



HAL
open science

Short-term labour mobility in the EU: a legal perspective

Pénélope Hardy, Marco Rocca

► To cite this version:

Pénélope Hardy, Marco Rocca. Short-term labour mobility in the EU: a legal perspective. Mehtap Akgüç; Wouter Zwysen. Moving under the radar: ongoing challenges for short-term intra-EU mobility, ETUI, pp.33-46, 2025, 978-2-87452-741-8. <hal-05206260>

HAL Id: hal-05206260

<https://hal.science/hal-05206260v1>

Submitted on 11 Aug 2025

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire HAL, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.



Distributed under a Creative Commons CC BY-NC 4.0 - Attribution - Non-commercial use - International License

CHAPTER 2: SHORT-TERM LABOUR MOBILITY IN THE EU: A LEGAL PERSPECTIVE

PÉNÉLOPE HARDY AND MARCO ROCCA

INTRODUCTION

The phenomenon of temporary labour migration in and to Europe is in continuous expansion, in terms of both quantity (OECD 2023; De Wispelaere et al. 2022; EMN 2020) and political interest (Geddes 2015). Demographic changes in European Union (EU) Member States have pushed governments to include temporary migration as a tool to address the ageing of populations (EMN 2015; Castles 2006), while the creation of a ‘temporary migration scheme’ periodically pops up as a response to a given labour shortage. At the same time, calls to ‘take back control’ of national borders are increasingly heard in the political debate, leading to the identification of temporary labour migration as a compromise between the control of migration and the needs of the labour market, expressed with particular emphasis by employers in certain labour-intensive sectors (Biffl and Skrivanek 2016: 102). More recently, the Covid-19 pandemic has revealed the fundamental importance of temporary labour migrants in several economic sectors across EU Member States, with workers being flown to Member States at a time when mobility was otherwise severely restricted (EMN 2020: 6). This book participates in this renewed interest but adopts a different approach by focusing on the concept of ‘short-term’ labour migration.

While there is an overlap between the two categories of ‘temporary’ and ‘short-term’ migration, they are fundamentally different. Temporary labour migration is often defined from the perspective of its expected or planned duration. The glossary of the European Migration Network defines it as ‘migration for a specific motivation and/or purpose with the intention that afterwards there will be a return to the country of origin or onward movement’. On the other hand, short-term migration is assessed looking at its duration from the end perspective: whatever the initial goal or plan, a migration experience will fall into this category if it lasts for an amount of time falling below a certain threshold.

Historically, the EU level and, by consequence, the national regulation of intra-EU migration has not relied on temporary migration schemes; that is, pathways for migration which establish and enforce a maximum duration from the start. This is based both on a commitment to ensure equal rights between EU citizens and on the economic rationale for incentivising mobility from Member States with higher unemployment levels to those facing labour shortages (Menéndez 2010: 366). The difference with temporary migration schemes can be seen starkly when confronted with the schemes set up at EU level for the migration of third-country nationals, such as in the case of the Seasonal Workers Directive,¹ which provides for a maximum duration of nine months, or the Intra-corporate Transfers Directive, where the duration is of one or three years, depending on the category of worker involved.² This also constitutes an evident deviation from previous experiences of ‘guest worker’ programmes (Janda 2017: 154).

¹ Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

² Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

On this basis, it is argued in this chapter that the lack of a legal category for short-term labour migrants has a direct impact on the obstacles and hurdles faced by those researchers who try to quantify the phenomenon. This is not to say that the creation of such a category is a desirable policy goal; in fact, on the contrary, as temporary migration schemes (defined as above) are linked to increased vulnerability and worse access to labour and social rights for migrants (Ottonelli and Torresi 2022: 40; Dauvergne and Marsden 2014: 234). However, at a descriptive level, the absence of such a legal category reduces the need for national administrations to track short-term migrants and, in general, the chances thereby of the existence of reliable data concerning this form of migration.

This difficulty stems from quantitative research into short-term migration largely making use of duration thresholds when it comes to the identification of its scope. The precise duration adopted may vary but tends to cluster around the 12-month duration, used for instance by the European system of national and regional accounts, European system of accounts (ESA) 2010 (Eurostat 2013). Therefore, the first and main goal of this chapter is to provide an overview of the legal conditions under which short-term intra-EU migration takes place, notably from the perspective of the labour and social rights of migrants established by EU legal instruments.

The second goal arises from the abovementioned tension; that is, from the difficulty of carving out a category of intra-EU short-term labour migrants which simply does not exist within the EU legal framework. Therefore, while addressing the various legal instruments which are relevant for our first goal, the chapter also considers if and how these allow for the identification of an (implicit) category of short-term migration, notably looking at the various duration thresholds which punctuate the granting or withholding of labour and social rights.

