



POSTED WORKERS FROM AND TO POLAND

FACTS AND FIGURES

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Abbreviations

Basic Directive – Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1-6

Basic Regulation (BR) – Regulation (EC) No. 883/2004 on the coordination of social security systems

CJEU (ECJ) – Court of Justice of the European Union (also known as the European Court of Justice)

CMLR – Common Market Law Review

EC / Commission – European Commission

EESSI – Electronic Exchange of Social Security Information

ELA – European Labour Authority

Enforcement Directive - Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28.5.2014, p. 11–31

EU – European Union

FTE – Full-Time Equivalent

GUS – Statistics Poland

OSH – Occupational Safety and Health

PD A1 – Portable Document A1

PIP – National Labour Inspectorate (of Poland)

PWD – Posting of Workers Directive

Revision Directive – Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173, 9.7.2018, p. 16–24

Rome I - Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16

TCN – Third-Country National

TFEU – Treaty on the Functioning of the European Union

UdSC – (Polish) Office for Foreigners

ZUS – (Polish) Social Insurance Institution

Executive summary

Poland is **one of the main sending Member States of posted workers** under Art. 12 of Regulation 883/2004 in the EU – in fact, up to 2019, it was the very main sending State of the Union.

Unlike the largest sending Member State, Germany, Poland is the main issuing Member State of Portable Documents A1 (PDs A1) issued to persons covered by Art. 13 of Regulation 883/2004¹.

It is predominantly a sending country, as its incoming postings constitute only a fraction of the outgoing ones², and are not of huge importance on the EU scale. Therefore, the focus of the present Polish Country Report will mostly be on outgoing postings.

Posting of workers as such has become an important form of labour mobility used by many Polish entrepreneurs in various sectors of activity, in particular in transport and construction and it is also set to grow in temporary employment and human health sectors. An interesting feature which makes Poland stand out (together with e.g., Slovenia), developed in detail in our Report and below herein, is also **the ever-growing number of third-country nationals (especially Ukrainians), posted from Poland**.

As indicated in the other Reports drawn up within the framework of the POSTING.STAT³ project, the statistical evidence available at the EU level provided solely a part (if not a fraction) of the administrative data available throughout respective Member States⁴. This Report, along with the other ones, aims to provide reply to it. Indeed, it aims to provide additional evidence and data concerning four main research areas and the following main research questions that we posed ourselves:

- 1) What are the scale, characteristics and impact of intra-EU posting from and to Poland? (*Chapter 2*);

¹ Cf. F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2020*, HIVA-KU Leuven, November 2021, p. 12-13.

² Last available comparable data from 2020 show the amount of **24,373 incoming posted workers (up to 60% thereof in 2020 were third-country nationals posted to Poland)** and **617,709 (619,127 if the PDs A1 issued to British citizens are added) PDs A1 issued in Poland for outgoing posted workers**.

³ POSTING.STAT brings together a consortium of universities and research centres from 10 different Member States to promote the evidence basis through the collection and analysis of national micro-data. The geographical scope of the project covers the six main ‘sending’ Member States (Germany, Poland, Italy, Spain, Slovenia and Luxembourg) and the six main ‘receiving’ Member States (Germany, France, Belgium, Austria, the Netherlands and Luxembourg) of posted workers. For more see the project’s website: <https://hiva.kuleuven.be/en/news/newsitems/posting-stat-Seenhancing-collection-and-analysis-national-data-on-intra-eu-posting>; see also the Twitter account of the consortium: <https://twitter.com/PostingStat>

⁴ Cf. F. De Wispelaere, L. De Smedt, M. Munoz, D. Gillis & J. Pacolet, *Posted workers from and to Belgium. Fact and figures*, 2022, p. 7.

- 2) What are the scale and characteristics of ‘irregular’ intra-EU posting from and to Poland? (*Chapter 3*);
- 3) What is the impact of the COVID-19 pandemic on intra-EU posting from and to Poland? (*Chapter 4*);
- 4) What is the impact of Directive 2018/957/EU amending Directive 96/71/EC? (*Chapter 5*).

As it is the case of the other POSTING.STAT reports, our analyses have been based on quantitative data drawn from PD A1 forms, as well as data from other source. Data on the number of **‘reported’ posted persons incoming to Poland** are collected *via* declarations filed with the National Labour Inspectorate (NLI / PIP). When it comes to **outgoing postings**, we have carefully analysed the data provided on our request for information by the Polish Social Insurance Institution⁵, containing information on PDs A1 issued by Poland in a given year. Such an attestation, provided for in Art. 19(2) of Regulation 987/2009⁶, issued at the request of the person concerned or of the employer by the competent institution of the Member States whose legislation is applicable pursuant to Title II of the very Regulation proves that such social security legislation of that Member State is applicable and, where appropriate, until what date and under what conditions. It is therefore, by contrast, also an indication that the posted person is under no obligation with regards to payment of social security contributions in another Member State.

The above-mentioned data are then supplemented by the data from the Statistics Poland (GUS), the Ministry of Family and Social Policy (MRiPS), the Polish Border Guard (BG / SG), Polish Office for Foreigners (UdSC) as well by the desk research and the data publicly available on other websites of public offices.

Poland as a predominantly sending country

Careful analysis of the scope and characteristics of posting in Poland leads firstly to a sound confirmation of the conclusion, that, as indicated above, Poland is a major posting Member State (taken for granted for years). **The latest available data**, as measured by the total outgoing PDs

⁵ Please note that the ZUS does not make available such data in a form of an available-for-all database.

⁶ Please note that data are sometimes incomplete; of note is also that they concern different aspects – PDs A1 do not document neither ‘unique’ persons nor full-time equivalents (‘FTEs’) – as Portable Documents A1 may be issued more than once a year. However, this is also the case for employment titles described below, especially the declarations on entrusting work to a foreigner. Therefore, there might be a discrepancy between the number of PDs A1 issued and the actual number of persons being sent abroad – cf. F. De Wispelaere, L. De Smedt, J. Pacolet, *Coordination of social security systems at a glance. 2021 Statistical Report*, Luxembourg 2022, p. 12.

A1 issued in Poland, demonstrate that **in 2021 a grand total of 676,775 PDs A1 were issued, up from 617,709 (619,127 when adding attestations issued that year to Britain's citizens)** issued in a COVID-19-plagued 2020⁷. Such a rebound in numbers of attestations year on year exceeded also the pre-COVID numbers (in 2019, 647,989 PDs A1 were issued) – which had previously been increasing steadily year on year since 2011.

In terms PDs A1 issued under Art. 12 of the Basic Regulation 883/2004, they were ‘translatable into 142,658 ‘unique’ persons, who received those attestations. That number then declined to 119,214 in the COVID-19’s 2020, to rise again substantially to 173,832 in 2021. When it comes to PDs A1 issued under Art. 13 of the Basic Regulation – the number of ‘unique’ persons increased from 322,381 in 2019 to 350,717 (!) in 2020 and then further to 419,581 in 2021.

At the same time – in case of the average duration (in days) of all PDs A1 issued under Art. 12 BR – in 2019 those were 124, in 2020 – 147 and in 2021 – 175. In the case of Art. 13 PDs A1 the situation was somehow different. In 2019, the average number of days amounted to 290, whereas in 2021 (at the same time when – as reported above - the ‘unique’ persons’ number went up substantially) – that number went down to 273. The takeaway from the above numbers is that, by and large, workers in recent years have been posted from Poland mainly under Art. 13 PDs A1, their ‘unique’ numbers have been growing (true for both Art. 12 and Art. 13 PDs A1), however while the average period of duration used to drop in case of work in two or more Member States (Art. 13), it increased in the case of Art. 12 PDs A1. One might therefore say that while workers are posted less frequently under Art. 12 Regulation 883/2004, when they do go abroad, they go for longer periods. A likely explanation, which however will need to be corroborated (or falsified by the further research) is that entrepreneurs posting workers pursuant to Art. 12 BR might be concerned with the lapse of 12-month (extendable to 18 months by a notification under Art. 1(2)(b) of the Revision Directive 2018/957) and further requirements burdening them, introduced by the Revision Directive 2018/957. Of note if of course here that naturally such a period is a category of labour law and not of social security law, as recently noted by the Court of Justice of the EU in C-17/19 Bouygues⁸ (and therefore such concerns are likely to be exaggerated).

⁷ Against approximately 1.4 million PDs A1 issued in Germany that year, accounting for 37% of the total outflow in posted workers in 2020 - cf. C. Albrecht, S. Duran, Y. Giesing, B. Niederhoefer, B. Rutte, J. Steigmeier, *Posted workers from and to Germany. Facts and figures*, 2022, p. 6 and p. 11.

⁸ Cf. judgment of the CJEU in C-17/19 Bouygues, para. 44 et seq.

The ZUS data show that the decline in PDs A1 in 2020 was primarily due to the decreasing (by 35,422) number in the attestations issued pursuant to Art. 12(1) of the Basic Regulation (their number rose again in 2021). In turn, when it comes to persons who normally pursue an activity as an employed person in two or more Member States, that is under Art. 13(1) of the Basic Regulation, there was an increase by about 15,000 between 2019 and 2020, followed by a spectacular increase of almost 90,000 between 2020 and 2021 (more than 26% growth). The above-mentioned numbers, including in particular transport drivers, further corroborate the fact that Poland as a sending country has increasingly been relying on Art. 13, having therefore a completely different profile than Germany⁹.

