

INT-AR Paper 11 – Third-country nationals on the EU labour market – Jan Cremers (UvT)

Introduction

In recent years, the labour inspectorates and other social enforcement authorities, and NGOs have signalled a more prominent presence of third-country national migrant labour (hereafter TCNs) on the labour market of the EU Member States. A third-country national labour migrant is a citizen who resides and works in EU Member States but does not have the nationality of one of the Member States (nor of one of the EFTA-countries). Although it is not an easy task to find representative and precise statistics, the impression, also in the media, is that this presence is increasing.¹

Both the Member States and the European Commission consider attracting (some) third-country national workers to the EU as a method to address labour shortages. For instance, the European Commission's Skills and Talent package aims to increase the effectiveness of the EU legal migration policy in this regard.

In general terms, the position of TCNs is in many cases extremely vulnerable because their legal residence status is dependent on their employment status. In this working paper an effort is made to describe the position of TCNs on the EU labour market. This position is the result of an interaction between the immigration pathways enshrined in national immigration law regimes and the labour market access and the enforcement of labour standards in the country where TCNs carry out their work.

In the first paragraph, I provide some basic data that are available both with quantitative and qualitative information that can be found in studies and reports. The second paragraph sketches out the regulatory framework of applicable rules and regulation regarding labour standards and social security. The third paragraph looks after the, sometimes problematic, enforcement of the TCNs rights. The resuming part ends with considerations concerning the strengthening of the position of TCNs, starting from a fair recruitment to equal treatment at the workplace. Complimentary, I refer to a synthesis of the outcome of a brief survey among labour inspectors, collecting experiences inspection services have with TCNs on the labour market. That synthesis was produced in the frame of the Eurodetachment project *Posting of workers: strengthening and deepening international cooperation 2023-2024*, funded by EU and can be found on the project's website.²

What do we know?

Between 2015 and 2019, the share of migrants in OECD capitals rose by 3.5 percentage points. TCNs often make up a substantial part of key workers in European regions. And most high-income countries of immigration recognise their need for migrant labour from third countries at both the high- and low-skill ends of the labour market.³

It is clear from studies and Eurostat-data that work is the most important driver and primary distinctive reason why third-country nationals migrate to the EU and EEA.⁴ Although many TCNs are living and working in the EU, the share of the population and of the labour force they represent varies greatly between countries. According to the most recent data of the OECD, labour migration comprised 21% of all migration in 2022 in the OECD-countries, an increase of 36% since 2021. In most EU Member States, the permanent-type labour migration continued to increase, following a trend since the mid-2010s. Temporary labour

¹ In a summary of the experiences of enforcement authorities and NGOs in 11 Member States (Annex 1), the counselling NGOs in Germany, for instance, reported an important increase of cases with TCNs involved. The Berlin office had in 2022 for the first time more cases with TCNs than with EU workers. The German Employment Agency identified several reasons for the increased arrival of TCNs: such as the 2020 Skilled Worker Immigration Law, influx from crisis-areas and more bilateral contracts with non-EU Eastern European and South-Eastern European countries.

In: Cremers J. (2023) Dealing with third-country nationals working in the EU - a summary, unpublished.

² www.eurodetachment-travail.eu

³ OECD (2022) The contribution of migration to regional development, Policy Highlights.

⁴ Bogoeski V., Rasnača Z. (2023) Interaction between labour law and immigration regimes.

migration reached above 2019 levels, after a substantial fall due to the Covid-pandemic. Temporary seasonal workers constitute the main category here. Specifically for the EU countries, the number of permits issued to temporary foreign workers increased in 2022 with 24% year-on-year. Labour migration was in 2022 at a 15-year record level in the OECD-countries.⁵

Entrance to a Member State's labour market from outside the EU is based on the application of national migration legislation. Nationally controlled systems of migration legislation/regulation provide TCNs with legal access to a Member State where they are supposed to reside and work, with a work and residence permit for that Member State. The conditions for entrance are not harmonised and can be based on very diverged schemes and systems. In some countries, simplified arrangements and/or bilateral agreements facilitate this entrance. The role of their future employer (or 'sponsor') is a key condition in most procedures.

