.e., services) carried out through non-established employers. Consequently cross-border labour mobility by the freedom to provide services do not fall within these boundaries and makes that posted workers are counted in the employment statistics of their Member State of origin. The approach to posted workers in the labour market of the host country is therefore not only a legal but also a statistical fiction.

The demarcation of the labour market in the *Rush Portuguesa* case also seems to indicate that the main fear at the time was that mobile workers would disrupt the labour market of the host country. Indeed, as we have seen above in the context of *Vicoplus* decision, the fear that mobile workers would move from low-wage to high-wage Member States resulted in the set-up of transitional arrangements applicable to countries that joined the EU. That differences in wages and social protection between Member States would be exploited by the freedom to provide transnational services, by means of intra-EU posting, was at the moment of the creation of the European Union and of the European internal market considered to be relatively low.⁷⁰ As we pointed out above, this is an outdated view for several labour-intensive sectors.

The narrow legal and statistical approach to who is on the labour market of the host country has consequences in several areas. Firstly, on the transnational social rights of posted workers. After all,

⁷⁰ Indeed, only Germany and Austria asked (and were allowed) to apply restrictions on the cross-border provision of services involving posting of workers in certain sensitive sectors under the transitional arrangements applying in the context of the 2004 and 2007 enlargements. See A. FIHEL, A. JANICKA, P. KACZMARCZYK, J. NESTOROWICZ, *Free movement of workers and transitional arrangements: lessons from the 2004 and 2007 enlargements*, Warsaw, 2015, p. 69.

their wages and working conditions will often be lower than those of other mobile workers as well as local workers.⁷¹ Recent research has shown what the result of this can be.⁷² Figures for France show that the minimum wage of the host country to be paid to posted workers is also considered a maximum. For instance, almost 25% of all posted workers to France and even 75% of the posted workers employed in the agricultural sector are paid at the French minimum wage. Moreover, posted workers to France earn on average 30% less than comparable French workers employed at the same workplace. In addition, posted workers cannot benefit from the (potentially) more comprehensive social protection in the host Member State. Consequently, the question arises that the legal framework for posting further reinforces the development of a dual labour market in the host country consisting of a core of workers who have well developed social rights and a group of workers on the periphery with non-standard contracts who do not have decent working conditions or job security. In that respect, Cremers⁷³ argues that “although posted workers are supposed not to seek access to the host-country labour market, they cannot be deprived from the wider principles that fit in a policy of rights-based migration and labour mobility.”

Furthermore, as we have shown, this narrow approach may lead a significant misrepresentation of the size of several economic sectors characterised by an important presence of outgoing or incoming posted workers, not least in the construction sector and the road transport sector. Moreover, it is not because posted workers do not enter the labour market of the host country that intra-EU posting cannot lead to its distortion,⁷⁴ both from an external and internal point of view. Replacement effects, read a negative trend in the employment of local workers and an increase in the number of incoming posted workers, are identified in the construction sector of several host Member States.⁷⁵ For instance, at macro-level (i.e., the ‘external’ labour market), figures for Belgium show a negative correlation between the evolution of investments in construction and the evolution of employment of local workers. This while there was a positive correlation between the evolution of investments in construction and the evolution of posted workers. At micro-level (i.e., the ‘internal’ labour market) Muñoz found that the employment of ‘Belgian’ workers decreased in Belgian companies that benefit from the services of posted workers.⁷⁶ Employment decreased in these companies by 2% the year they started subcontracting services to posted workers. There is a risk that local workers are out-bid by

⁷¹ This risk was identified in the Impact Assessment of the European Commission accompanying the proposal to revise the Posting of Workers Directive (SWD(2016) 52 final: 11 and 13) by concluding that “the existing Directive has an in-built structural wage gap between posted and local workers” and that “the labour market effect of these provisions is segmentation between posted and local workers”.

⁷² M. MUNOZ, *Posted workers from and to France*, POSTING.STAT, 2022.