When it comes to self-employed persons under Art. 12(2) of the Basic Regulation – numbers of PDs A1 have been decreasing since 2016, with a particularly sharp decline between 2019 and 2020 – understandable given COVID-19, however, no particular rebound in 2021 was observed, so the trend has been maintained. Given the fact that PDs A1 under Art. 12 are in retreat, too – most probably some self-employed posted persons have decided to embark on activities on the basis of Art. 13(2) – (4) of Regulation 883/2004. In case of all the above-mentioned legal bases there were more PDs A1 in 2021 than in 2020.

Main receiving Member States (such an indication is only possible on the basis of PDs A1 issued pursuant to Art. 12 of Regulation 883/2004, as no information is provided concerning the place of cross-border activities under Art. 13 thereof) in 2021 included **Germany** (125,380 PDs A1 issued under Art. 12 of the BR - up from 113,138 in 2020), **France** (23,591 – up from 21,199), **Belgium** (16,687 – down from 17,038) **the Netherlands** (16,644 – down from 17,877) and **Sweden** (13,306 – up from 10,758).

Posting third-country nationals from Poland an ever-growing phenomenon

As mentioned above, **we found that a growing phenomenon of Poland are outgoing postings of third-country nationals from Poland, especially from Ukraine.**

Interestingly, just a decade ago, Poland was not an immigration country – quite the contrary, due to the post-2004 mass mobility to other European Union Member States, the migration balance of

⁹ F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2020*, op. cit., p. 12-13.

our country was negative¹⁰. Just seven years ago (in 2015), Poland was ranked as one of the last among EU Member States in terms of the share of immigrants in the total population. This changed abruptly and substantially in 2014, after the first war in the East of Ukraine. From that year to 2022 Poland admitted between one and two million immigrants from Ukraine. Indeed, from 2014 onwards, following the Russian annexation of Crimea and the armed conflict in Donbass, Poland witnessed an unprecedented inflow of immigrant workers from Ukraine. Coupled with strong labour demand, this surge in labour supply provided a major contribution to Poland's economic growth¹¹. This wave of immigration, of an unprecedented scale in Poland's modern history, was significant also from the European perspective¹².

Workers hailing from third countries and posted in largest numbers from Poland **are mostly nationals of the former USSR countries, especially Ukraine**. Apart from economic and (recently) humanitarian reasons, they are pulled by relatively strong historical and societal links, but also common cultural heritage (e.g., Slavic language and relative religious similarity) as well as are mostly in close geographical proximity to Poland and the languages are considered similar, too¹³. Moreover, the six former Soviet Union republics (Ukraine, Belarus, Armenia, Georgia, Moldova, and Russia) have enjoyed the previously described special simplified regime of employment, based on the declarations on entrusting work.

What is more, the citizens of certain of the above-mentioned countries also enjoy visa-free entry to Poland provided that they hold biometric passports. This is the case of Moldova, Georgia and most notably – Ukraine (since 11 June 2017¹⁴). When it comes to Belarussians, although they do

¹⁰ See e.g., R. King, M. Okolski, *Diverse, Fragile and Fragmented: The New Map of European Migration*, Central and Eastern European Migration Review 2018, 1-24.

¹¹ P. Strzelecki, J. Growiec, R. Wyszyński, *The contribution of immigration from Ukraine to economic growth in Poland*, op. cit.

¹² Cf. Eurostat (2019), *Residence permits for non-EU citizens: First residence permits issued in the EU Member States remain above 3 million in 2018*, 25 October 2019, retrievable at: <https://ec.europa.eu/eurostat/documents/2995521/10189082/3-25102019-AP-EN.pdf/95e08bc8-476d-1f7d-a519-300bdec438cb>

¹³ According to data from the representative research of the Institute of Public Affairs in 2013, 41 per cent of Ukrainians claimed that they speak or understand Polish – for more see e.g.: J. Fomina, J. Konieczna-Sałamatin, J. Kucharczyk, Ł. Wenerski (2013). *Poland – Ukraine, Poles – Ukrainians. Look Across the Border*. Warsaw: Institute of Public Affairs.

¹⁴ See more: M. Jaroszewicz, *Zniesienie wiz dla Ukraińców – konsekwencje i wyzwania / Visa Abolition for Ukrainians – consequences and challenges*, Centre for Eastern Studies, retrievable at: <https://www.osw.waw.pl/pl/publikacje/analizy/2017-04-26/zniesienie-wiz-dla-ukraincow-konsekwencje-i-wyzwania>

not enjoy the visa-free regime, their entry for work purposes has recently been facilitated by a number of legal institutions¹⁵.

Ukrainian citizens by far the leaders (in immigration to Poland and outgoing postings)

It goes without saying that **the citizens of Ukraine are by far the most numerous group of third-country nationals in Poland**. The pull factors are economical, humanitarian (especially after 2014) as well as by being close to our borders and as a country with a similar language, culture and, up to a point, societal and religious observances. It goes without saying that push factors were exacerbated when on 24 February 2022, Russian armed forces launched a large-scale invasion of Ukraine at multiple locations from the Russian Federation, from Belarus and from non-government-controlled areas of Ukraine. As a result, substantial areas of Ukrainian territory now constitute areas of armed conflict from which millions of persons have fled or are fleeing. As described in detail in our Report, the Member States of the Union established that **there was a mass influx of displaced persons** within the meaning of Directive 2001/55/EC, in order to provide temporary protection for them. Their response took the form of the Council Implementing Decision 2022/382¹⁶. It 'awoke' the Temporary Protection Directive 2001/55¹⁷.

We also discuss below the enumeration of persons fleeing the war - it is worth pointing out to that the scale of Ukrainian presence in Poland in April 2022 may be estimated at approximately 2.9 million, divided into two sub-populations: persons who were staying in Poland before the Russo-Ukrainian war (1.35 million approximately) and a population of around 1.55 million who arrived after 24 February 2022¹⁸.

To map and to appropriately convey the phenomenon and dimensions of posting third-country nationals (especially Ukrainians) from Poland, we have also carefully analysed, apart from the inflow of such nationals to Poland also **the manners in which such persons are employed in Poland**. This is for a very simple and practical reason - **the legal stay and work are preconditions for being able to rely on social security coordination EU rules** (and therefore for legally posting

¹⁵ PBH has been addressed to IT experts. For more see the contents of the Report.

¹⁶ It confirmed in its Art. 1 that the existence of a mass influx into the Union of displaced persons who have had to leave Ukraine as a consequence of an armed conflict has been established.

¹⁷ M. I. Ciger, *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022, EU Immigration and Asylum Law and Policy*, retrievable at: <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>

¹⁸ Cf. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, *Intereconomics*, 2022, 57(3), p. 167.

third-country nationals to work abroad)¹⁹. We took into considerations the legal bases (legal institutions) under which third-country nationals are most likely to be employed in Poland, taking into account **the most frequent of such bases** - work permits²⁰, declarations on entrusting work²¹, as well as seasonal work permits²².

2021 was actually a record year in terms of the impact of foreign workers on the Polish labour market. According to data made available by the Ministry of Family and Social Policy, 1,979,866 declarations on entrusting work were entered into the register (of which 1,635,104 were registered for Ukrainian citizens²³), 504,172 work permits (of which 325,213 to Ukrainian citizens) last year as well as 113,435 seasonal work permits (overwhelming majority, 111,061 to Ukrainian citizens) were issued to third-country country nationals. The declarations on entrusting work in 2021 actually concerned (as ‘unique’ persons) 1,303,606 third-country nationals (among them – 1,055,226 Ukrainian citizens). One could add to that number about 0.5 million work permits (usually applied for at least 1 year) and roughly about 100,000 ‘unique’ seasonal workers (certain of the above-mentioned seasonal work permits were applied for at least once) one could think of approximately 1.9 million third-country nationals (including at least 1.5 million Ukrainians) having attestations to work legally in Poland in 2021. Given that the grand total number of persons in employment in the Polish economy as of 31 December 2021 amounted (according to preliminary estimates) to 15.0 million persons, as reported²⁴, a very rough estimate²⁵ denotes that **third-country nationals may have constituted up to 12.7% of the total amount of persons in**

¹⁹ See the judgment of the CJEU in C-477/17 Balandin and Others, para. 48.

²⁰ Work permits (type A, B, C, D and E) - are applied for by the employer to the competent voivode (a local government entity – at the highest level of administrative division in Poland). It authorizes to work for up to 3 years (for the B type permit, if the foreigner fulfills a function in the legal entity employing more than 25 people, it can be issued for up to 5 years);

²¹ Declarations on entrusting work to a foreigner (**‘declarations on entrusting work’**) — to be submitted by the employer to the Poviat Labour Office for the nationals of Armenia, Belarus, Georgia, Moldova, Russia and Ukraine. Up to 29 January 2022 they authorized to carry out non-seasonal work without a permit for 6 months during consecutive 12 months, after that date – they enable the work for up to 24 months.

²² **Seasonal work permit** (type S) — are to be applied for by the employer to the competent starost (Poviat Labour Office). They authorize to work in subclasses considered seasonal (in agriculture, horticulture, tourist industry), up to 9 months in a calendar year.