The position of TCNs on the labour market is often vulnerable in several respects. They are depending on their employer for their residence, for their employment, as well as for their housing and living. One important consequence of this complete dependency for the involved TCNs is a higher risk of exploitation, as both the intertwined key conditions of residence and work permit depend on the original employer in the country of entrance. In this respect, the right to move freely as fundament for a worker's mobility in the EU does not apply for TCNs. Even in a situation where breaches and abuses occur too often with mobile EU-workers, they enjoy more freedom and mobility rights on the labour market than TCNs.

Based on several studies, there is evidence of a weaker economic position and a lack of equal treatment on the labour market. Nationals of a non-EU country do not enjoy equal access to the labour market and social support as nationals. This will not be treated extensively in this paper. We just restrict ourselves to findings listed in a series of documents, published by the OECD and the European Commission with indicators of immigrant integration. Close to one in five third-country nationals EU-wide felt belonging to a group that was discriminated against on the grounds of ethnicity, nationality or race. EU-wide, around two in five tertiary educated TCNs are overqualified for their job, compared with roughly only one in five nationals. TCN women experience a particularly high overqualification rate of 44%. Even with host-country degree TCNs remained more likely to be overqualified than nationals everywhere. They had a lower annual disposable household income and more risk to be hit by poverty than nationals in virtually every EU country. In the Benelux, Spain and Sweden, their income was less than 60% of nationals' median income.⁶

Posting of TCNs generally does not happen directly from outside the EU. However, once hosted in an EU Member State and in the possession of a work permit, TCNs can be temporary posted by their employer. Based on the free movement of services, it is allowed to post TCNs across the EU. Case-law of the European Court of Justice has confirmed that TCNs with a valid work and residence permit in one Member State are not exclusively tied to that country and can be posted to any other EU Member State. Over the years, the number of posted TCNs has increased, with an overrepresentation from Slovenia, Poland, Spain and Lithuania as the first countries of entrance. On the other side, Belgium, Austria, the Netherlands, Luxembourg and France are important receiving countries of posted TCNs. Relevant sectors are the road transport, storage and distribution, construction and agriculture.⁷

There is some evidence that posted TCN workers belong to the category low- and medium-skilled/paid that normally would have difficulties as TCNs to enter and obtain a work and residence permit from a receiving Member State. The regulation of their labour migration from outside the EU thus goes beyond the control of such a receiving country.⁸ As a consequence, the supposed execution of a service contract in another Member State, on behalf of an employer in the Member State of entrance, easily degenerates into a non-intended new form of a migration industry that can resort to lenient recruitment procedures for TCNs. This questions the national control and restrictions over the entry and residence of TCNs, often based on labour market tests,

⁵ OECD (2023) International Migration Outlook 2023

⁶ The last publication in this series was: OECD/European Commission (2023), Indicators of Immigrant Integration 2023: Settling In, OECD Publishing, Paris.

⁷ De Wispelaere F., De Smedt L., Pacolet J. (2022), Posted workers in the European Union. Facts and figures. Leuven: POSTING.STAT project VS/2020/0499.

⁸ Lens D., Mussche N., Marx I. (2021) A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants, International Migration, Vol 60.2.

point systems and other conditions. It also shows the contradictions between nation-state formulated migration objectives and the often employer sponsorship dominated policy of TCN-recruitment necessary for the national labour market on the one hand. A good example in this respect is Hungary that has a very antagonistic policy against the entrance of third-country nationals, whilst employers with a strategic partnership agreement with the Government relatively easy can employ TCNs from a country neighbouring Hungary in professions provided for in a communication by the Ministry of National Economy of for investment projects of preferential status for national economy considerations.⁹

In several studies, the phenomenon of a ‘business model’ that is applied with posted TCNs has come to the forefront. Some Member States are criticised because they function as the country of entrance, whilst the involved TCNs are immediately posted to another Member State, without having any working tradition in the country of first entrance. In such situations, the relatively easy entrance through national quota or bilateral arrangements, combined with the freedom of establishment and the free service provision, opens doors for the recruitment of cheap labour.¹⁰

The regulatory framework

The entrance of TCNs to the labour market is, as said beyond, a national competence based on policies formulated by an individual Member State. Unlike the free movement of EU-citizens, the recruitment of TCNs falls under immigration right, a legal area that is almost exclusively assigned to the Member States. Member States decide on this entrance, based on points systems or national quota, ‘sponsorship’ by companies, on (bilateral) agreements with preferred and dedicated countries or national schemes aimed at high-skilled workers in parallel with the EU blue card scheme. This EU-wide admission scheme (the blue card directive) that aims to attract and retain highly qualified workers, particularly in sectors facing skills shortages, was revised in 2021.¹¹

Rights that can be derived from a labour relationship.