Both of these goals are pursued from the perspective of legal researchers focused on labour and social rights in transnational situations. Because of this, the chapter relies mainly on legal instruments dealing with the working conditions and social security situation of short-term labour migrants in the EU.

Section 1 begins by presenting the regime under which the free movement of workers operates. It highlights the role of this fundamental freedom in fostering intra-EU migration, as well as the application of the principle of equal treatment. This section also considers the different duration thresholds which can be identified as (indirectly) applying in situations covered by the free movement of workers. In its turn, Section 2 addresses the posting of workers. While posting might seem at first blush to be the perfect example of short-term intra-EU migration, being legally defined as lasting for a ‘limited period’, it is suggested that the legal framework does not allow for such a straightforward equivalence. Section 3 presents the EU regime for social security coordination, inasmuch as it applies to short-term migrants, arguing that, while this represents a comprehensive system facilitating intra-EU mobility, obstacles do remain, in particular when it comes to short-term labour migrants. The final section concludes.

1. FREE MOVEMENT OF WORKERS

Free movement of workers has been one of the fundamental pillars of European integration since its very beginning, being established by the Treaty of Rome signed in 1957. Although the provision guaranteeing this right has been dubbed the ‘Cinderella provision’ (Barnard 2012: 143), with respect to the other fundamental freedoms guaranteed by the Treaties, both the Spaak³ and the Ohlin⁴ reports have referred to the importance of the free movement of labour for the

³ *Report of the Heads of Delegations to the Foreign Ministers at the Messina Conference*, 21 April 1956.

⁴ *Social Aspects of European Economic Co-operation. Report by a Group of Experts*, Studies and Reports, New Series, No. 46 (Geneva, ILO, 1956).

establishment and effectiveness of the common market. Since then, a fundamental rights approach has added nuance to the economic one, even before the shift towards a ‘European citizenship’ approach (O’Leary 2011: 506). Such an evolution is visible in the Opinion of Advocate General Jacobs in the *Bettray* case.⁵ Referring to the Third Recital of the Preamble to Regulation 1612/68,⁶ the Advocate General affirmed that ‘labour is not, in Community law, to be regarded as a commodity’, so that the fundamental rights of workers should take precedence ‘over satisfying the requirements of the economies of the Member States’.⁷

In light of this, Barnard and Fraser Butlin (2022: 655) have identified four rationales underpinning the original introduction of the freedom here at stake: 1) the link with the single market; 2) the importance of free movement to economic and 3) to political integration; and 4) the need to improve the social position of EU citizens. However, contemporary discourse on the promotion of labour mobility by the European institutions focuses on an economic rationale. The European employment guidelines refer to the need to ensure mobility under the heading of ‘enhancing the functioning of labour markets’⁸ and ‘increasing labour market participation and reducing structural unemployment’.⁹ That being said, workers’ mobility between Member States remains relatively low, with around 10 million European citizens of working age having moved to another Member State (De Wispelaere 2022: 29). This number is, in fact, surpassed by third-country nationals who have moved to the EU (Canetta et al. 2014: 6).

The freedom of movement of workers is recognised by Article 45 Treaty on the Functioning of the European Union (TFEU) and further regulated by Regulation 492/2011,¹⁰ Directive 2004/38¹¹ (the Citizenship Rights Directive, CRD) and Directive 2014/54.¹² The EU framework for the coordination of social security also contributes to the implementation of this fundamental freedom. Coming to labour and social rights, the free movement of workers entails the right to equal treatment for intra-EU migrants on matters related to employment, remuneration and other working conditions. It grants the right to accept offers of employment in another Member State and the ability to move freely and remain in the Member State of arrival for this purpose, as well as the right to remain after being employed (Janda 2017: 145; Nuti 2018: 204). Therefore, the specificities of the regime for intra-EU migration challenge the vision which identifies a correlation between the openness of a migration regime and its generosity in terms of the rights granted to migrants (Ruhs 2013: 96-97). According to this vision, the more open the regime, the fewer the rights granted to migrants, whereas the intra-EU regime grants equal treatment with local workers without imposing any limitation in terms of the number of admissions.

For the purposes of this chapter, the first point to highlight is that the enjoyment of the principle of equal treatment is not characterised by any exception for short-term situations. In order to find some sort of threshold, one can turn to the CRD. This legal instrument identifies three situations for intra-EU migrants, defined on the basis of the time spent in the country of arrival. The first category recognises rights for those entering the country of arrival for up to three months (Article 6); the second covers those residing for up to five years (Articles 7-15); while the third (Articles 16-18) concerns ‘permanent residents’; that is, those residing for more than five years in the country of arrival. It is interesting to note that, in the context of residence cards (Article 11) and

⁵ CJEU Case 344/87, *Bettray v Staatssecretaris van Justitie*, 31 May 1989.