²³ See the data provided by the Polish Ministry of Family and Social Policy: <https://psz.praca.gov.pl/web/urzad-pracy-/8180211-oswiadczenia-o-powierzeniu-wykonywania-pracy-cudzoziemcowi-wpisane-do-ewidencji-oswiadczen-obowiazujace-od-2018-r>

²⁴ Cf. file:///C:/Users/MarcinKIE%81BASA/Downloads/pracujacy_i_wynagrodzenia_w_gospodarce_narodowej_j_w_2021_roku_dane_wstepne_2.pdf

²⁵ No exact data concerning other, minor employment titles have been made available.

employment in Poland in 2021 (11.4% if Eurostat data²⁶, assuming the total domestic employment at the end of 2021 to be 16,639,100 to be applicable).

When it comes to the share in non-Polish citizens being subject to social security in Poland to the grand total of all persons subject thereto – it amounted to 5.4% as of 31 December 2021 (95.6% of all non-Polish citizens that made up that number²⁷ were third-country nationals) and more than 6% in current figures for 2022²⁸. It was lower than the share of posted third-country nationals in the total number of PDs A1 issued pursuant to Art. 12 and 13 of the Basic Regulation in both 2020 and 2021²⁹. The major numbers of third-country nationals registered for retirement and disability insurance scheme according to the payer's PKD (equivalent to NACE's) section in Poland were registered under the following sections:

- N – activities in the field of administrative and support services – 186,680 persons as of 31 December 2021 (20.9%);
- C – manufacturing – 141,953 persons (15.9%);
- H – transportation and storage – 134,744 (15.1%);
- F – construction – 117,991 (13.2%).

Outgoing TCN postings on a steady rise (even despite the pandemic)

When it comes to outgoing postings of third-country nationals from Poland, we examined figures of PDs A1 issued to them in respective years, their main nationalities and the breakdown by the main legal bases - Articles 12 and 13 of Regulation 883/2004.

The overall number of PDs A1 issued on the two above-mentioned legal bases increased from 2018 to 2019 from 23,269 to 50,643. The latter figure meant that **PDs A1 issued to third-country**

²⁶ See the Eurostat's website at: https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_a10_e&lang=en

²⁷ At the end of 2021, there were 875,090 persons being subject to the 'ordinary' (narrower) contributions, covering retirement and disability pension insurance (paid when one is employed on the basis e.g., of employment contract under the Polish Labour Code). Of them - only 38,608 were EU citizens, while the remaining 836,482 were third-country nationals (of those - 627,028 were Ukrainians). At the end of April 2022 there were almost 970 thousand of third-country nationals who are subject to such contributions, with Ukrainians accounting for 72% of all TCNs registered with the ZUS; at the end of June 2022 that number rose for the first time over 1 million (to 1,011,820 – as will be described below herein).

²⁸ Cf. T. Żołciak, G. Osiecki, *Praca szuka cudzoziemca. Rośnie liczba płatników ZUS*, 12 May 2022, <https://praca.gazetaprawnia.pl/artykuly/8416744,rosnie-liczba-platnikow-zus-obcokrajowcy-ukraincy.html>

²⁹ Cf.: *Rośnie liczba płatników składek i ubezpieczonych*, 13 May 2022, <https://www.zus.pl/-/ro%C5%9Bnie-liczba-%C5%82atnik%C3%B3w-%C3%B3B3w-sk%C5%82adek-i-ubezpieczonych>

nationals on those bases constituted 8.2% of all PDs A1 issued by Poland in 2019 (while PDs A1 issued to Ukrainians amounted to 7% of all the PDs A1 issued in Poland that year).

Interestingly, PDs A1 issued in Poland to third-country nationals **in 2020** proved to be somewhat ‘immune’ to COVID-19 pandemic. **Indeed, in 2020, as compared to 2019, the total amount of PDs A1 issued pursuant to Art. 12 and 13 to third-country nationals went up from 50,643 to 63,640.** In absolute numbers, the greatest increase concerned the Ukrainians (9,612 PDs A1 more than in 2019), however when it comes to the percentage rise, the highest was noted in case of Belarussians. Given that in 2020 607,639 PDs A1 were issued pursuant to Art. 12 and Art. 13³⁰, **10.5% of all PDs A1 issued pursuant to those two provisions were actually issued to third country nationals** (PDs A1 issued under those provisions to Ukrainians amounted to 8.7% of all the PDs A1 issued in Poland that year).

Interestingly and importantly, **the 2021 ZUS data** demonstrate that the numbers in question rebounded further (that time, it meant a surge indeed). That year, **115,240 PDs A1 under both Art. 12 (14,500) and 13 (100,740) of Regulation 883/2004 were issued to third-country nationals (up from 63,640 in 2020, a whopping 44.8% increase).** Given the fact that the total number of PDs A1 issued in 2021 in Poland amounted to 676,775 and those issued on the basis of Art. 12 and Art. 13 of the Basic Regulation were 667,244³¹, **17.2% of the very attestations were issued under Art. 12 and 13 in 2021 to third-country nationals.** 91,933 of those PDs A1 were issued to Ukrainian citizens (12,064 under Art. 12 and 91,933 under Art. 13), which meant that **13.8% of all PDs A1 issued under Art. 12 and 13 of Regulation 883/2004 in 2021 in Poland concerned Ukrainian citizens.**

Irregularities in posting – small number of controls, meagre percentage of negative ZUS’ decisions concerning PDs A1

The National Labour Inspectorate (NLI), competent for the issues connected with potential irregularities of incoming and also outgoing posting has seen a shrinking number of controls year on year. In 2020, the latest with available data, a total of 156 controls were carried out on the

³⁰ Out of the total amount of 619,127. The other PDs A1 forming the balance were issued on the basis of art. 11(3)(b), Art. 15, Art. 11(4), Art. 11(5), Art. 16(1) as well as to ‘*persons employed /self-employed in the country referred to in point 2.1 of the A1 certificate*’ (34 attestations).

³¹ The others were issued on the basis of art. 11(3)(b), Art. 15, Art. 11(4), Art. 11(5), Art. 16(1) as well as to ‘*persons employed /self-employed in the country referred to in point 2.1 of the A1 certificate*’ (97 attestations).

posting of workers from the territory of Poland to work in other European countries. It's almost 100 less than in 2019, contrary to a trend which saw them rise (in 2018 there were 204)³².

Control activities carried out by the NLI shed some light on some examples of illegal (or at least doubtful) patterns of practices of posting entities:

- circumventing the regulations on remuneration **in force in the country of posting** - by paying dues for business trips, which are not recognized by foreign authorities as a component of the worker's remuneration;
- posting to work outside the territory of the Republic of Poland, in order to perform contracts concluded with foreign contractors such persons **who previously were not connected with Polish entities by an employment relationship or another type of legal bond**;
- posting workers from the territory of the Republic of Poland **by companies using the services of the so-called virtual offices**;
- **posting third country nationals** to work abroad - mainly citizens of Ukraine and Belarus, including those who **are illegally employed in Poland**. Not infrequently, these are also foreigners not registered for social insurance in Poland, who do not have a PD A1 declaration;
- **apparent posting of workers to EU countries, mainly third-country nationals formally 'employed' in companies registered in Poland** and who never took up work in the territory of the Republic of Poland, because their aim was only to obtain this way a "pass" to other EU/EEA countries, which constitutes **an abuse of the institution of posting of workers in the framework of the provision of services**.

There are no official data available on fraud concerning PDs A1. The only statistical data from which irregularities may be inferred are data on the number of negative decisions taken by the Polish Social Security Institution after an application for PD A1 has been filled.

In 2019 there were 6,889 negative decisions. In 2,989 cases conditions have not been met. In 3,900 cases there was a different cause for refusal. Altogether, **negative decisions constituted 1.50% of all PDs A1 issued in Poland that year (647,989)**.

In 2020 there were 3,309 negative decisions; in 1,569 cases conditions have not been met, while in 1,740 cases there was a different cause for refusal – therefore out of **619,127 PDs A1 (including attestations issued to British citizens), there was 0.53% share of negative decisions**.

³² *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020 [Report on the activities of the State Labour Inspection for the year 2020]*, Warszawa 2021, p. 173.

Last, but not least, in 2021 there were 3,493 negative decisions; in 1,020 cases conditions have not been met and in 2473 cases there was a different cause for refusal. Thus, **the share of negative decisions, given 676,775 PDs A1 issued in Poland that year, amounted to 0.51%.**

(Only) temporary impact of the COVID-19 pandemic on the outgoing postings from Poland...

The COVID-19 pandemic and the consequential restrictions have taken its toll on posting to and from Poland. When it comes to **incoming postings, they declined by 21.92% in 2020 as compared to 2019** (although absolute figures were meagre from 31,217 to 24,373³³).

Changes to outgoing postings were more diverse. Generally speaking, **the number of PDs A1 issued in Poland in 2020 decreased by 28,862 compared to 2019** (from 647,989 to **619,127**). However, the latter figure **was still larger by 13,417 compared to the number of PDs A1 issued in Poland in 2018** (not to mention the figures for previous years).

What is more, in 2021, the number of outgoing PDs A1 rebounded – it amounted to 676,775.

Therefore, one may conclude that the pandemic has exerted only a temporary effect on outgoing postings. It was clearly visible in respective months of 2020. Surprisingly, the sharpest declines were observed in August (by 21.4% year on year) and in September 2020 (by 22.4%). Those monthly decreases were also larger in absolute terms than the declines in April (-17.7%), May (-11.5%) and in June (-11.5%) – where the initial shock accompanying the pandemic was becoming visible.