In a 2023 study, I listed the rights that workers carrying out their work in the EU can derive from being in a labour relationship, independent from their juridical status. These rights, with high relevance for TCNs, are enshrined in sources of international rights and sources of European or EU-rights. In the frame of this working paper, I will only summarise and highlight these rights, and complete the summary with a few remarks in relation to the social security.¹²

At international level, the eight core ILO-standards are important references. The standards provide, inter alia, for the right of association and collective bargaining, prohibition of forced and child labour and discrimination in work and employment. An additional protocol prescribes prevention, protection, and compensation. For instance, all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, shall have access to appropriate and effective remedies, such as compensation (Protocol 2014).

At the level of the Council of Europe, the European Convention on Human Rights sets forth a set of similar fundamental rights and freedoms (such as the prohibition of slavery and forced labour, the right to form or join trade unions, right to an effective remedy, prohibition of discrimination). Individuals can bring complaints against any of the forty-six member states to the European Court of Human Rights after they have used up every possible chance of appeal at the national level.

At EU-level, the Treaty of the functioning of the EU and the EU Charter of Fundamental Rights refer to the international standards treated beyond. The EU-Charter lists several basic provisions, such as the prohibition of slavery, trafficking and forced labour (article 5), respect for private life (article 8), the freedom of

⁹ <http://oif.gov.hu/images/formanyomtatvanyok-reljes/ENG/pdf/FOGALOMMAGYARAZAT%20EN.pdf>

¹⁰ See for instance: Cremers J. (2014) Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping, ETUI, Brussels.

Lens D., Mussche N. & Marx I. (2022) The different faces of international posting: Why do companies use posting of workers?

¹¹ <https://www.consilium.europa.eu/en/press/press-releases/2021/10/07/legal-migration-council-adopts-blue-card-directive-to-attract-highly-qualified-workers/>

¹² Cremers J. (2023) Supporting mobile migrant labour – the role of the trade union movement.

association (article 12), the right to education (article 14), the equality between women and men, including in employment, work and pay (article 23) and equality before the law (article 20). Relevant in this context is the right to engage in work, the freedom to seek employment in any Member State and the entitlement to working conditions equivalent for all workers that are authorised to work in the EU territory (enshrined in article 15 of the Charter). Workers and their representatives have the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action (article 28). Moreover, protection against unjustified dismissal (article 30), the right to fair and just working conditions (article 31), and the entitlement to social security benefits of everyone residing and moving legally within the European Union and to social and housing assistance in order to ensure a decent existence (article 34) are laid down in the Charter.

Regulation (EU) No 492/2011 on free movement of workers within the EU prescribes that the prescribed workers' rights should be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services. The Regulation does not formulate access to justice as such but touches upon aspects of equal treatment and representation.

The European Pillar of Social Rights, adopted in 2017, sets out twenty principles to support fair and well-functioning labour markets as well as social protection and inclusion, including housing. Moreover, several EU Directives set minimum standards and aim to improve overall working conditions, with a protection targeting all workers. Some protect migrant workers more specifically. Relevant for migrant labour are also legal frameworks governing, for instance, corporate responsibility or public procurement that can include specific obligations regarding labour rights or liability for companies and employers (along supply and sub-contracting chains), and sanction and complaint mechanisms in case of violations (Keith 2022).

In Member States with labour legislation related to working time, sickness pay, mandatory minimum wages and holiday pay and/or generally binding collective agreements, all workers, whether organised or not, can derive rights from these provisions. In some Member States, the case law goes further and provides rights related to dismissal, liability, wage claims and compensation.

In addition, the Court of Justice of the EU (CJEU) limited Member States' discretion to define who is a 'worker' under national law and expanded the protective scope of EU employment legislation. The CJEU held, for instance, that employment law applies to third-country nationals (TCNs) who do not hold a regular residence permit. This decision clarified that migrant workers are 'workers,' regardless of their status, and that they can derive rights employment law and connected labour standards. In other cases, the equal treatment of workers was, irrespective of the legal status, confirmed for parental leave.

