



INFO-RIGHTS

Making information the basis for strengthened and increased working rights in the agriculture and manufacturing sectors within the context of intra-EU posting of workers

POLAND REPORT —

**CASE STUDY ON THE TERMS AND CONDITIONS OF
EMPLOYMENT IN THE AGRICULTURE AND
MANUFACTURING SECTORS**



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1. Introduction

One of the most sacrosanct principles of the Single Market is the freedom to provide services in other Member States¹. Posting of workers is a hybrid type of intra-EU labour mobility based on the very freedom, which has experienced a strong upward evolution during the last two decades, as a part of the larger notion of intra-EU mobility². Posted workers, including also third-country nationals (hereinafter also as ‘TCNs’), are ‘posted’ (or ‘post themselves’) as part of a cross-border service provided by their employer (or principal or yet other entity or by themselves) pursuant to Art. 56 *et seq.* TFEU³. They are to be differentiated from another important form of labour mobility – that is from migration to another EU Member State under the free movement of workers (Art. 45 *et seq.* TFEU).

Given the above and generally speaking, posted workers remain connected with their home country (usually – sending Member State), through their employment agreement (in Polish conditions – it is either a contract of employment or a civil-type contract⁴) and they generally remain affiliated to the social security system of their home country, while they become subject to certain areas of the labour and employment legislation of the host country⁵.

When it comes to outgoing posting of workers, Poland has long been among the main ‘sending’ Member States. Until 2018 it was Poland where the most Portable Documents A1⁶ had been issued every year. This changed in 2019, when it was surpassed in a number of PDs A1 issued by Germany⁷. At the same time Poland is only a minor player when it comes to incoming postings – in 2023 the State Labour Inspection (competent Polish institution) received 17,061 declarations of the employers posting workers to Poland (of which 11,771 came from EU / EEA Member States or Switzerland)⁸.

In turn, the agricultural sector is estimated to have employed around 9.1 million people in 2021 (latest available data in this regard) across the European Union, which equals about 4.4% of total employment in the EU-27. However, in terms of workforce, this is a shrinking category: its share of total EU-27 employment has decreased by 3.8 % since 2000.

During the work accompanying the present project, it has become constantly more and more clear that posting of workers (as understood by the European and national law) is not the main form of cross-border employment in the agricultural (and horticultural) sector. Rather, it is seasonal work (in particular cross-border seasonal work) that is the sector's (majoritarian) answer to seeking appropriate form of employment outside of workers' countries of origin⁹.

¹ D. Lens, N. Mussche, I. Marx, *The different faces of international posting: Why do companies use posting of workers?*, European Journal of Industrial Relations 2022, Vol. 28(1), p. 27.

² Cf. E. Fries-Tersch, M. Jones & L. Siöland (2021), *2020 Annual Report on intra-Eu Labour Mobility*, Network Statistics FMSSFE. European Commission; M. Kielbasa, *The Poland Report: Recommendations and Solutions* [within the framework of POSTCARE 2.0. Informing the Care Services Workers on Posting Rules] 2023, p. 2.

³ Cf. G. Davies & D. Kramer, *The Posting of Workers* [in:] R. Schütze, T. Tridimas (eds.), *Oxford Principles of European Union Law Vol. 2: The Internal Market*, Oxford, retrievable at the following address: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939196), p. 5 *et seq.*

⁴ Cf. L. Mitrus, *Social security in Poland in times of corona*, in S. Devetzi, A. Stergiou, *Social security in times of corona - a legal comparison of selected European countries*, Athens – Thessaloniki 2021, p. 110 *et seq.*

⁵ See: M. Kielbasa, *The Poland Report*, *op. cit.*, p. 2-3.

⁶ With a PD A1 (also referred to as ‘**the A1 certificate**’ herein) social security legislation a person is subject to is confirmed. The PD A1 may be issued if the conditions under EU law are met. For more on this certificate cf. e.g. in: D. Carrascosa Bermejo, J. Molina Millian, *The binding nature of posting PDA1 issued under EU social security coordination regulations and the possible role of national courts*. ERA Forum 2023, No 24, p. 69 *et seq.*

⁷ F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2022*, HIVA-KU Leuven, November 2021, p. 11. Poland remained the main issuing Member State for PDs A1 pursuant to Art. 13 Regulation 883/2004.

⁸ *Report on the activities of the Polish State Labour Inspection in 2023.*, p. 197.

⁹ See also: EFFAT, *Posting of workers in the European agricultural sector*, 2010, p. 9.

It is worth emphasizing that seasonal work in agriculture (and horticulture) is more likely to occur within the EU under the above-mentioned free movement of workers (Art. 45 et seq. TFEU), although sometimes it falls under the freedom to provide service (and therefore under the legal provisions concerning the posting of workers) and in some countries (e.g. in France) it may assume respectable proportions¹⁰. Given the above, we shall examine both those two *phenomena* below.