However, starting from March 2021 (first increase – from 59,420 PDs A1 in 2020 to 60,056 in 2021), the increases began to be felt and since then, there has not been decrease in any month as compared with the very same month in 2020.

... as well as that of the Revision Directive 2018/957 (at least – so far)

Given the nature of posting (predominantly outgoing) the application of the Revision Directive 2018/957 could have been envisaged to exert only a limited impact on posting to and from Poland. Our research seems to have demonstrated precisely that point. A major, adverse role, perhaps apart from outgoing postings in August 2020, in our opinion, was rather played by the COVID-19 pandemic.

³³ Only in case of posting of Ukrainian citizens there was a slight increase – by 7.36% (from 8,745 to 9,389).

We have mentioned August 2020, since that month the most significant month-to-month drop in 2020 was registered (apart to the decline between March and April 2020 – understandable given the harsh anti-COVID-19 measures introduced in March 2020 and the overall state of uncertainty, palpable both in economy and at a society level in Poland and throughout the EU). Decline in August 2020 figures (from 51,164 in July to 43,564 in August) might be down to the fact that the Revision Directive was to be transposed and applied from 30 July 2020³⁴, therefore the initial uncertainty (possibly – coupled with the COVID-19-related summer confusion and scepticism) might have contributed to such adverse change. The hypothesis seems all the more plausible, given the fact that in subsequent months the amounts of PDs A1 increased significantly (to 55,469 in September and to 58,251 in October 2021).

Another potential (minor) effect of the application of the Revision Directive could be the drop in the average number of duration (in days) of all PDs A1 issued under Art. 12 of the Basic Regulation (from 290 days in 2019 to 273 days in 2021) – mentioned above, with all the reservations raised therein.

³⁴ Cf. Art. 3(1) Directive 2018/957.

Podsumowanie

Polska jest jednym z głównych państw członkowskich wysyłającym pracowników delegowanych na podstawie art. 12 rozporządzenia 883/2004 w UE - do 2019 r. była głównym państwem wysyłającym.

W przeciwnieństwie do największego kraju wysyłającego czyli Niemiec, Polska przoduje pod względem ilości tzw. dokumentów przenośnych A1 (dalej jako „A1” / „formularze A1”) poświadczanych osobom objętym art. 13 rozporządzenia 883/2004³⁵.

Polska jest przede wszystkim państwem wysyłającym pracowników delegowanych, zaś oddelegowania do Polski [określane też mianem „przychodzących” (*‘incoming’*)] stanowią jedynie ułamek oddelegowań z Polski („wychodzących” (*‘outgoing’*))³⁶ i nie mają istotnego znaczenia w skali UE. Dlatego też w niniejszym Raporcie krajowym skupiono się głównie na ww. delegowaniach wychodzących.

Delegowanie pracowników jako takie stało się ważną formą mobilności siły roboczej wykorzystywaną przez wielu polskich przedsiębiorców w różnych sektorach działalności, w szczególności w transporcie i budownictwie, a także szybko rozwijającą się w sektorze pracy tymczasowej i sektorze zdrowia ludzkiego (obejmującego m.in. opiekę domową [*‘live-in care’*]). Ciekawą cechą wyróżniającą Polskę (wraz z np. Słowenią), opisaną szczegółowo w naszym Raporcie, jest również **stale rosnąca liczba obywateli państw trzecich (zwłaszcza Ukraińców), delegowanych z Polski**.

Jak wskazano w innych Raportach sporządzonych w ramach projektu POSTING.STAT³⁷, dane statystyczne dostępne na poziomie UE stanowią jedynie część (jeśli nie ułamek) danych

³⁵ Cf. F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2020*, HIVA-KU Leuven, November 2021, s. 12-13.

³⁶ Ostatnie dostępne porównywalne dane z 2020 r. wskazują na liczbę 24 373 pracowników delegowanych do Polski (ok. 60% z nich w 2020 r. stanowili obywatele państw trzecich delegowani do Polski) oraz 617 709 (619 127, jeśli dodać A1 wydane obywatelom brytyjskim) A1 wydanych w Polsce dla wyjeżdżających pracowników delegowanych.

³⁷ POSTING.STAT to konsorcjum skupiające uniwersytety i ośrodki badawcze z 10 różnych państw członkowskich UE powołane w celu w celu promowania opartego na faktach i dowodach podejścia do delegowania pracowników poprzez gromadzenie i analizę krajowych mikrodanych. Zakres geograficzny projektu obejmuje sześć głównych „wysyłających” pracowników delegowanych państw członkowskich (Niemcy, Polska, Włochy, Hiszpania, Slovenia i Luksemburg) oraz sześć głównych „przyjmujących” państw członkowskich (Niemcy, Francja, Belgia, Austria, Holandia i Luksemburg). Więcej na stronie projektu: <https://hiva.kuleuven.be/en/news/newsitems/posting-stat-Seenhancing-collection-and-analysis-national-data-on-intra-eu-posting> ; zob. również konto konsorcjum na Twitterze: <https://twitter.com/PostingStat>

administracyjnych dostępnych w poszczególnych państwach członkowskich³⁸. Niniejszy Raport, wraz z pozostałymi, ma na celu wypełnienie tej luki. Ma on również na celu dostarczenie dodatkowych dowodów i danych dotyczących czterech głównych obszarów badawczych i następujących głównych zagadnień badawczych, które sami sobie postawiliśmy:

- 1) Jaka jest skala, cechy i wpływ wewnętrzunijnego delegowania z i do Polski? (rozdział 2);
- 2) Jaka jest skala i charakterystyka "nieregularnego" delegowania wewnętrz UE z i do Polski? (rozdział 3);
- 3) Jaki jest wpływ pandemii COVID-19 na wewnętrzunijne delegowanie z i do Polski? (rozdział 4);
- 4) Jaki jest wpływ dyrektywy 2018/957/UE zmieniającej dyrektywę 96/71/WE? (rozdział 5).

Podobnie jak w przypadku pozostałych raportów POSTING.STAT, nasze analizy zostały oparte na danych ilościowych zaczerpniętych z formularzy A1, a także danych pochodzących z innych źródeł. Dane dotyczące liczby „zgłoszonych” osób delegowanych do Polski zbierane są za pośrednictwem deklaracji składanych do Państwowej Inspekcji Pracy (PIP). Jeśli chodzi o delegowania wychodzące, przede wszystkim dokładnie przeanalizowaliśmy dane przekazane na nasz wniosek o udzielenie informacji publicznej przez ZUS³⁹, zawierające informacje o A1 poświadczonych przez Polskę w danym roku. Takie zaświadczenie, przewidziane w art. 19 ust. 2 rozporządzenia 987/2009⁴⁰, wydawane na wniosek zainteresowanego lub pracodawcy przez właściwą instytucję państwa członkowskiego, którego ustawodawstwo ma zastosowanie na podstawie tytułu II tegoż rozporządzenia, dowodzi, że takie ustawodawstwo tego państwa członkowskiego w zakresie zabezpieczenia społecznego ma zastosowanie oraz ewentualnie do jakiej daty i na jakich warunkach. Jest to zatem również wskazówka, że osoba delegowana nie ma obowiązku opłacania składek na ubezpieczenia społeczne w innym państwie członkowskim.

Powyższe dane następnie uzupełnialiśmy o dane z Głównego Urzędu Statystycznego (GUS), Ministerstwa Rodziny i Polityki Społecznej (MRiPS), Straży Granicznej (SG), Urzędu do Spraw

³⁸ Zob. F. De Wispelaere, L. De Smedt, M. Munoz, D. Gillis & J. Pacolet, *Posted workers from and to Belgium. Fact and figures*, 2022, s. 7.

³⁹ Należy pamiętać, że ZUS nie udostępnia takich danych w formie ogólnodostępnej bazy danych.

⁴⁰ Należy pamiętać, że dane bywają niekompletne; na uwagę zasługuje również fakt, że dotyczą różnych aspektów - A1 nie dokumentują ani tzw. „indywidualnych” osób (‘unique persons’), ani tzw. „ekwiwalentów pełnych etatów” („FTE”) - ponieważ formularze A1 mogą być poświadczane więcej niż raz w roku. Dotyczy to jednak również opisanych poniżej tytułów zatrudnienia, w szczególności oświadczeń o powierzeniu pracy cudzoziemcowi. W związku z tym może występować rozbieżność pomiędzy liczbą wydanych PD A1 a rzeczywistą liczbą osób kierowanych za granicę - por. F. De Wispelaere, L. De Smedt, J. Pacolet, *Koordynacja systemów zabezpieczenia społecznego w skrócie. 2021 Statistical Report*, Luxemburg 2022, s. 12.

Cudzoziemców (UdSC), a także o analizę danych publicznie dostępnych na stronach internetowych i w innych publikatorach innych urzędów publicznych.