⁶ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

⁷ Opinion of Advocate General Jacobs in *Bettray*, paras 28-29.

⁸ European Council, *Guidelines for the employment policies of the Member States*, COM(2010) 193 final, p. 21.

⁹ European Council, *Guidelines for the employment policies of the Member States*, COM(2015) 98 final, p. 3.

¹⁰ Regulation (EU) No 492/2011 on freedom of movement for workers within the Union.

¹¹ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

¹² Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

of the assessment of continuity of residence (Article 16), the CRD states that *temporary* absences (own emphasis) – defined as not exceeding six months in a given year – do not affect accrual.

2. THE POSTING OF WORKERS

The posting of workers is the main, but not the only, form of intra-EU temporary labour migration (OECD 2019). From the point of view of working conditions, it is regulated by the Posting of Workers Directive (PWD),¹³ which was reformed in 2018.¹⁴ A posted worker is a worker temporarily sent by their employer to a Member State other than the one in which they normally work to carry out the provision of services (Article 2.1 PWD). This is legally construed as part of the employer's freedom to provide services (Sjödén 2013: 31), recognised by Article 56 TFEU. The most recent data, based on the number of A1 certificates delivered by national administrations,¹⁵ indicate that in 2018 there were 2.2 million individual postings in the EU, with an increase of 165,000 compared to 2017 (De Wispelaere et al. 2022).

Posted workers in the EU are covered by the wages and working conditions of the Member State where they habitually work; that is, their home state. However, the PWD (Article 3.1) provides a closed list of conditions in force in the country of arrival which must be applied to posted workers, including important aspects such as remuneration, minimum paid holidays and maximum working time. In its case law,¹⁶ the Court of Justice of the European Union (CJEU) has clarified that these conditions represent a 'ceiling' (Malmberg and Sigeman 2008: 1140) in that applying higher standards would represent a restriction on the freedom to provide services. Collective aspects remain excluded from this list, a situation which, following the well-known *Laval* decision,¹⁷ still places posted workers in a zone of exception, or 'variegated sovereignty' (Wagner and Lillie 2014: 5), as regards the exercise of collective bargaining or collective action in the country of arrival. Ultimately, posted workers are legally excluded from the application of the principle of equal treatment, unlike workers moving (whether short-term or permanently) under the free movement of workers. Indeed, this exclusion of posted workers is at the heart of a conflict between the EU legal order and that of the Council of Europe (Rocca 2013), as the European Social Charter has been interpreted by the European Committee on Social Rights as mandating the application of the principle of equal treatment to posted workers.¹⁸

The posting of workers has a multi-faceted relationship with time. The PWD defines posting as a limited period during which the worker is sent to a Member State other than the one where they are habitually employed. However, the actual maximum duration of this limited period is not established by the Directive. The duration is only limited inasmuch as the posting must have a foreseeable end after a given period of time. This can be derived from the definition of the freedom to provide services and has been confirmed by the CJEU.¹⁹

Such a lack of any indication of a maximum duration has been pointed out as a problematic element of the Directive which can lead to temporary situations extending over long periods (Voivozeanu 2019; Berntsen and Lillie 2016). However, posting being a facet of the freedom to provide services means that imposing a strict limit on its duration constitutes a restriction to this

¹³ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

¹⁴ Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

¹⁵ The A1 certificate is provided by the competent Member State at the request of the employer or the person concerned and establishes the presumption that the holder is properly affiliated to the social security system of the Member State which has issued the certificate.

¹⁶ CJEU Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 18 December 2007; CJEU Case C-346/06, *Dirk Ruffert v Land Niedersachsen*, 3 April 2008; CJEU Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, 19 June 2008.

¹⁷ CJEU Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 18 December 2007.

¹⁸ ECSR, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No 85/2012, 3 July 2013.

¹⁹ Case C-456/02, *Trojani v CPAS*, 7 September 2004, para. 28.

fundamental freedom which could be scrutinised by the CJEU. So far, no limitation in time for the provision of services has been accepted by the Court (Houwerzijl and van Hoek 2016: 243).

The 2018 reform of the PWD attached legal effects to the passage of time by establishing, in Article 3.1(a), the rule that, after 12 months of posting, which can be extended by a further six months, most labour law regulations in force in the country of arrival will be applicable to posted workers. While this does not represent a time limit for the duration of the posting itself, Recital 9 of the 2018 Directive explicitly refers to a period longer than 12 months as ‘long duration’ and ‘long periods’. Of all the different duration thresholds listed in this chapter, this is the one which most closely resembles a statistical definition. This is worth pointing out since it is unclear if, under the ESA 2010 definitions, posted workers would be counted in the employment statistics of the country of arrival, even in the (rare) case when the posting lasts for more than 12 months. This is because their work might still be performed by a non-resident worker employed by a non-resident employer.