This brief analysis of the appropriate international, national, European and EU labour standards reveals that several work-related general rights can be derived for all workers, including TCNs. This includes the right to engage in work, to an entitlement to working conditions and equivalent pay for all workers, and the right to protection against unjustified treatment. TCNs working in the EU should, in principle, be treated fair and on an equal footing in comparison with local workers. However, a worker will not often refer to the general standards, let alone bring breaches before court. The quoted standards can nevertheless function as the (legal) background for support action in addressing victimisation or engaging in judicial and/or administrative procedure on behalf or in support TCNs.

Specific rules and limitations for TCNs.

In parts of the *acquis* TCNs are sometimes explicitly included, sometimes excluded. Some EU-Directives limit the equal treatment referred to in the above-mentioned Regulation 492 to EU citizens. Directive 2004/38/EC can illustrate the exclusion as the prescribed equal treatment with the nationals of a Member State applies only to all Union citizens residing in the territory of the host Member State (Directive 2004/38/EC of the European Parliament and of the Council, 29 April 2004, article 24). On the other hand, special legal arrangements were concluded in the last decades for TCNs.

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

(hereafter the Seasonal Work Directive) aims to provide measures in the fields of asylum, immigration and protection of the rights of third-country nationals.¹³ The objective is to contribute to an efficient management of migration flows and fair treatment of third-country nationals staying legally in Member States.

To a certain extent, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (hereafter the Sanctions Directive), follows the same reasoning. Its objectives are regulating and preventing illegal immigration.

The Single Permit Directive and Long-Term Residence Directive complement the instruments applying to third-country national workers legally residing in an EU Member State. They set out a series of rights and grant equal treatment with nationals of the EU Member State in which they reside in relation to working conditions, access to employment as well as freedom of association and membership of trade unions.¹⁴ TCNs can, for instance, cumulate residence periods of up to two years in other Member States in order to meet the requirements of a five-year residence period, necessary for a more permanent resident status. However, so far, the European Council has decided to accept only certain types of legal residence permits, such as holders of EU Blue Cards or residence permits issued for the purpose of highly qualified employment. Applicants must provide evidence of stable and regular resources that are sufficient to maintain themselves and their family members. EU long-term resident status grants status holders the possibility to move and reside in other EU countries, for instance for work or studies. A long-term resident status can be withdrawn in certain cases, for instance when a person has not had the main residence in the EU for a certain period.

After a lengthy process of negotiations, the European Council and the European Parliament reached by the end of 2023 an agreement on the renewal of the Single Permit Directive. In the draft of the text that must be approved by both legislators, one of the amendments is that Single permit holders will have the possibility to change employer, subject to a notification to the competent authorities.¹⁵

The application of social security rights

The issue of social security will be touched upon only briefly here; it is a theme that requires more extensive treatment that goes beyond the aim of this paper. In general terms, the main objective of the EU-regulations of social security is to guarantee equal treatment. This equal treatment should thus also contribute to the integration of third-country nationals into a host country. And employers who employ TCNs are supposed to pay social security contributions as they do for regularly hired local workers. Member States may not make this right conditionally, for instance depending on a certain level of integration in a country. Verschueren, however, sees a growing tendency in the EU, justified by Member States' discretion in immigration law, to introduce conditions relating to the right to social benefits that are mostly disadvantageous to TCNs. These conditions are at risk of conflicting with provisions on the right to equal treatment with the nationals in a host country, as set down in the EU migration directives. In this respect, he also refers to a broad interpretation of these provisions as provided by the Court of Justice of the European Union.¹⁶

As a result, although every worker in the EU is and should, in principle, be covered by social security, notably TCNs are subject to uncertainties and gaps in the application of such coverage. TCNs who work temporary in the EU often are excluded or only partially covered. An analysis of various jurisdictions revealed that the general rule - coverage by social security - is subject to a range of exceptions and restrictions. This varies from exclusions from social security coverage to non-coverage for certain risks. The authors of a comparative study of the national application of social security to third country nationals conclude that, while social security regimes have been seen as a source of solidarity and insurance systems cushion (un)employment

¹³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0036&from=EN>

¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0098>

<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003L0109>

¹⁵ <https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/legal-migration-council-and-parliament-reach-deal-on-a-single-permit-directive/>

¹⁶ Verschueren H. (2023) Equal treatment as an instrument of integration. The CJEU's case law on social rights for third-country nationals under the EU migration directives.

related risks, in the case of short-term migrant workers, social security frameworks in combination with different migration schemes have often resulted in systematic exclusion of workers and groups of workers.¹⁷