Polska krajem głównie delegującym (wysyłającym) pracowników

Dokładna analiza zakresu i charakterystyki delegowania w Polsce prowadzi po pierwsze do klarownego potwierdzenia hipotezy, że jak wskazano powyżej, Polska jest jednym z głównych państw delegujących. Najnowsze dostępne dane, mierzone całkowitą liczbą wydanych w Polsce PD A1, wskazują, że w 2021 r. wydano łącznie 676 775 A1, co oznacza wzrost z 617 709 (619 127 po dodaniu poświadczzeń wydanych w tym roku obywatelom Wielkiej Brytanii) wydanych w nękanym przez pandemię COVID-19 roku 2020⁴¹. Takie „odbiecie” w liczbach zaświadczeń rok do roku przekroczyło również wartości sprzed pandemii COVID-19 (w 2019 r. wydano 647 989 A1) – w których wcześniej od 2011 r. odnotowywano systematyczne wzrosty.

W odniesieniu do A1 poświadczanych na podstawie art. 12 rozporządzenia podstawowego 883/2004, można je „przełożyć” na 142 658 „indywidualnych” osób (*‘unique persons’*), które otrzymały te zaświadczenia. Liczba ta spadła następnie do 119 214 w roku 2020 podczas pandemii COVID-19, by ponownie znacznie wzrosnąć do 173 832 w roku 2021. Jeśli chodzi o A1 wydane na podstawie art. 13 rozporządzenia podstawowego – liczba „indywidualnych” osób wzrosła z 322 381 w 2019 r. do 350 717 (!) w 2020 r., a następnie zaś do 419 581 w 2021 r.

Jednocześnie - w przypadku średniego czasu trwania (w dniach) wszystkich A1 wydanych na podstawie art. 12 rozporządzenia podstawowego - w 2019 r. były to 124, w 2020 - 147, a w 2021 – 175 dni. W przypadku A1 poświadczonych na podstawie art. 13 sytuacja była nieco inna. W 2019 r. średnia liczba dni wynosiła 290, natomiast w 2021 r. (w tym samym czasie, gdy - jak podano powyżej - liczba „indywidualnych” osób znacznie wzrosła) - liczba ta spadła do 273 dni. Z powyższych danych wynika, że w ostatnich latach pracownicy byli delegowani z Polski głównie na podstawie art. 13 rozporządzenia podstawowego, zaś gros „indywidualnych” osób delegowano z Polski (a nie do Polski). Rośnie liczba A1 poświadczonych na podstawie art. 13 rozporządzenia podstawowego oraz liczba „indywidualnych” osób (zarówno w przypadku art. 12, jak i art. 13 rozporządzenia podstawowego), jednak podczas gdy średni okres trwania spadał w przypadku pracy w dwóch lub więcej państwach członkowskich (art. 13), to wzrastał w przypadku art. 12

⁴¹ Wobec około 1,4 mln A1 poświadczonych w tamtym roku w Niemczech, stanowiących 37% wszystkich A1 wystawionych dla pracowników delegowanych w 2020 roku - por. C. Albrecht, S. Duran, Y. Giesing, B. Niederhoefer, B. Rutte, J. Steigmeier, *Posted workers from and to Germany. Facts and figures*, 2022, s. 6 i s. 11.

tegoż rozporządzenia. Można zatem powiedzieć, że o ile pracownicy są rzadziej delegowani w ramach art. 12 rozporządzenia 883/2004, o tyle kiedy już wyjeżdżają za granicę - to na dłuższe okresy. Prawdopodobnym wyjaśnieniem, które jednak będzie wymagało potwierdzenia (lub sfalsyfikowania) w dalszych badaniach jest to, że przedsiębiorcom delegującym pracowników na podstawie art. 12 rozporządzenia podstawowego może zależeć na długości pobytu za granicą ich pracowników. Ci pierwsi mogą być bowiem zaniepokojeni upływem 12-miesięcznego (z możliwością przedłużenia do 18 miesięcy w drodze zgłoszenia na podstawie art. 1 ust. 2 lit. b dyrektywy rewizyjnej 2018/957) okresu oddelegowania i dalszych obciążających ich wymogów, wprowadzonych dyrektywą rewizyjną 2018/957. Powyższe należy przy tym interpretować w świetle konstatacji, że naturalnie ww. okresy oddelegowania są kategorią prawa pracy, a nie prawa zabezpieczeń społecznych, na co ostatnio zwrócił uwagę Trybunał Sprawiedliwości UE w sprawie C-17/19 Bouygues⁴².

Z danych ZUS wynika, że spadek liczby A1 w 2020 r. wynikał przede wszystkim z malejącej (o 35 422) liczby ww. zaświadczeń wydawanych na podstawie art. 12 ust. 1 rozporządzenia podstawowego (ich liczba ponownie wzrosła w 2021 r.). Z kolei jeśli chodzi o osoby, które normalnie wykonują pracę najemną w dwóch lub więcej państwach członkowskich, czyli na podstawie art. 13 ust. 1 rozporządzenia podstawowego, w latach 2019-2020 nastąpił wzrost o ok. 15 tys. poświadczonych formularzy, a następnie w latach 2020-2021 nastąpił ich wprost spektakularny wzrost o prawie 90 tys. osób (o ponad 26%). Powyższe liczby, w szczególności w kontekście kierowców w transporcie międzynarodowym, dodatkowo potwierdzają fakt, że z Polski, jako kraju wysyłającego, coraz częściej wysyła się osoby na podstawie art. 13 rozporządzenia podstawowego. Tym samym, oddelegowania z Polski mają zupełnie inny profil niż te z Niemiec⁴³.

Jeśli chodzi o osoby prowadzące działalność gospodarczą na podstawie art. 12 ust. 2 rozporządzenia podstawowego - liczba A1 maleje od 2016 r., ze szczególnie gwałtownym spadkiem w latach 2019-2020 - co zrozumiałe biorąc pod uwagę COVID-19, jednak w 2021 r. nie zaobserwowano szczególnego odbicia, a więc ten trend został utrzymany. Biorąc pod uwagę fakt, że formularze A1 wydane na podstawie art. 12 również są „w odwrocie” - najprawdopodobniej część osób delegowanych na własny rachunek zdecydowała się na podjęcie działalności na

⁴² Por. wyrok TSUE w sprawie C-17/19 Bouygues, pkt. 44 i n.

⁴³ F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2020*, op. cit., s. 12-13.

podstawie Art. 13 ust. 2 - 4 rozporządzenia 883/2004. Tym niemniej, w przypadku wszystkich ww. podstaw prawnych - w 2021 r. poświadczono więcej A1 niż w 2020 r.

Głównymi przyjmującymi państwami członkowskimi (warto przypomnieć, że takie wskazanie jest możliwe tylko w odniesieniu do formularzy A1 poświadczonych na podstawie art. 12 rozporządzenia 883/2004, gdyż przy A1 poświadczanych na podstawie art. 13 tego rozporządzenia nie podaje się informacji dotyczących miejsca prowadzenia działalności transgranicznej – obejmują one wszak pracę w dwóch lub więcej państwach członkowskich) w 2021 r. były Niemcy (125 380 A1 wydanych na podstawie art. 12 rozporządzenia podstawowego - wzrost z 113 138 w 2020 r.), Francja (23 591 - wzrost z 21 199), Belgia (16 687 - spadek z liczby 17 038) Holandia (16 644 - spadek z 17 877) i Szwecja (13 306 - wzrost z 10 758).

Delegowanie obywateli państw trzecich z Polski coraz częstszym zjawiskiem

Jak wspominano powyżej, **w toku badań stwierdziliśmy, że coraz częstszym zjawiskiem w Polsce są oddelegowania wychodzące obywateli państw trzecich, zwłaszcza obywateli Ukrainy.**

Co ciekawe, jeszcze dekadę temu Polska nie była krajem imigracyjnym - wręcz przeciwnie, ze względem na masową mobilność po 2004 roku do innych państw członkowskich Unii Europejskiej, saldo migracji naszego kraju było ujemne⁴⁴. Jeszcze siedem lat temu Polska zajmowała jedno z ostatnich miejsc wśród państw członkowskich UE pod względem udziału imigrantów w ogólnej liczbie ludności. Zmieniło się to gwałtownie i znaczco po 2014 roku, po pierwszej wojnie na wschodzie Ukrainy. Od tego czasu do 2022 roku Polska przyjęła do dwóch milionów imigrantów z Ukrainy. Po 2014 roku, po rosyjskiej aneksji Krymu i konflikcie zbrojnym w Donbasie, Polska stała się miejscem bezprecedensowego napływu pracowników-imigrantów z Ukrainy. W połączeniu z silnym popytem na pracę, ten gwałtowny wzrost podaży siły roboczej zapewnił istotny wkład we wzrost gospodarczy Polski⁴⁵. Ta fala imigracji, o niespotykanej w nowoczesnej historii Polski skali, była istotna również z perspektywy europejskiej⁴⁶.

⁴⁴ Por. np. R. King, M. Okolski, *Diverse, Fragile and Fragmented: The New Map of European Migration*, Central and Eastern European Migration Review 2018, s. 1-24.

⁴⁵ P. Strzelecki, J. Growiec, R. Wyszyński, *The contribution of immigration from Ukraine to economic growth in Poland*, op. cit.