⁷³ J. CREMERS, “Free provision of services and cross-border labour recruitment”, *Policy Studies 2013*, vol. 34, no. 2.

⁷⁴ As stated by Martin “The apparent separation between trade in services and labour migration prompts misleading assertions such as the following: “Temporary movers hardly pose any cultural or integration threats and make virtually no call on public services...[their] threat to indigenous low-skilled workers ...is neither more nor less than the challenge posed by imports of labour-intensive goods ...[which have] been significantly overcome in the past by the weight of economic gain that trade could deliver and by policies to ease adjustment among the local unskilled.” (Winters et al., 2003).” See P.L. MARTIN, GATS, Migration, and Labour Standards, Discussion Paper DP/165/2006, Geneva, International Institute for Labour Studies, 2006; A. WINTERS, T. WALMSLEY, Z.K. WANG, R. GRYNBERG, Negotiating the Liberalization of the Temporary Movement of Natural Persons, *World Economy 2003*, vol. 26, no. 8.

⁷⁵ F. DE WISPELAERE and PACOLET, J., *An ad hoc statistical analysis on short term mobility. The economic value of posting of workers. The impact of intra-EU cross-border services, with special attention to the construction sector*, on behalf of DG EMPL, 2016. Already in 2012 the Commission recognised that the Posting of Worker Directive puts pressure on local labour markets (SWD(2012) 63 final).

⁷⁶ M. MUNOZ, “Trading Non-Tradables: The Implications of Europe’s Job Posting Policy”, *Working Paper*, 2021.

workers who are not on the labour market and, in order to be competitive, should accept wages similar to those of posted workers. Finally, intra-EU posting may influence not only the supply for labour but also its demand. In particular, large companies seem to rely on the services of posted workers. This reveals a risk of a dual employer market, in which large companies benefit from the use of posting on the one hand, whereas subcontractors (read smaller SMEs) might be out-bid in the market on the other.⁷⁷ After all, the current rules on posting may create regulatory competition among local and foreign companies, particularly beneficial to large local companies, which have an easier access to the services of posting undertakings, instead of smaller local companies.

To conclude, in light of the strong concentration of posted workers in certain sectors, Member States or regions, we argue that courts and legislators should reconsider how the implicit definition of “labour market” applies to the empirical reality.⁷⁸ What emerges from the case law of the CJEU and from EU legislation, is a definition of the access to a given labour market which is based on the *impact* that posting of workers can have on said market. Such an impact is construed either as disruption of the labour market, replacement of direct hiring by the user undertaking, or existence of a stronger link due to prolonged presence. Furthermore, said impact should be understood as going beyond the one of the *individual* posted worker, as we discussed at the end of the previous Section when addressing long-term posting operations. As such, the identification of the workers covered by this definition should take into account the structural nature of posting in the said sectors, Member States or regions, which has evolved into a permanent source of manpower, fully integrated in the normal functioning of supply chains. Exploring the full ramifications of such an empirical approach to the demarcation between those posted workers who remain outside the labour market of the Host State and those who instead access to it, remains beyond the scope of the present article. However, it is clear that these would be profound both in terms of social rights and of the statistical representation of employment across Member States.

⁷⁷ F. DE WISPELAERE and J. PACOLET, “The Benefits of Posting: Facts and Figures on the Use and Impact of Intra-EU Posting”, in J. ARNHOLTZ and N. Lillie (eds.), *Posted Work in the European Union. The Political Economy of Free Movement*, Routledge, 2020.

⁷⁸ See also Verschueren (2021: 701): “In view of the fact that posted workers form a structural part of the labour market of many Member States, the question arises as to whether this principle is still valid. The question remains at what point these posted workers can be considered sufficiently integrated into the labour market of the host Member State for them to be fully treated as local workers” (our translation). H. VERSCHUEREN, “Detachering binnen de Europese Unie: the story goes on”, *TSR/RDS 2021*.