Especially the intertwined relationship with national migration regimes, interferes with the type of social security benefits that short-term third-country national workers will be entitled to. The social security application for these workers is the result of a combination of the national migration policy, the relevant EU social security legislation (as enshrined in regulations and directives), and national welfare schemes and social security regulation in the Member States. In combination with the fact that TCNs are often carrying out work in precarious or casual work, this contributes to their vulnerability on the labour market. Or as the authors of the comparative study resume, there are three reasons why the social security issue – or more concretely, lack of access to certain social security components – contributes to put short-term third-country national migrant workers in a vulnerable or precarious position in host societies. First, the exclusion from immediate social security support upon the termination of employment. Second, limited access to health and pension insurance for some categories of short-term migrant workers yields both short-term and long-term precariousness and vulnerability. Third, issues with transferability of benefits and entitlements exacerbate the previous two.¹⁸

The enforcement of workers' rights and labour standards

What to enforce

In the Directives that specifically deal with TCNs, such as the Seasonal Work Directive or the Sanctions Directive, explicit rules on enforcement are formulated. These rules apply, next to the ordinary rules mentioned in an earlier paragraph that regulate the posting of workers or the workers' rights, which can be derived from a labour relationship (independent from the juridical status).

The Seasonal Work Directive obliges the Member States that issue third-country nationals with an authorisation for the purpose of seasonal work, to also provide them with information in writing about their rights and obligations under the Directive, including complaint procedures. It is a Directive that prescribes that the workers' accommodation must be adequate. Sanctions against employers and liability to pay compensation apply to non-respect of any outstanding obligations. This also applies to activities with subcontracting chains. Article 23 on equal treatment underlines several trade union related aspects, such as the right to strike and take industrial action, in accordance with the host Member State's national law and practice, freedom of association and affiliation and membership of an organisation representing workers or of any organisation whose members are engaged in a specific occupation, including the rights and benefits conferred by such organisations, i.e., the right to negotiate and conclude collective agreements, without prejudice to the national provisions on public policy and public security. Furthermore, Article 24 that settles the monitoring of rights, where provided for under national law for national workers, gives organisations representing workers' interests access to the workplace and, with the agreement of the workers, to their accommodation. Moreover, Article 25 states that seasonal workers may lodge complaints against their employers directly or through third parties, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with the Directive. These third parties may engage either on behalf of or in support of a seasonal worker, with his or her approval, in any administrative or civil proceedings, excluding procedures or decisions concerning short-stay visas. Research on challenges of mobility in the EU reveal, however, a severe lack of access to information regarding the working conditions and employment rights of seasonal workers, and the way to claim these rights. Even more, so far, no information is available on cases brought before the courts on behalf of seasonal workers.

The Sanctions Directive includes liability beyond the direct employer and compensation to workers of any outstanding obligations. Third-country nationals have, according to Article 13 of this Directive, the rights to lodge complaints directly or through third parties, such as trade unions or other associations. Third parties which have, in accordance with the criteria laid down in their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of an illegally employed third-

¹⁷ Bogoeski V. and Rasnača Z. (eds.) (2023) Report on the social security rights of short-term third-country national migrant workers

¹⁸ Ibid., 10-11.

country national, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing the Directive. Designated third parties should be protected against sanctions, when helping to lodge complaints. In a 2021 Communication on the application of Sanction Directive, the European Commission explicitly accentuates that the Employers Sanctions Directive requires the establishment of specific mechanisms through which irregular migrants can file a complaint to competent authorities either directly or through third parties (e.g., trade unions, employees' associations and non-governmental organisations) including when they are no longer present in the Member State'.¹⁹

Interaction with migration law

One of the most sensitive issues for TCNs is the fact that the enforcement and the tackling of bogus practices can significantly interact with migration law and illegality. Migrants' fear of seeking help and, as a result, being left vulnerable to immigration enforcement action is often manifest. Given their mandate and competences, the immigration offices and/or the border police will probably give more weight to immigration issues than to investigating labour market related abuses and safeguarding victims. This can lead to situations in which migrants are unable to differentiate between agencies that aim at enforcing immigration policy, and those whose primary objective is to support them. If authorities prioritise their immigration status over the harm they experience, the consequence can be mistrust from the side of migrants or the fear to be penalised for reporting abuse and exploitation. Especially in cases other TCNs are arrested, detained or deported, the message to other migrants is that they may face the same consequences if they report. This strengthens the level of vulnerability and the dependency from their perpetrators and allows them to continue abusing and exploiting.