⁴⁶ Por. dane Eurostatu (2019) – w: *Residence permits for non-EU citizens: First residence permits issued in the EU Member States remain above 3 million in 2018*, 25 października 2019 r., <https://ec.europa.eu/eurostat/documents/2995521/10189082/3-25102019-AP-EN.pdf/95e08bc8-476d-1f7d-a519-300bdec438cb>

Pracownicy pochodzący z krajów trzecich i delegowani w największej liczbie z Polski **to przede wszystkim obywatele krajów byłego ZSRR, a zwłaszcza Ukrainy**. Poza względami ekonomicznymi i (ostatnio) humanitarnymi, przyciągają ich stosunkowo silne więzi historyczne i społeczne, a także wspólne dziedzictwo kulturowe (dotyczące także języka i religii), jak również to, że w większości znajdują się w bliskim sąsiedztwie geograficznym z Polską, a ich języki również uważane są za podobne⁴⁷. Ponadto sześć byłych republik Związku Radzieckiego (Ukraina, Białoruś, Armenia, Gruzja, Mołdawia i Rosja) korzysta ze specjalnego, uproszczonego reżimu zatrudnienia, opartego na oświadczeniach o powierzeniu wykonywania pracy.

Co więcej, obywatele niektórych z ww. państw korzystają również z bezwizowego wjazdu do Polski pod warunkiem posiadania paszportów biometrycznych. Tak jest w przypadku Mołdawii, Gruzji i przede wszystkim - Ukrainy (od 11 czerwca 2017⁴⁸). Jeśli chodzi o Białorusinów, to choć nie korzystają oni z ruchu bezwizowego, to ich wjazd w celach zarobkowych jest od niedawna ułatwiony przez szereg instytucji prawnych⁴⁹.

Obywatele Ukrainy zdecydowanymi liderami (imigracji do Polski i oddelegowań z Polski)

Nie ulega wątpliwości, że **obywatele Ukrainy stanowią zdecydowanie najliczniejszą grupę obywateli państw trzecich w Polsce**. Czynniki przyciągające ich do Polski ('pull factors') obejmują wzgłydy ekonomiczne, humanitarne (zwłaszcza po 2014 roku), a także bliskość geograficzną oraz podobieństwa w języku, kulturze i do pewnego stopnia obyczajach społecznych i religijnych. Nie trzeba dodawać, że wpływ czynników „wypychających” / „wymuszających” ('push factors') nasilił się, gdy 24 lutego 2022 r. rosyjskie siły zbrojne rozpoczęły zakrojoną na szeroką skalę inwazję na Ukrainę z Federacji Rosyjskiej, z Białorusi i z niekontrolowanych przez rząd obszarów Ukrainy. W rezultacie znaczne obszary terytorium Ukrainy stanowią obecnie obszary konfliktu zbrojnego, z których uciekły lub uciekają miliony osób. Jak szczegółowo opisano w naszym Raporcie, państwa członkowskie Unii stwierdziły, że nastąpił masowy napływ wysiedleńców w rozumieniu dyrektywy 2001/55/WE, w celu zapewnienia im tymczasowej

⁴⁷ Według danych z reprezentatywnych badań Instytutu Spraw Publicznych w 2013 r., 41 procent Ukraińców twierdziło, że zna lub rozumie język polski - zob. też np: J. Fomina, J. Konieczna-Sałamatin, J. Kucharczyk, Ł. Wenerski, *Poland – Ukraine, Poles – Ukrainians. Look Across the Border*. Warszawa, Instytut Spraw Publicznych, Warszawa 2013.

⁴⁸ Zob. M. Jaroszewicz, *Zniesienie wiz dla Ukraińców – konsekwencje i wyzwania*, Ośrodek Studiów Wschodnich, <https://www.osw.waw.pl/pl/publikacje/analizy/2017-04-26/zniesienie-wiz-dla-ukraincow-konsekwencje-i-wyzwania>

⁴⁹ Np. tzw. ‘Polish Business Harbour’ – instytucja adresowana do specjalistów IT. Zob. więcej w dalszej części niniejszego Raportu.

ochrony. Ich odpowiedź przybrała formę decyzji wykonawczej Rady 2022/382⁵⁰. W jej ramach niejako „obudzono” dyrektywę 2001/55 w sprawie minimalnych standardów przyznawania tymczasowej ochrony⁵¹.

Poniżej omawiamy również wyliczenia osób uciekających przed wojną - warto zwrócić uwagę, że skalę obecności Ukraińców w Polsce w kwietniu 2022 r. można szacować na ok. 2,9 mln, w podziale na dwie subpopulacje: osoby, które przebywały w Polsce przed wojną rosyjsko-ukraińską (ok. 1,35 mln) oraz populację ok. 1,55 mln, która przybyła po 24 lutego 2022 r.⁵².

Aby odwzorować i odpowiednio oddać zjawisko i wymiary delegowania obywateli państw trzecich (zwłaszcza Ukraińców) z Polski, przeanalizowaliśmy również dokładnie, oprócz napływu takich obywateli do Polski również **sposoby zatrudniania takich osób w Polsce**. Stało się tak z bardzo prostego i praktycznego powodu - **legalny pobyt i legalne zatrudnienie są warunkami wstępymi dla korzystania z unijnych zasad koordynacji zabezpieczenia społecznego** (a więc do legalnego delegowania obywateli państw trzecich do pracy za granicą)⁵³. Wzięliśmy pod uwagę podstawy prawne (instytucje prawne), na podstawie których obywatele państw trzecich są najczęściej zatrudniani w Polsce, uwzględniając najczęstsze z tych podstaw - zezwolenia na

⁵⁰ Potwierdziła ona w art. 1 istnienie masowego napływu do Unii wysiedleńców, którzy musieli opuścić Ukrainę w wyniku konfliktu zbrojnego.

⁵¹ Dyrektywa Rady 2001/55/WE z dnia 20 lipca 2001 r. w sprawie minimalnych standardów przyznawania tymczasowej ochrony na wypadek masowego napływu wysiedleńców oraz środków wspierających równowagę wysiłków między Państwami Członkowskimi związanych z przyjęciem takich osób wraz z jego następstwami, Dz. Urz. UE L 212, 7.8.2001, s. 12–23; por. też: M. I. Ciger, *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022, EU Immigration and Asylum Law and Policy*, <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>

⁵² Por. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, *Intereconomics*, 2022, 57(3), p. 167.

⁵³ Zob. wyrok TSUE w sprawie C-477/17 Balandin i in., pkt. 48.

pracę⁵⁴, oświadczenia o powierzeniu wykonywania pracy cudzoziemcowi⁵⁵, a także zezwolenia na pracę sezonową⁵⁶.

Rok 2021 był rekordowy pod względem wpływem pracowników z zagranicy na polski rynek pracy. Według danych udostępnionych przez Ministerstwo Rodziny i Polityki Społecznej, do rejestru wpisano 1 979 866 oświadczeń o powierzeniu wykonywania pracy (z czego 1 635 104 dotyczyło obywateli Ukrainy⁵⁷), obywatelom państw trzecich wydano w ubiegłym roku 504 172 zezwolenia na pracę (z czego - 325 213 - obywatelom Ukrainy), a także 113 435 zezwoleń na pracę sezonową (w przeważającej większości, 111 061 - obywatelom Ukrainy). Oświadczenia o powierzeniu pracy w 2021 roku dotyczyły faktycznie (w odniesieniu do ilości osób, wobec których je zarejestrowano) 1 303 606 obywateli państw trzecich (wśród nich - 1 055 226 - obywateli Ukrainy). Dodając do tej liczby ok. 0,5 mln zezwoleń na pracę (zwykle wnioskuje się o nie na co najmniej 1 rok) oraz ok. 100 tys. „indywidualnych” (odniesienie do ilości osób, na które je

⁵⁴ **Zezwolenie na pracę (typu A, B, C, D oraz E)** wydawane jest przez wojewodę na wniosek pracodawcy. Cudzoziemiec musi sam ubiegać się o tytuł pobytowy, aby mógł wykonywać legalnie pracę w Polsce na podstawie zezwolenia na pracę (do 3 miesięcy jest możliwe wykonywanie pracy w ramach ruchu bezwizowego, jeśli dla danego państwa wprowadzono takie rozwiązanie).

⁵⁵ **Oświadczenie o powierzeniu wykonywania pracy cudzoziemcowi („oświadczenie o powierzeniu wykonywania pracy”)** jest składane przez podmiot powierzający wykonywanie pracy, w celu wpisu oświadczenia do ewidencji oświadczeń. Oświadczenie wpisane przez Powiatowy Urząd Pracy do ewidencji oświadczeń uprawnia cudzoziemca do wykonywania pracy bez obowiązku posiadania zezwolenia na pracę, jeżeli praca wykonywana jest na warunkach określonych w tym oświadczeniu.

Powiatowy urząd pracy właściwy ze względu na siedzibę lub miejsce stałego pobytu podmiotu powierzającego wykonywanie pracy cudzoziemcowi, wpisuje oświadczenie o powierzeniu wykonywania pracy cudzoziemcowi do ewidencji oświadczeń, jeżeli:

- cudzoziemiec, któremu zostanie powierzona praca jest obywatelem Republiki Armenii, Republiki Białorusi, Republiki Gruzji, Republiki Mołdawii, Federacji Rosyjskiej lub Ukrainy, oraz
- praca cudzoziemca nie jest związana z działalnością sezonową (rozporządzenie ws. podklasy działalności według klasyfikacji PKD, w których wydaje się zezwolenia na pracę sezonową), oraz
- okres wykonywania pracy wskazany w złożonym oświadczeniu nie jest dłuższy niż 24 miesiące, a dzień rozpoczęcia pracy nastąpi nie później niż za 6 miesięcy od daty złożenia oświadczenia, oraz
- praca cudzoziemca nie jest związana z: pełnieniem funkcji w zarządzie osoby prawnej (prezes, wiceprezes, członek zarządu), prowadzeniem spraw spółki komandytowej lub komandytowo-akcyjnej jako komplementariusz lub działaniem w charakterze prokurenta podmiotu z KRS oraz
- wysokość wynagrodzenia cudzoziemca nie będzie niższa od wynagrodzenia pracowników wykonujących pracę porównywalnego rodzaju lub na porównywalnym stanowisku.