Last, but not least, migrants workers from third countries are covered by the Seasonal Workers Directive¹¹ (Directive 2014/36/EU), which grants them equal treatment in terms of employment conditions, minimum working age, working conditions and occupational health and safety measures. For the first time, the Directive provided a set of harmonized rules for the admission, residence and rights of third-country seasonal workers.

¹⁰ F. De Wispelaere, L. De Smedt, J. Pacolet (2022), *Posted workers in the European Union. Facts and Figures*, Leuven: POSTING.STAT project VS/2020/0499, p. 59.

¹¹ Directive 2014/36/EU of the EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers Official Journal of the European Union, L 94/375, pp. 375–390.

2. Methodology

The choice of the methodological approach adopted in this case study follows its purposes. Therefore, it relies on a legal doctrinal method for the analysis of the existing framework, covering relevant legal sources of Polish law and the Community/EU law, crucial judgments, selected literature *and acquis communautaire*¹². Moreover, following research methods (perspectives) were used herein: theoretical-legal, legal and comparative as well as the descriptive one, using the following interpretations: linguistic, functional, systemic and logical. Their common denominator and purpose was not only to present (and comment on) legal solutions, but also to present their practical implications. Statistical data illustrating economic trends is quoted from the original sources of data collected by competent social security institution as well as from the external research.

3. Findings

Estimations concerning the number of persons working in a cross-border manner in agriculture (and horticulture vary. According to a study published in 2021 by the European Commission, there are around 650 000 – 850 000 EU citizens that carry out seasonal work in another EU country, most of whom in agriculture¹³. However, seeing that many migrant seasonal workers go unrecorded, for example undocumented migrants or asylum-seekers, this number is higher in reality¹⁴.

According to a study of the European Migration Network (EMN)'s report¹⁵, seasonal workers from non-EU countries mostly originate from the neighbouring regions of the receiving Member States. For example, in 2018, the Ukraine was the most frequent country of origin across the Member States, followed by Bosnia and Herzegovina, Serbia, North Macedonia, Moldova and Belarus. It is also worth stressing that for some Member States, key countries of origin of seasonal workers are outside the European continent, namely from Africa and South America¹⁶. Germany receives around 300,000 workers a year for agricultural, horticultural and forestry work, many of them from Central and Eastern Europe, mainly from Romania and Bulgaria, while in Italy, 370,000 migrants from 155 countries are employed in agriculture, accounting for 27 % of the legal agricultural workforce. France and Spain employ 276 000 and 150 000 seasonal workers respectively¹⁷.

¹² J. M. Smits, *What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research*, [in:] R. Van Gestel, H.-V. Micklitz, E. L. Rubin (editors), *Rethinking Legal Scholarship*, Cambridge 2017, p. 227 *et seq.*

¹³ M. Andriescu, S. Buckingham, A. Broughton (Ecorys), F. De Wispelaere, L. De Smedt (HIVA-KU Leuven), O. Gascon, A. Ongono Pomme (Spark Legal and Policy Consulting), E. Voss and K. Vitols (wmp consult), *Study supporting the Monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU. The situation of temporary cross-border mobile workers and workers in subcontracting chains*, Luxembourg: Publications Office of the European Union, 2024p. 116. See also E. Fries-Tersch, M. Jones & L. Siöland (2021), *2020 Annual Report on intra-Eu Labour Mobility*, *op. cit.*

¹⁴ F. De Wispelaere, L. De Smedt, J. Pacolet (2022), *Posted workers in the European Union. Facts and Figures*, Leuven: POSTING.STAT project VS/2020/0499, p. 59.

¹⁵ European Migration Network, *'Attracting and protecting the rights of seasonal workers in the EU and United Kingdom'*, Synthesis Report, 2020, available at: https://home-affairs.ec.europa.eu/system/files/en?file=2020-12/00_eu_seasonal_workers_study_synthesis_report_en_1.pdf [last accessed on 15.07.2024].

¹⁶ M. Andriescu, S. Buckingham, A. Broughton, F. De Wispelaere, L. De Smedt, O. Gascon, A. Ongono Pomme, E. Voss and K. Vitols, *Study*, *op. cit.*

¹⁷ Cf. M.-L. Augere-Granier, *Migrant seasonal workers in the European agricultural sector*, Think Tank of the European Parliament 2021, retrievable at:

[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)689347](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)689347)

When it comes to Poland, starting from 1 January 2018, the amended Polish Act on Employment Promotion and Labour Market Institutions introduced new solutions enabling to employ foreigners (actually – third-country nationals) in Poland to do seasonal work, i.e. a seasonal work permit. Under provisions governing it, seasonal work is the one done for no more than 9 months during a calendar year in the following industries: agriculture, horticulture, tourist industry, within the activities considered seasonal, as stipulated in the implementing regulation (Journal of Laws 2018.1749) of the Minister of Family, Labour and Social Policy on the business activity subclasses based on the Polish Classification of Activities (*PKD*)¹⁸ where the seasonal work permits are issued to a foreigner.