A report of the European Union Agency for Fundamental Rights (FRA), clearly states:

Migrant workers in an irregular situation feel they cannot complain, they cannot confront their employer and they cannot report the exploitation to the police for fear of losing the job and of being returned to their country of origin. The fear of being reported to authorities is actively used by employers to threaten the workers and to exert control.

According to the report, the most common reason for not reporting abuses to the police is being afraid or scared of, for example, losing the job, of being arrested and returned to the country of origin, or of generally getting into trouble. The second most frequent reason for not reporting to the police was a belief that the police would or could not help.²⁰

The question is thus how to secure reporting mechanisms that prioritise the well-being and safeguarding of TCNs over potential immigration offences. Some Member States have developed policies to ensure that workers are not penalised for reporting abusive or exploitative conditions, at home, at work and beyond. They have introduced mechanism to encourage 'safe reporting.' One of the used principles is the concept of professional secrecy. This can guarantee confidentiality, if a worker approaches a labour inspector to report labour abuses and breaches. Moreover, it can remove the inspector's duty to report TCNs who might be undocumented to immigration authorities. Another mechanism is the regularisation. However, administrative requirements to regularise the worker bear the risk of increasing workers' dependence on the employer, and the risk of exploitation. It can lead to situations where TCNs stay with an exploitative employer because of the fear of losing their right to remain. In the FRA-report, practices are signalled with work without pay, only in exchange for a work contract, so that one can apply to the immigration authorities for a residence permit.

¹⁹ https://home-affairs.ec.europa.eu/system/files/2021-09/COM-2021-592_en_0.pdf

²⁰ FRA (2019) Protecting migrant workers from exploitation in the EU: workers' perspectives.

Resuming

The aim of this working paper was to briefly describe the position of third-country national migrant labour (or TCNs) on the EU labour market. As set out, this position is the result of an interaction between the immigration pathways enshrined in national immigration law regimes and the labour market access and the enforcement of labour standards in the country where TCNs conduct their work. As also signalled by the European Labour Authority, their dependency on the employer for the renewal of the work and residence permits make TCNs to a higher degree vulnerable. Given this particular vulnerability, it looks as if they are more open to exploitation, breaches of labour rights and terms and conditions of employment, to abusive practices and fake posting, and the irregular payment of social contribution in comparison with EU citizens who use the right of free movement of workers or with posted EU workers. The dependency leads to fear for the loss of their job and income and, consequently, their housing and residence rights. TCNs are reticent to complain or to seek assistance from the authorities.

TCNs who are recruited, based on business models that apply their posting abroad directly after their entrance, are ‘like soft wax, very malleable.’ They have no clue where they are going to, what their rights are in that constituency, often they do not know who their employer is and how long the posting will take. They probably also do not know what posting is or to whom address in case of breaches. This can only be avoided if, at the very beginning of the recruitment process, strict conditions related to fairness are obligatory. Or like stated in the ILO Fair Recruitment Initiative, recruitment practices that are nationally and across borders grounded in labour standards, that are transparent and effectively regulated, monitored, and enforced, that protect all workers’ rights, including fundamental principles and rights at work, and prevent human trafficking and forced labour, and that efficiently inform and respond to employment policies and labour market needs, including for recovery and resilience.²¹

Third-country nationals who enter the EU labour market as a labour migrant are motivated to work. Their labour market participation is high and, in general terms, their arrival leads to a rejuvenation of the labour force. Notwithstanding this high labour market participation, the position of TCNs is weak compared to the position of nationals. This is reflected in discrimination, a mismatch between education and work to be carried out and income. They are often invisible and unrepresented. This should lead to a much heavier responsibility from the side of the user undertaking.

Enforcement of their rights is, as noted beyond, a very complicated affair. The rules that can be applied in this enforcement are spread over several national and EU regulations and their effectiveness can be questioned. Moreover, the thin line in abusive situations between the enforcement of workers’ rights and the application of (restrictive) migration policies can lead to a balancing act between protection and policing. In such a situation it is necessary to establish enforcement procedures and reporting mechanisms that prioritise the well-being and safeguarding of TCNs over potential immigration offences.

²¹ <https://www.ilo.org/global/topics/fair-recruitment/fri/lang--en/index.htm>