⁵⁶ **Zezwolenie na pracę sezonową** może być wydane dla obywateli wszystkich państw spoza Unii Europejskiej i Europejskiego Obszaru Gospodarczego. Zezwolenie wydaje się, jeśli cudzoziemiec ma wykonywać pracę w zakresie działalności bezpośrednio związanych z rolnictwem, leśnictwem, łowiectwem i rybactwem lub gastronomią i zakwaterowaniem. Zezwolenie na pracę sezonową wydaje starosta właściwy ze względu na siedzibę lub miejsce zamieszkania podmiotu powierzającego wykonywanie pracy cudzoziemcowi na okres nie dłuższy niż 9 miesięcy w roku kalendarzowym.

⁵⁷ Por. dane Ministerstwa Rodziny i Polityki Społecznej: <https://psz.praca.gov.pl/web/urzad-pracy/-/8180211-oswiadczenia-o-powierzeniu-wykonywania-pracy-cudzoziemcowi-wpisane-do-ewidencji-oswiadczen-obowiazujace-od-2018-r->

zarejestrowano) pracowników sezonowych (o niektóre z ww. zezwoleń na pracę sezonową wnioskowano co najmniej raz) można by sądzić, że w 2021 r. ok. 1,9 mln obywateli państw trzecich (w tym co najmniej 1,5 mln Ukraińców) posiadało jeden z trzech najpopularniejszych tytułów do wykonywania legalnej pracy w Polsce. Biorąc pod uwagę, że według wstępnych szacunków całkowita liczba osób zatrudnionych w polskiej gospodarce na dzień 31 grudnia 2021 r. wynosiła 15,0 mln osób⁵⁸, jak podano, bardzo przybliżony szacunek⁵⁹ oznacza, że **obywatele państw trzecich mogli stanowić do 12,7% całkowitej liczby osób zatrudnionych w Polsce w 2021 r. (11,4%, jeśli zastosowanie miałyby dane Eurostatu⁶⁰**, zakładające całkowite zatrudnienie w kraju na koniec 2021 r. na poziomie 16 639 100 osób).

Jeśli chodzi o udział obywateli innych niż polscy podlegających ubezpieczeniom społecznym w Polsce do ogółu osób podlegających tym ubezpieczeniom - wynosił on 5,4% na dzień 31 grudnia 2021 r. (95,6 wszystkich obywateli innych niż polscy, którzy stanowili tę liczbę, to obywatele państw trzecich) i ponad 6% w aktualnych danych na rok 2022⁶¹. Był on niższy niż udział delegowanych obywateli państw trzecich w ogólnej liczbie A1 poświadczonych na podstawie art. 12 i 13 rozporządzenia podstawowego zarówno w roku 2020, jak i 2021⁶². Najwięcej obywateli państw trzecich zgłoszonych do ubezpieczeń emerytalnych i rentowych według sekcji PKD płatnika w Polsce zarejestrowano w następujących sekcjach:

- N - działalność w zakresie usług administrowania i działalność wspierająca – 186 680 osób według stanu na dzień 31 grudnia 2021 r. (20,9%);
- C - przetwórstwo przemysłowe – 141 953 osoby (15,9%);
- H - transport i gospodarka magazynowa – 134 744 osoby (15,1%);
- F - budownictwo – 117 991 (13,2%).

⁵⁸Por.

file:///C:/Users/MarcinKIE%C5%81BASA/Downloads/pracujacy_i_wynagrodzenia_w_gospodarce_narodowej_w_2021_roku_dane_wstepne_2.pdf

⁵⁹ Brak konkretnych zagregowanych danych liczbowych dotyczących pozostałych tytułów do legalnego zatrudnienia w Polsce.

⁶⁰ Zob. dane Eurostatu pod adresem: https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_a10_e&lang=en

⁶¹ Por. T. Żołciak, G. Osiecki, *Praca szuka cudzoziemca. Rośnie liczba płatników ZUS*, 12 maja 2022, <https://praca.gazetaprawnia.pl/artykuly/8416744,rosnie-liczba-platnikow-zus-obcokrajowcy-ukraincy.html>

⁶² Por. Informacja ZUS: *Rośnie liczba płatników składek i ubezpieczonych*, 13 maja 2022, <https://www.zus.pl-/ro%C5%9Bnie-liczba-p%C5%82atnik%C3%B3w-zus-ubezpieczonych>

Delegowania obywateli państw trzecich z Polski rosną nawet pomimo pandemii

Jeśli chodzi o delegowania obywateli państw trzecich z Polski, zbadaliśmy liczbę formularzy A1 poświadczonych dla nich w poszczególnych latach, ich główne narodowości oraz podział według najistotniejszych podstaw prawnych - art. 12 i 13 rozporządzenia 883/2004.

Ogólna liczba A1 poświadczonych na dwóch wyżej wymienionych podstawach prawnych wzrosła w latach 2018-2019 z 23 269 do 50 643. Ta ostatnia liczba oznaczała, że **A1 poświadczone dla obywateli państw trzecich na tych podstawach stanowiły 8,2% wszystkich A1 poświadczonych przez Polskę w 2019 roku** (A1 poświadczone dla Ukraińców stanowiły ok. 7% wszystkich A1 wydanych w Polsce w tym roku).

Co ciekawe, A1 poświadczone w Polsce obywatelom państw trzecich w 2020 r. okazały się w pewnym stopniu „odporne” na pandemię COVID-19. **W 2020 r. bowiem, w porównaniu do 2019 r., łączna ilość A1 wydanych na podstawie art. 12 i 13 rozporządzenia 883/2004 na rzecz obywateli państw trzecich wzrosła z 50 643 do 63 640.** W liczbach bezwzględnych największy wzrost dotyczył Ukraińców (9 612 PD A1 więcej niż w 2019 r.), natomiast jeśli chodzi o wzrost procentowy, to największy odnotowano w przypadku Białorusinów. Biorąc pod uwagę, że w 2020 r. poświadczono 607 639 A1 na podstawie art. 12 i Art. 13 rozporządzenia 883/2004⁶³, **10,5% wszystkich A1 poświadczonych na podstawie tych dwóch przepisów zostało poświadczonych obywatelom państw trzecich** (A1 povertiserowane na podstawie tych przepisów Ukraińcom stanowiły 8,7% wszystkich A1 wydanych w Polsce w tamtym roku).

Co istotne, **dane ZUS z 2021 r.** pokazują, że te dane liczbowe uległy dalszemu (znacznemu) podwyższeniu. W tym roku **115 240 A1 povertiserowane na podstawie art. 12 (14 500), jak i art. 13 (100 740) rozporządzenia 883/2004 zostało wydanych obywatelom państw trzecich (wzrost z 63 640 w 2020 r.!).** Biorąc pod uwagę fakt, że całkowita liczba A1 povertiserowane w 2021 r. w Polsce wyniosła 676 775, a te povertiserowane na podstawie art. 12 i art. 13 rozporządzenia podstawowego to 667 244⁶⁴, **17,2% zaświadczeń zostało povertiseranych na podstawie art. 12 i 13 rozporządzenia 883/2004 w 2021 r. obywatelom państw trzecich. 91 933 z tych A1 povertiserono obywatelom Ukrainy (12 064 na podstawie art. 12 i 91 933 na podstawie art.**

⁶³ Łączna ilość A1 povertiserowane w 2020 r. to 619 127. Pozostałe formularze A1 zostały povertiserowane na podstawie art. 11 ust. 3 lit. b), art. 15, art. 11 ust. 4, art. 11 ust. 5, art. 16 ust. 1 rozporządzenia 883/2004, a także wobec „osób zatrudnionych/samozatrudnionych, o których mowa w pkt 2.1 zaświadczenia A1” (34 zaświadczenia”).

⁶⁴ Pozostałe formularze A1 zostały povertiserowane na podstawie art. 11 ust. 3 lit. b), art. 15, art. 11 ust. 4, art. 11 ust. 5, art. 16 ust. 1 rozporządzenia 883/2004, a także wobec „osób zatrudnionych/samozatrudnionych, o których mowa w pkt 2.1 zaświadczenia A1” (97 zaświadczeń”).

13), co oznaczało, że 13,8% wszystkich formularzy A1 poświadczonych na podstawie art. 12 i 13 rozporządzenia 883/2004 w 2021 r. w Polsce dotyczyło obywateli Ukrainy.