The procedures for seasonal work permits in Poland are different from the principle, which is to obtain a work permit for a third-country national. They are granted by starosts (at District Labour Offices) at the request of employers operating in certain subclasses of the above-mentioned Polish Classification of Activities (mainly in agriculture). If the application concerns a foreigner who is to enter the territory of the Republic of Poland, the procedure for issuing a seasonal work permit is a two-stage process. At the first stage, the application is entered in the register and a certificate is issued to the employer, which the employer sends to the foreigner (justifying the issuance of a visa). The seasonal work permit itself is issued to the employer at the second stage - after the foreigner has entered the territory of the Republic of Poland and the employer has confirmed that the foreigner has applied for it.

In the case of citizens of Armenia, Belarus, Georgia, Moldova or Ukraine, the permit to work outside the ‘seasonal subclasses’ may be replaced by ‘a declaration on entrusting work to a foreigner’ (*oświadczenie o powierzeniu wykonywania pracy cudzoziemcowi*) entered in the register of statements by the District Labour Office¹⁹ or by a ‘notification on entrusting work to a Ukrainian citizen’ to such an office (*powiadomienie o powierzeniu wykonywania pracy obywatelowi Ukrainy*) in case of Ukrainian citizens.

In 2023, there were around 72,000 applications for Seasonal Work Permits (twice less than in 2022 and 6 times less than in 2021). Of these, approximately 37,000 concerned citizens of Ukraine, 6,000 from Nepal, 5,000 from India, 3,000 each from Bangladesh and Turkey. At the same time, only around 16,000 seasonal work permits were issued (13,000 concerned citizens of Ukraine). However, it should be noted that thanks to the introduction of the abovementioned ‘notification procedure’, some farmers are using this very form of legalisation of employment of foreigners.

In 2023, almost 39,000 proceedings for granting a seasonal work permit were discontinued - it should be noted that a mechanism for automatic discontinuation of cases was introduced in 2022. At same time, at the end of 2023, 17 thousand applications for seasonal work permits were still pending²⁰.

When it comes to posting of workers in cross-border agriculture (and horticulture), in 2022 (latest available data) Poland issued 6,477 A1 pursuant to Art. 12 Regulation 883/2004 in Agriculture, hunting and fishing (NACE A)²¹ as well as 3,319 A1 of Art. 13 of that Regulation under NACE A²². At the same time, Poland received only, 190 PDs A1 in NACE A under Art. 12 of that Regulation (due to the construction of Article 13 PDs A1, it is currently impossible to indicate the receiving Member States, involved in the reception of certificates under that provision).

¹⁸ PKD - Polish Classification of Activities (latest version - PKD 2007) is based on NACE - the Statistical Classification of Economic Activities in the European Community, established by the Council Regulation No 3037/90 (OJ No L 293 of Oct. 24th 1990), as amended. The Regulation (EC) No 1893/2006 of the EP and of the Council, of 20 December 2006, established statistical classification of economic activities NACE Revision 2 and amended Council Regulation No 3037/90. PKD 2007 is fully methodologically, conceptually, in the scope and coding system (up to fourth digit) coherent and comparable with the classification NACE Revision 2 – see Statistics Poland (GUS) at: <https://stat.gov.pl/en/metainformation/classifications/>

¹⁹ Cf. the Polish Ministry of Family, Labour and Social Policy [MRPiPS], *Informacja o zatrudnieniu cudzoziemców w Polsce*, Warszawa, January 2024, p. 5.

²⁰ *Ibidem*, p. 10 et seq.

²¹ F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 PDs issued in 2022*, p. 52.

²² *Ibidem*, p. 55.

The main receiving Member State in the NACE A category were Germany with 4,131 PDs A1 under Art. 12 received in 2022, followed by the Netherlands (2,863) and ... Malta (895 PDs A1 received). In total, only 13,154 PDs A1 were received under that legal basis in the EU-27 in 2022²³.

Seasonal agricultural workers fill jobs shunned by local workers because of the low wages, hardship, long hours and poor living conditions. Work on farms is intensive physical labour, taking place outdoors in all weathers and with early starts and there are many job-related risks²⁴. With regards to the terms and conditions of employment, the present sector differs from the overall workforce in the EU in a number of aspects. In terms of working status, the proportion of family workers is significantly higher than the average for the whole EU workforce, at more than 15% compared to just 1%. The levels of self-employment are also significantly higher than the average for the whole EU workforce, at 53.7% compared to 14.1%²⁵. Further differences are related to working hours: the proportion of workers working 49 hours per week (21.7%) or more is three times higher than the proportion in the total EU workforce (7.5%). Illustrating the seasonal character of large parts of agri- and horticulture, a further characteristic of employment is the comparatively high share of short-term employment: In 2020 having a short-term contract of up to three months was 3.6 times as common in the agriculture workforce²⁶.