The PWD also includes two lower thresholds for duration which entail an exception from the application of the closed list of working conditions or the possibility to introduce such an exception at national level. The second threshold allows receiving Member States to introduce an exception to the application of Article 3.1.c (concerning remuneration) to postings lasting less than 30 days, following consultation with the social partners or the conclusion of a collective agreement to this end. Such a collective agreement must be universally or generally applicable under the conditions set by Article 3.8. The first threshold exempts postings lasting up to eight days from the application of Article 3.1.c and Article 3.1.b (minimum paid holidays) when these postings happen in the context of the initial assembly or first installation of goods and are necessary to the performance of a contract for the supply of these. While seemingly very narrow, this exception has been relied upon by the CJEU²⁰ to exclude postings lacking a ‘sufficient connection’ with the country of arrival from the application of the entire PWD (Rocca 2020).

These exceptions are reflective of the difficult negotiations surrounding the adoption of the original Posting of Workers Directive in 1996. Indeed, the earlier drafts of the Directive featured a so-called ‘grace period’; that is, an initial period of time during which posted workers would remain fully covered by the working conditions applicable to them in the country of origin. The 1991 draft tabled by the Commission set this period to three months.²¹ Following the critiques and comments coming both from the European Parliament and the European Economic and Social Committee, a second draft, proposed in 1993, included a shortened grace period of one month.²² The existence of any length of grace period would represent one of the main points of contention in the debate between Member States, with the side favouring a ‘day 0’ application of the Directive, that is, the removal of any grace periods, being the one that ultimately prevailed in the negotiations.

All in all, the review of the different thresholds included in the legal framework governing the working conditions applicable to posted workers paints a complex picture for the identification of an implicit legal meaning of ‘short-term’ intra-EU migration. While it would be tempting to point simply to the empirical reality of posting (see Carrascosa and Contreras; Irastorza, this volume) and declare it de facto a form of short-term migration, the PWD does not include an actual limitation on the duration of postings. Furthermore, the various thresholds pose a difficult

²⁰ CJEU Case C-16/18, *Michael Dobersberger v Magistrat der Stadt Wien*, 19 December 2019; CJEU Case C-815/18, *Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV and Others*, 1 December 2020.

²¹ OJ C 225/6 of 30 August 1991.

²² COM(93) 225 final, Brussels, 15 June 1993.

question for the identification of neat categories, with postings under 30 (or eight) days probably deserving the definition of ultra short-term migration. What is more, a further threshold emerges once one turns to the question of the social security of posted workers. This will be covered in the next section.

3.THE COORDINATION OF SOCIAL SECURITY

The coordination of social security for mobile workers has been a central topic for the EU since the first stages of the European Communities. Indeed, a first regulation (Regulation No 3) was adopted as early as 1958, originating from the European Convention on the Social Security of Migrant Workers of 1957 (Fertikh 2019), which was never enforced. Since then, the Regulation has seen multiple amendments, leading to the adoption of a second instrument (Regulation (EEC) 1408/71) and then a third (Regulation (EC) 883/2004). All these legal instruments were adopted under the EU competence concerning the free movement of workers, where the legal basis has major significance. Even if these regulations were to be considered as social security instruments, their first and main objective is to facilitate mobility within the EU. Furthermore, the legal basis refers specifically to the free movement of 'workers' (Article 48 TFEU). Therefore, the Coordination Regulations (in all their versions) have a strong economic dimension even though the scope has been extended from 'workers' to 'persons'. In the context of the presently ongoing negotiations, the legal basis of Regulation (EC) 883/2004 would remain the free movement of workers despite the preamble of the proposition referring to the free movement of citizens.

Therefore, the first consideration is that the EU coordination of social security is meant as an instrument to foster labour mobility (Mavridis 2018: 578; Servais 2021: 339). The focus here is on how the Coordination Regulations provide solutions to the challenges arising from labour mobility, notably a consideration (or their highlighting of the lack of consideration) of short-term labour mobility. The following analysis is limited to the currently applicable regulation; that is, Regulation 883/2004. Unless otherwise specified, references to specific Articles should be understood as referring to this instrument.

The coordination of social security systems is framed by six principles: equality of treatment; 'unicity' of social security applicable legislation; the aggregation of periods; the assimilation of facts; the exportation/portability of rights; and good administration. The principle of equality entails that the mobile worker 'shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State (MS) as the nationals thereof' (Article 4; Jorens and Van Overmeiren 2009: 64).

