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Protecting Migrant Workers in the EU: a Mission for the Court of Justice

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The European Court of Justice's approach to labour migration is multifaceted and may even appear, at times, contradictory. On the one hand, the Court has, in a number of cases, and again recently, interpreted EU legislative instruments in the domain of immigration policy in favour of migrant workers, whose right to equal treatment is conceived extensively[1]. The Court has followed a rather consistent path on equal treatment, as if it could disregard the increasing prominence of "national preference" in many European countries, where extreme right parties are gaining strength, if not yet acceding to power. On the other hand, when the mobility of third-country nationals (TCN) for work purposes takes place under the auspices of free provision of services and the so-called "posting of workers", their protection has not been a priority. The Court has conceived free provision of services extensively, as one could expect, and strictly reviewed national immigration law limiting the mobility of service providers' employees. At a time of restrictive immigration policies in Member states, free provision of services is used as a means of providing migrant workers from third countries to employers across Europe in search of cheap labour. This is done most efficiently through posting by temporary work agencies, which very purpose is to pro-

[1] CJEU, Judgement of 19 December 2024, *Caisse d'allocations familiales des Hauts-de-Seine*, Case C-664/23.

vide manpower. In this process, the protection of workers that can be achieved by the equal treatment rule, in the framework of labour migration policies, is inactivated. As a result, highly mobile and very vulnerable posted TCN are victims of extensive exploitation, on the EU territory[2].

However, the case law of the Court of Justice is paving the way to more convergence between protective interpretation of EU legislation on labour migration and limited attention to the risk of TCN exploitation in the framework of free provision of services. In a series of cases[3], recently confirmed[4], the Court distinguished the activity consisting in "the loan of manpower" from other business activities[5]. It implicitly admitted that workers posted for the purpose of the former could be considered ordinary migrant workers, falling under national immigration law. This also means, whenever EU immigration law applies, that they should benefit from equal treatment, as interpreted by the Court of Justice.

1. *Resilience of equal treatment in the framework of EU immigration policy*

Non-discrimination is a central provision in all EU directives concerning migrations, and has been taken seriously by the Court of Justice. The Court made it clear that the right to equal treatment in the Directives concerning the status of third country nationals constitutes a general rule[6]. As a result, when derogations from that right are possible, Member states can only rely on them if they have stated clearly that they intended to do so[7]. The most extensive equal treatment rule benefits to long-term residents, covered by Directive 2003/109. Adopted on the basis of the progressive pre-Lisbon

[2] On this phenomenon, see namely: ROBIN-OLIVIER, *Posting of workers in the European Union: an exploitative labour system*, in *EPs*, 2022, 1, p. 679. See also, recently, VERSCHUEREN, *Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative*, in *ELLJ*, 2024, 15, 4, pp. 875-890.

[3] CJEU, Judgement of 10 February 2011, *Vicoplus,* Case C-307/09 to C-309/09; Judgement of 14 November 2018, *Danieli*, C-18/17.

[4] CJEU, Judgement of 20 June 2024, *SN*, Case C-540/22.

[5] *Ibid*. § 79.

[6] CJEU, Judgement of 24 April 2012, *Kamberaj,* Case C-571/10, § 86 (concerning Directive 2003/109) and Judgement of 21 June 2017, *Martinez Silva*, Case C-449/16, § 29 (concerning Directive 2011/98).

[7] CJEU, *Kamberaj*, cit.

provisions of the TFEU, it aims at fostering integration of third country nationals, who have settled in a Member state[8]. Long-term residents benefit from equal treatment for access to employment and self-employed activity; conditions of employment and working conditions; education and vocational training, including study grants; recognition of professional diplomas, certificates and other qualifications; tax benefits; access to goods and services and the supply of goods and services made available to the public; procedures for obtaining housing; freedom of association and affiliation and membership in an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation[9]. Although Directive 2003/109 holds an important limit, since it allows Member states to restrict equal treatment in respect of social assistance and social protection to "core benefits"[10], the Court of Justice imposed a restrictive interpretation of this limit[11].

Other immigration Directives also contain equal treatment rules. This is namely the case of Directive 2011/98 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. In an important case decided in 2020, the Court rejected Italy's reservation of the benefit of equal treatment to holders of a single permit whose family members reside in Italy[12]. This solution has been recently confirmed in a decision that addressed a highly contestable aspect of French immigration law[13]. In that recent case, the Court affirmed that the French legislation could not, for the purposes of determining the entitlement to social security benefits of a TCN holding a single permit, refuse to take into account dependent children born in a third country whenever they cannot prove that they have entered the territory of that

[8] CJEU, Judgement of 26 April 2012, *European Commission v Netherlands*, Case C-508/10. On this objective of integration, and the extensive conception of equality that it entails, see also: CJEU, Judgement of 14 March 2019, *Y.Z.*, Case C-557/17, § 63.