²³ Ibidem, p. 53.

²⁴ *Migrant seasonal workers in the European agricultural sector*, op. cit., p. 6.

²⁵ Eurostat, 'Key figures on the European Food chain' 2021, retrievable at: <https://ec.europa.eu/eurostat/web/products-key-figures/-/ks-fk-21-001>., p. 19

²⁶ M. Andriescu, S. Buckingham, A. Broughton, F. De Wispelaere, L. De Smedt, O. Gascon, A. Ongono Pomme, E. Voss and K. Vitols, *Study*, op. cit., p. 115.

4. Discussion

Despite indisputable modernisation both agriculture and horticulture sectors underwent in recent years, they remain labour intensive and highly seasonal. These two features prevent stable employment and foster seasonal work and work mobility, including cross-border work mobility. It is often difficult to determine *in situ* the legal status of an agriculture worker from another Member State, let alone a third-country national. Distinguishing unregistered employment and bogus self-employment on the one hand from direct, often seasonal, employment of a mobile worker and posting of workers in the framework of service provision on the other hand is a necessary precondition to determine and protect workers' rights. The following case study focuses on the posting of workers tracing its features which set it apart from other forms of work mobility.

Jan is a Polish citizen, who gets a job offer from a Polish Temporary Employment Agency (TEA) for a temporary work contract in France where his assignment is to pick up grapefruits in vineyard for a harvest season. How do we know he is a posted worker, not a seasonal worker? Firstly, his employer is registered and carries out normal activity in another Member State (Poland) and is hiring out personnel (including Jan) to a user employer in to France. In such situation EU law and jurisprudence requires to assume a legal fiction that Jan remains part of the labour market of the sending Member State (Poland) and does not seek employment in France. Throughout the entire duration of posting, he continues to be employed by the Polish TEA. After the harvest season, after completing the assignment in France, he will return to Poland. Jan's employer is obliged to file a simple notification of the fact of posting Jan in the French SIPSI system. Also Jan should receive the information about basic employment conditions, especially if they differ from Polish employment conditions. The parties are most likely to choose Polish employment law to apply to their contract. However there is a set of employment conditions from the French law which will override this choice. The most important stem from the employment conditions listed in Art. 3 (1) of the Posting of Workers Directive (PWD). They include French remuneration: not only the level but all the mandatory components which may be obligatory under the French law and not necessarily present in the Polish (chosen) legislation. For instance a compensation for temporary nature of the employment contract – an allowance foreign to the Polish system. Minimum periods of rest and maximum periods of work as well as the number of paid annual leave – proportional to the part of the year worked in France – will also apply under the French rules. Important in this case is the application of the rules on hiring out workers according to French law. There are nine areas of labour law listed in Art. 3 (1) in which the French rules will override the choice of legislation made by the parties. Among them there are rules of hiring out workers.

The heart of the PWD is however the favourability principle, which may override the overriding and self-imposing rules of the French national law (sic!). This simple principle makes full legal compliance problematic and causes controversies. It requires constant comparative analysis of the employment conditions of both legal systems. Art 3 (7) of the PWD states that application of the mandatory French employment conditions shall not prevent application of terms and conditions of employment which are more favourable to workers. This clearly contradicts with the principle of equal treatment which is prevailing in the case of hiring out workers. If two principles contradict each other, the favourability principle should prevail.

Only a tiny bit easier it is to resolve the conflict of norms in the field of social security. Regulation 883/2004/EU guarantees posted workers that they will not change their social security system during the posting period, provided that their employer runs normal activity in the sending Member State and that the duration of posting does not exceed 24 months, which in case of temporary work is prevented by maximum duration of hiring out workers on temporary basis.

We set aside the personal income tax legislation, which also requires legal certainty for both worker and employer. When it comes to enforcement of the above mentioned rules, there is a serious obstacle which

lies in national only competence of control institutions (labour inspection, frontier guard or social security control). Their legal competence remains only national, so they are not entitled to assess favourability. The complexity of the rules make it easier for shady intermediaries to hide the real legal status of a worker who are crossing internal EU borders in agriculture and horticulture sectors.

5. Conclusion

Work in agricultural sector, provided in a cross-border manner by seasonal workers (majority) under Art. 45 et seq. TFEU (and the Seasonal Workers' Directive) and posted workers (under Art. 56 et seq. TFEU) hailing either from other EU countries or from outside the EU has long been a constant feature of the workforce in the EU agriculture sector. Cross-border mobile workers are important and likely to continue due to significant labour shortages in both agriculture and horticulture.







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