According to the principle of unicity, the mobile worker 'shall be subject to the legislation of a single MS only' (Article 11). This is meant to prevent conflicts of law (Servais 2021: 346; Omarjee 2021: 157, 222-23; Martin 2019: 644; Jorens and Van Overmeiren 2009: 72).

The principle of aggregation mandates the competent Member State to, 'to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies' (Article 6; Mavridis 2019: 256-57; Jorens and Van Overmeiren 2009: 68-69).

The principle of assimilation, named on the basis of the translation from the French version of the Regulation, covers the 'equal treatment of benefits, income, facts or events' (Article 5). This principle was first considered part of the principle of equal treatment, being introduced as a subparagraph of

Article 4²³ before being inscribed in a separate article. Even so, the English version of the text still refers to it as a principle of equal treatment, whereas the French-speaking literature considers it as a distinct principle (Morsa 2012: 103-104; Servais 2021: 342-343; Omarjee 2021: 159-160). That said, according to this principle, the benefits, incomes, facts or events that occur in a different Member State than the competent one, identified according to the rules established by the Regulation, shall be considered as if they had occurred under the legislation or on the territory of the competent Member State (Servais 2021: 342; Jorens and Van Overmeiren 2009: 65-67).

The principle of portability results from the waiving of residence rules and applies when the worker modifies their state of residence,²⁴ although it is limited to (some) cash benefits (Jorens and Van Overmeiren 2009: 69-72; Omarjee 2021: 162-163). According to Article 7 of Regulation (EC) 883/2004:

... cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

Finally, the obligation of good administration provided by Article 71 is often included within the principles of coordination (Morsa 2012: 111; Jorens and Van Overmeiren 2009: 49) as it guides the application of the coordination rules.

Among these principles, the principle of unicity has important implications when it comes to short-term labour mobility, providing various rules on the determination of the law applicable in this area. The first is the general principle of *lex loci laboris* (Article 11.3.a), under which '[a] person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State'. This is applicable from 'day 0'; that is, as soon as an activity is performed in a Member State, the law (social security) of this Member State is applicable (Omarjee 2021: 226; Mavridis 2019). There is no time threshold, condition or restriction. Therefore, the principle applies *prima facie* to all forms of short-term labour mobility. However, this can lead to excessively fragmented situations,²⁵ entailing difficulties in accruing rights, accessing them and even having knowledge of them. Because of the short-term nature of the mobility at stake, the worker will, subsequently, be subject to multiple national legislations. Therefore, even if the rules are, in theory, applicable to short-term mobility, their specific application seems to be complicated, if not impossible.

Two specific rules are applicable to particular situations, notably those of posted workers and where workers are performing activities in two or more Member States. As discussed below, these might fall into a given definition of short-term mobility.

Posted workers remain subject to the law of their Member State of origin (Article 12). Therefore, during the period of posting they are neither affiliated to, nor covered by, the system of the country of arrival. This emerged as a problem during the recent Covid-19 crisis, as measures aimed at providing relief during lockdowns did not cover posted workers who were blocked in the country of arrival (Rasnača 2020). The differences in labour costs entailed by this have given rise to business practices aimed at their minimisation through transnational subcontracting and, sometimes, rules avoidance or evasion (Berntsen and Lillie 2016).

²³ CJEU has also considered it in the scope of non-discrimination. See CJEU Case C-349/87, *Elissavet Paraschi v Landesversicherungsanstalt Württemberg*, 4 October 1991, paras 19, 23-25.

²⁴ CJEU Case C-589/10, *Janina Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku*, 16 May 2013, para. 44.

²⁵ For example, about the applicable law during intervening periods between temporary assignments of a person working for a temporary work agency in one Member State but residing in another. See CJEU Case C-713/20, *Raad van bestuur van de Sociale verzekeringsbank*, 13 October 2022.

This echo of the country of origin principle in the context of labour and social rights, a reminder of the fierce battle over the so-called ‘Services Directive’²⁶ (for a critical discussion, see Crespy 2010), has made the posting of workers a highly contested topic in EU politics (Fromage and Kreiling 2017; Lubow and Schmidt 2020). The applicability of this exception is conditioned to a limited duration of the posting of up to 24 months on top of the conditions²⁷ related to the posting under the Coordination Regulations (Article 12). Therefore, while the *lex loci laboris* principle has no time dimension, this exception is conditional upon the mobility being temporary.