[9] Art 11(1) of Directive 2003/109.

[10] Art 11(4) of Directive 2003/109/EC. In this respect, recital 12 to this Directive states that "with regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care".

[11] CJEU, *Kamberaj*, cit.

[12] CJEU, Judgement of 25 November 2020, *WS*, Case C-302/19.

[13] CJEU, *Caisse d'allocations familiales des Hauts-de-Seine*, cit.

Member State lawfully. The Court confirmed that Directive 2011/98 provides a right to equal treatment, which is the general rule, and that the derogations from that right, which the Member States have the option of establishing, must be interpreted strictly[14]. This decision can be regarded as an act of resistance in the context of prevailing anti-migrant sentiment in the political sphere. While this course of action may incur a heightened risk of hostility directed towards the Court, and courts in general, it is a risk worth taking in the name of justice and fairness.

2. *Posted TCN as migrant workers*

Protection of TCN is not yet clearly emerging in the case law concerning posting of workers for provision of services. However, some elements in recent case law developments open the path to an evolution towards TCN being considered as migrant workers rather than posted workers, when posting is a way to circumvent direct employment. In the *SN* case[15], Ukrainian employees were posted to the Netherlands by a Slovak employer to carry out metal work for a Dutch company in the port of Rotterdam. The Dutch regulation stipulated that for a posting exceeding three months (which corresponds to the duration of Schengen visas), a residence permit must be obtained. The validity of this permit could not exceed that of the residence and work permit granted by the sending Member State. Furthermore, the acquisition of this permit necessitated the payment of a substantial fee. In its decision, the Court of Justice accorded significant deference to the arguments advanced by the Dutch government, which sought to justify the restriction on the free movement of services under immigration law. It held that the requirement of a residence permit could be justified (if proportionate), not only for public policy reasons, but also to increase "legal certainty for posted workers". It is noteworthy that this particular strand of the defence of Dutch legislation addresses one of the sources of vulnerability faced by posted workers, which consists in their uncertain immigration status. However, this part of the case is not the central one. The primary focus is directed towards the maintenance of public order and security, with one legitimate

[14] *Ibid.* § 45.
[15] CJEU, *SN*, cit.

objective being the verification that migrants do not constitute a threat to public policy or public security[16]. In addition, freedom to provide services remains well defended: in particular, the limitation of the validity of the residence permits can only be accepted, according to the Court, if the initial period of validity is not "manifestly too short to meet the needs of the majority of service providers" or if it is possible to renew that period of validity without meeting excessive formal requirements.

The limited attention paid to posted workers' rights comes as no surprise: this is not what the Court of Justice was questioned about. The case was brought before the Dutch court by the Ukrainian migrant workers who contested the payment of a fee to obtain a residence permit, not their exploitation as workers. And as for the question brought to the Court of Justice by the Dutch judges, it concerned the conformity to EU law of restrictions to free provision of services resulting from the application of immigration law. But in some discreet, but very interesting developments, the case underlines that TCN, who are assigned by temporary work agencies or placement agencies to employers established on the territory of the receiving State, belong to the category of migrant workers and should not be treated as employees of a service provider.

This distinction was sufficiently important for the Court to mention it in an *obiter dictum*, which points at the specificity of the "loan of manpower"[17] to exclude this operation from the specific regime of posting. Temporary work assignment or placement of workers beyond borders falls outside the domain of posting, and cannot serve to circumvent immigration law. Indeed, immigration law constitutes, first and foremost, a restrictive regime limiting mobility of migrant workers. However, the equal treatment rule, as emphasised by the Court of Justice's case law, also entails a protective dimension.

As the Court stated in *Team power Europe*, EU law should not foster "distortion of competition between the various possible modes of employment in favour of recourse to temporary agency work as opposed to undertakings directly recruiting their workers"[18]. However, the distinction between loan of manpower and service provision will not be easy to implement, especially when chains of contracts are put in place to conceal the actual activity of firms involved. But limiting the use of posting as a means to provide

[16] CJEU, *SN*, § 102.
[17] CJEU, *SN*, § 80.
[18] CJEU, Judgement of 3 June 2021, Case C-784/19, § 65.

workers, a source of severe forms of exploitation of TCN, is needed. Ultimately, the prevention of this bypass to accessing national labour markets may result, one can hope, in the opening of new legal channels for labour migration.