Would this be sufficient to consider it as a provision which takes short-term mobility into account? Evidently so: the rules apply from the first day of posting, so they cover situations of short-term mobility. However, the posting rule is also conditional upon a one-month previous affiliation of the worker to the social security system of the originating Member State.²⁸ This can lead to non-application in situations of short-term mobility, notably in the case of ‘chain’ mobility. Therefore, in some circumstances,²⁹ the posting rule will be applicable to short-term mobility, even if the rule in itself is designed to apply to the broader category of *temporary* mobility, not only to short-term situations, as proved by the application beyond 12 months of presence in the Member State of arrival. Indeed, an analysis of the exception for posted work in the context of social security coordination points to the partially overlapping nature of these concepts.

A worker pursuing an activity in two or more Member States (so-called ‘pluriactivity’) is covered by a separate provision (Article 13).³⁰ This is one of the most intricate articles of the Regulation. It provides various hypotheses to determine the applicable legislation, which can be that of the Member State of residence or that of the place of business (or registration) of the undertaking (or, in the case of the self-employed, the centre of interest) (Servais 2021: 361-362; Omarjee 2021: 229-234). How does this interact with situations of short-term mobility? If one such situation implies a short time abroad but a degree of permanence (or, at least, a longer duration) in the Member State where the worker (whether employed or self-employed) resides, the law applicable will be that of the Member State of residence. On the other hand, if short-term mobility is combined with a situation where the Member State of residence is different to that where the main activity takes place, or if no Member State of main activity can be identified, the application of the rules is increasingly complicated (van Ooij 2020).³¹ This shows how Article 13 is not a provision aimed at facilitating short-term mobility per se, potentially leaving these situations in a permanent state of uncertainty.

CONCLUSIONS

This chapter provided a short overview of the EU legal framework covering labour and social rights for intra-EU movers. In pursuing its second goal – that is, the identification of an implicit category of workers migrating within the EU on a short-term basis – it has collected a series of duration thresholds governing such rights.

²⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

²⁷ The conditions are: 1) the worker pursued an activity previously for the employer in the Member State of origin; 2) the employer ‘normally carries out its activities’ in that Member State; and 3) the worker remains under the direction of the employer. These are largely similar to Directive 96/71, analysed in the previous section. On the application of conditions of the ‘posting work rule’ to temporary work agencies, see, for example, CJEU Case C-784/19, *Team Power Europe*, 3 June 2021.

²⁸ Art. 1, Decision A2 of the Administrative Commission for the coordination of social security systems of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State.

²⁹ When the previous affiliation is fulfilled, even if exceptions to the one-month rule are considered (Art. 1 decision A2) and where ‘short-term mobility’ concerns only a part of working life.

³⁰ The example of pluriactivity provided by the European Commission reads as follows: ‘Mrs X is a business manager for two companies: one in Poland and one in the Czech Republic. She resides in Poland near the German border. Each week, she spends three working days in Germany for the Polish company. For the Czech company, she works one day in Slovakia and one in the Czech Republic’ (European Commission 2013).

³¹ The application of Article 13 is conflicted concerning flight and cabin crew; see for example CJEU Case C-33/21, *INAIL and INPS v Ryanair DAC*, 19 May 2022.

The first, relatively straightforward, conclusion on this point is that the scope of these thresholds is extremely wide. Thresholds as low as eight days are highlighted (in the context of exceptions to the application of the PWD), as well as some which are as high as five years (in the context of the CRD). In general, these thresholds are used to introduce exceptions to the labour and social rights of mobile workers or to grant such workers access to these rights (or to rights of residence). While concluding against the possibility of identifying a precise duration for an implicit category of short-term intra-EU mobility in EU law, the second conclusion points to the existence of a link between reduced rights and ‘shorter’ durations of a given mobility.

The vastness of the conceptual scope poses an interesting challenge for the interaction between the law and the representation of reality mediated by employment and demographic statistics. Indeed, what might be identified as short-term under the former might well fall, for instance, under the free movement of workers and be treated largely in the same way as long-term mobility. Along with this third conclusion, it is important to stress the importance of being aware of this dissociation when using the category of ‘short-term mobility’ to refer to any given portion of the workforce. Furthermore, the tension between the establishment of thresholds and the reality of the labour market in an era of non-standard employment relationships must be kept in mind (Vosko 2010: 132). Indeed, short-term migration has sometimes been identified with any form of migration lasting less than five years (e.g. Rasnača and Bogoeski 2023: 15) because of the threshold set by the CRD. Even the 12-month threshold of the ESA 2010 standards ends up being higher than the average duration of fixed-term contracts in several EU Member States and industries (Eichhorst et al. 2018: 6). This poses a further challenge to the identification of short-term mobility based on the legal classification of the mobility itself. Ultimately, the duration of the employment contract might well have a larger impact on the duration of the mobility than the degree of access to any given labour and social right.

As a final point, one of the elements mentioned in the Introduction needs to be recalled; namely that, where they exist, schemes for temporary labour migration – that is, enforceable short-term migration – are linked to increased vulnerability and worse access to labour and social rights for migrants (for a recent example, see Mantouvalou and Sedacca 2022). This chapter, notably when discussing the Social Security Coordination Regulations, highlights how (some) short-term mobile workers might benefit from solutions more tailored to their needs. However, if such a category were to be introduced in EU law, attention should be paid to the potential risk of exclusion of these workers from the enjoyment of labour and social rights, therefore creating a lower tier of intra-EU mobility.

REFERENCES

Barnard C. (2012) *EU employment law*, Oxford University Press.

Barnard C. and Fraser Butlin S. (2022) Ceding control and taking it back: the origins of free movement in EU law, *Industrial Law Journal*, 51 (3), 643–671. <https://doi.org/10.1093/inclaw/dwab032>

Berntsen L. and Lillie N. (2016) Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites, *Economic and Industrial Democracy*, 37 (1), 171–187. <https://doi.org/10.1177/0143831X14537357>

Biffl G. and Skrivanek I. (2016) The distinction between temporary labour migration and posted work in Austria: labour law versus trade law, in Howe J. and Owens R. (eds.) *Temporary labour migration in the global era: the regulatory challenges*, Hart Publishing, 91–112.

Canetta E., Fries-Tersch E. and Mabilia V. (2014) *Annual report on statistics on intra-EU movers*, Network Statistics FMSSFE, Publications Office of the European Union.

Castles S. (2006) *Guestworkers in Europe: a resurrection?*, *International Migration Review*, 40 (4), 741–766. <https://doi.org/10.1111/j.1747-7379.2006.00042.x>

Crespy A. (2010) *Legitimizing resistance to EU integration: social Europe as a europeanized normative frame in the conflict over the Bolkestein Directive*, *Les Cahiers européens de Sciences Po.*, 3, 1–24.

Dauvergne C. and Marsden S. (2014) *The ideology of temporary labour migration in the post-global era*, *Citizenship Studies*, 18 (2), 224–242. <https://doi.org/10.1080/13621025.2014.886441>

De Wispelaere F. (2022) *Improving the monitoring of posted workers in the EU: towards an exhaustive approach of employment statistics*, *CESifo Forum*, 23 (3), 29–32.

De Wispelaere F., De Smedt L. and Pacolet J. (2022) *Posting of workers – Report on A1 portable documents issued in 2020*, Publications Office of the European Union. <https://data.europa.eu/doi/10.2767/048597>

Eichhorst W., Marx P., Broughton A. and de Beer P. (2018) *Mitigating labour market dualism: single open-ended contracts and other Instruments*, European Parliament.

EMN (2015) *Determining labour shortages and the need for labour migration from third countries in the EU: synthesis report for the EMN study*, European Migration Network.

EMN (2020) *Attracting and protecting the rights of seasonal workers in the EU and United Kingdom: synthesis report*, European Migration Network.

European Commission (2013) *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*.

Eurostat (2013) *European system of accounts – ESA 2010*, Publications Office of the European Union. <https://doi.org/10.2785/16644>

Houwerzijl M. and van Hoek A. (2016) *Where do EU mobile workers belong, according to Rome I and the (E)PWD?*, in Verschueren H. (ed.) *Residence, employment and social rights of mobile persons: on how EU law defines where they belong*, Intersentia, 215–253.

Fertikh K. (2019) *From territorialized rights to personalized international social rights? The making of the European Convention on the Social Security of Migrant Workers (1957)*, in Baár M. and van Trigt P. (eds.) *Marginalized groups, inequalities and the post-war welfare state: whose welfare?*, Routledge, 29–48.

Geddes A. (2015) Temporary and circular migration in the construction of European migration governance, *Cambridge Review of International Affairs*, 28 (4), 571–588. <https://doi.org/10.1080/09557571.2015.1018135>

Janda C. (2017) We asked for workers: legal rules on temporary labor migration in the European Union and in Germany, *Comparative Labor Law and Policy Journal*, 39 (1), 143–164.

Jorens Y. and Van Overmeiren F. (2009) General principles of coordination in regulation 883/2004, *European Journal of Social Security*, 11 (1-2), 47–80.

Fromage D. and Kreilinger V. (2017) National parliaments' third yellow card and the struggle over the revision of the Posted Workers Directive, *European Journal of Legal Studies*, 10, 125–160.

Lubow A. and Schmidt S.K. (2020) A hidden champion? The European Court of Justice as an agenda-setter in the case of posted workers, *Public Administration*, 99 (2), 321–334. <https://doi.org/10.1111/padm.12643>

Malmberg J. and Sigeman T. (2008) Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice, *Common Market Law Review*, 45 (4), 1115–1146. <https://doi.org/10.54648/cola2008073>

Mantouvalou V. and Sedacca N. (2022) Trapped in cycles of exploitation: the UK overseas domestic worker visa 10 years on, *UK Labour Law Blog*, 06.04.2022.

Martin D. (2019) Article 48 TFEU, in Kellerbauer M., Klamert M. and Tomkin J. (eds.) *The EU treaties and the Charter of Fundamental Rights: a commentary*, Oxford University Press, 637–646. <https://doi.org/10.1093/oso/9780198759393.003.130>

Mavridis P. (2018) Libre circulation et sécurité sociale dans l'Union européenne: le paradigme vertueux de la régulation au niveau mondial?, in Jeammaud A., Le Friant M. and Wolmak C. (eds.) *À droit ouvert: mélanges en l'honneur d'Antoine Lyon-Caen*, Dalloz, 576–594.

Mavridis P. (2019) Y a-t-il encore des règles de conflits de lois en matière de sécurité sociale? Quelques réflexions, in *Liber Amicorum en hommage à Pierre Rodière: droit social international et européen en mouvement*, LGDJ, 247–268.

Menéndez A.J. (2010) European citizenship after Martínez Sala and Baumbast: has European law become more human and less social?, in Maduro M. and Azoulay L. (eds.) *The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome treaty*, Hart, 363–393.

Morsa M. (2012) *Sécurité sociale, libre circulation et citoyenneté européennes*, Anthémis.

Nuti A. (2018) Temporary labor migration within the EU as structural injustice, *Ethics and International Affairs*, 32 (2), 203–225. <https://doi.org/10.1017/S089267941800031X>

O'Leary S. (2011) Free movement of persons and services, in Craig P. and de Búrca G. (eds.) *The evolution of EU law*, Oxford University Press, 499–546.

OECD (2023) *International Migration Outlook 2023*, OECD Publishing. <https://doi.org/10.1787/b0f40584-en>

OECD (2019) International Migration Outlook, OECD Publishing. <https://doi.org/10.1787/c3e35eec-en>

Omarjee I. (2021) Manuel de droit européen de la protection sociale, Bruylant.

Ottonelli V. and Torresi T. (2022) The right not to stay: justice in migration, the liberal democratic state, and the case of temporary migration projects, Oxford University Press.

Rasnača Z. (2020) Essential but unprotected: highly mobile workers in the eu during the covid-19 pandemic, ETUI Policy Brief 2020–9, ETUI.

Rasnača Z. and Bogoeski V. (2023) Introduction, in Rasnača Z. and Bogoeski V. (eds.) Interaction between labour law and immigration regimes: the case of short-term third-country national workers in the EU and the EEA, Report 2023.06, ETUI, 7–18.

Rocca M. (2020) One train! (but different working conditions): CJEU C-16/18 (Michael Dobersberger v Magistrat der Stadt Wien), Arbeidsrechtelijke Annotaties, 3, 50–71. <https://doi.org/10.5553/ArA/156866392020014003003>

Rocca M. (2013) [A clash of kings. The European Committee of Social Rights on the ‘Lex Laval’ ... and on the EU framework for the posting of workers](#), European Journal of Social Law, 3, 217-232.

Ruhs M. (2013) The price of rights: regulating international labor migration , Princeton University Press.

Servais J.-M. (2021) Droit social de l’Union européenne, Bruylant.

Sjödin E. (2013) Labour market regulation as restrictions: a developmental study of ECJ case border services, posting workers, and multilevel governance, in Stein E. (ed.) Cross-border services, posting of workers, and multilevel governance, University of Oslo, 19–84.

Van Ooij E. (2020) Highly mobile workers challenging Regulation 883/2004: pushing borders or opening Pandora’s box?, Maastricht Journal of European and Comparative Law, 27 (5), 573–597. <https://doi.org/10.1177/1023263X20940137>

Voivozeanu A. (2019) Precarious posted migration: the case of Romanian construction and meat-industry workers in Germany, Central and Eastern European Migration Review, 85 (2), 85–99. <https://doi.org/10.17467/ceemr.2019.07>

Vosko L.F. (2010) Managing the margins: gender, citizenship, and the international regulation of precarious employment, Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199574810.001.0001>

Wagner I. and Lillie N. (2014) European integration and the disembedding of labour market regulation: transnational labour relations at the European Central Bank construction site, Journal of Common Market Studies, 52 (2), 403–419. <https://doi.org/10.1111/jcms.12096>

All links were checked on 30.10.2024.