Nieprawidłowości w delegowaniu - mała liczba kontroli, niewielki odsetek odmownych decyzji ZUS dotyczących A1

Państwowa Inspekcja Pracy (PIP), właściwa m.in. w sprawach związanych z potencjalnymi nieprawidłowościami w zakresie delegowania do Polski, a także delegowania z Polski, realizuje kontrole dotyczące delegowania pracowników z terytorium RP; w większości inicjowane są one wnioskiem zagranicznej instytucji kontrolnej o dokonanie ustaleń w stosunku np. do polskiego podmiotu delegującego. W 2020 r. odnotowano zmniejszoną liczbę kontroli, dotyczących delegowania pracowników z terytorium RP do pracy w innych krajach europejskich. W 2020 r., ostatnim z danymi dostępnymi w całości, przeprowadzono łącznie 156 takich kontroli. To o prawie 100 mniej niż w 2019 roku i wbrew wcześniejszej tendencji, zgodnie z którą ich liczba rosła (w 2018 roku było ich 204)⁶⁵.

Działania kontrolne prowadzone przez PIP rzucają światło na niektóre przykłady nielegalnych (lub co najmniej wątpliwych) wzorców praktyk podmiotów delegujących, takie jak na przykład:

- obchodzenie przepisów o wynagrodzeniu obowiązujących w kraju oddelegowania (przyjmującym) - poprzez wypłacanie należności z tytułu podróży służbowych, które nie są uznawane przez władze zagraniczne za składnik wynagrodzenia pracownika;
- kierowanie do pracy poza terytorium Rzeczypospolitej Polskiej, w celu realizacji umów zawartych z kontrahentami zagranicznymi osób, których uprzednio nie łączył z polskimi podmiotami stosunek pracy lub innego rodzaju więz prawnego;
- delegowanie pracowników z terytorium Rzeczypospolitej Polskiej przez firmy korzystające z usług tzw. biur wirtualnych;
- delegowanie do pracy za granicą obywateli państw trzecich - głównie obywateli Ukrainy i Białorusi, w tym również tych nielegalnie zatrudnionych w Polsce. Nierzadko są to również cudzoziemcy niezgłoszeni do ubezpieczeń społecznych w Polsce, którzy nie legitymują się formularzem A1;
- pozorne delegowanie pracowników do państw UE, głównie obywateli państw trzecich formalnie „zatrudnionych” w firmach zarejestrowanych w Polsce (w większości na podstawie oświadczeń o

⁶⁵ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, Warszawa 2021, s. 173.

powierzeniu wykonywania pracy), którzy nigdy nie podjęli pracy na terytorium RP, gdyż ich celem było jedynie uzyskanie w ten sposób „przepustki” do innych państw UE/EOG, co stanowi nadużycie instytucji delegowania pracowników w ramach świadczenia usług⁶⁶.

Brak jest również oficjalnych danych na temat nadużyć dotyczących zaświadczeń A1. Jedynymi danymi statystycznymi, z których można wnioskować o nieprawidłowościach, są dane z zakresu decyzji odmownych podejmowanych przez ZUS po otrzymaniu wniosku o poświadczenie formularza A1. Ich analiza przynosi następujące konstatacje:

- w roku 2019 wydano 6 889 decyzji odmownych (w tym: 2 989 – nie spełniało warunków i 3 900 – „inna przyczyna”)

W sumie więc **decyzje odmowne stanowiły 1,50% wszystkich A1 poświadczonych w Polsce w tamtym roku (647 989)**.

- w roku 2020 wydano 3 309 decyzji odmownych (w tym: 1 569 – nie spełniało warunków i 1 740 – „inna przyczyna”)

Zatem, **na 619 127 A1 (w tym zaświadczenia wydane obywatelom brytyjskim) udział decyzji odmownych wyniósł 0,53%.**

Wreszcie, w roku 2021 wydano 3 493 decyzji odmownych (w tym: 1 020 – nie spełniało warunków i 2 473 – „inna przyczyna”). Zatem, **udział decyzji odmownych, biorąc pod uwagę 676 775 A1 poświadczonych w Polsce w tamtym roku, wyniósł 0,51%.**

(Jedynie) przejściowy wpływ pandemii COVID-19 na delegowania z Polski ...

Pandemia COVID-19 i wynikające z niej ograniczenia odbiły się na delegowaniu do i z Polski – jednakże w odniesieniu do delegowań wychodzących - jedynie przejściowo.

Jeśli chodzi o delegowania do Polski, to w 2020 r. zmniejszyły się one o 21,92% w porównaniu z rokiem 2019 (choć w liczbach bezwzględnych ten spadek był stosunkowo skromny - z 31 217 do 24 373⁶⁷).

Zmiany w zakresie delegowań wychodzących były bardziej zróżnicowane. Liczba formularzy A1 poświadczonych w Polsce w 2020 r. zmniejszyła się o 28 862 w porównaniu z 2019 r. (z 647 989 do 619 127). Ta ostatnia liczba była jednak nadal większa o 13 417 w porównaniu do liczby

⁶⁶ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit., s. 175.

⁶⁷ Jedynie w przypadku delegowania obywateli Ukrainy do Polski odnotowano niewielki wzrost – o 7,36% (z 8 745 do 9 389).

A1 poświadczonych w Polsce w 2018 roku (nie wspominając o danych z lat poprzednich). Co więcej, w 2021 roku liczba wychodzących A1 znaczaco wzrosła – do 676 775.

Można zatem stwierdzić, że pandemia wywarła jedynie chwilowy wpływ na delegowania z Polski. Jej oddziaływanie było wyraźnie widoczne w poszczególnych miesiącach 2020 roku. Co zaskakujące, największe spadki odnotowano w sierpniu (o 21,4% rok do roku) oraz we wrześniu 2020 roku (o 22,4% rdr). Spadki w tych dwóch miesiącach były również większe w wartościach bezwzględnych niż spadki w miesiącach, w których jasno widać było początkowy szok towarzyszący pandemii – tj. w kwietniu (-17,7%), maju (-11,5%) i w czerwcu (-11,5%) 2020 r.

Jednak począwszy od marca 2021 roku (pierwszy wzrost - z 59 420 A1 w 2020 r. do 60 056 w 2021 r.) wzrosty zaczęły być odczuwalne i od tego czasu w żadnym miesiącu 2021 r. nie odnotowano spadku w stosunku do tego samego miesiąca w 2020 r.

... podobnie jak wpływ dyrektywy rewizyjnej 2018/957

Biorąc pod uwagę naturę delegowania (w przeważającej mierze z Polski, a nie do Polski) można było przewidzieć, że zastosowanie dyrektywy rewizyjnej 2018/957 będzie miało ograniczony wpływ na delegowanie do i z Polski. Wydaje się, że nasze badania potwierdziły tę właśnie hipotezę. Istotną, niekorzystną rolę, może poza delegowaniem z Polski w miesiącu sierpniu 2020 r., naszym zdaniem, odegrała raczej pandemia COVID-19.

Nie bez kozery wspominamy o tym miesiącu 2020 roku. W tym bowiem miesiącu odnotowano największy spadek miesiąc do miesiąca w 2020 roku (obok spadku w okresie marzec-kwiecień 2020 roku - co jest zrozumiałe, biorąc pod uwagę zaostrzone środki antycovidowe wprowadzone w marcu 2020 roku i ogólny stan niepewności, wyczuwalny zarówno w gospodarce, jak w społeczeństwie w Polsce i w całej UE). Spadek liczby poświadczonych w sierpniu 2020 formularzy A1 (z 51 164 w lipcu do 43 564 w sierpniu) może wynikać z faktu, że dyrektywa rewizyjna miała być transponowana i stosowana od 30 lipca 2020 r., zatem początkowa niepewność (być może - w połączeniu z letnim zamieszaniem i sceptyczmem związanym z COVID-19) mogła przyczynić się do tak niekorzystnej zmiany. Hipoteza ta wydaje się tym bardziej wiarygodna, że w kolejnych miesiącach ilości poświadczonych A1 znaczaco wzrastały (do 55 469 we wrześniu i do 58 251 w październiku 2020 r.).

Innym potencjalnym skutkiem stosowania dyrektywy rewizyjnej mógł być spadek średniej liczby czasu trwania (w dniach) formularzy A1 wydanych na podstawie art. 12 rozporządzenia podstawowego (z 290 dni w 2019 r. do 273 dni w 2021 r.).

1. Introduction

Posting of workers is a hybrid type of intra-EU labour mobility based on the free movement of services, which has experienced a strong upward evolution during the last fifteen years, as a part of the larger notion of intra-EU mobility⁶⁸. Based on Art. 49 et seq of the TFEU, it is to be differentiated from another important form of labour mobility: migration to another EU Member State under the free movement of workers (Art. 45 et seq. TFEU), as posted workers are employees who are sent by their employer to carry out a service in another EU Member State on a temporary basis. As such, the legal regulation of posting of workers is a side-effect of the desire to establish a single market for services, a sector that accounts for 70 per cent of GDP and employment in majority of the Member States⁶⁹. The free movement of services, one of the ‘fundamental freedoms’ of the internal market of the EU allows businesses and self-employed persons to deliver services on a non-discriminatory basis in other Member States than their country of establishment. Rather than moving to other countries independently (as ‘migrant workers’, relying on their rights under Art. 45 et seq. TFEU), posted workers, including also Third-Country Nationals, are sent (or ‘post themselves’) as part of a cross-border service provided by their employer (or by themselves) pursuant to Art. 56 et seq. TFEU⁷⁰.

Therefore, the situation of posted workers is ‘split’ – even though they carry out work in the receiving (‘host’) Member State, their residence is not shifted to the host country, as they, by and large, stay connected with their home country, given that their agreement concerning employment (either contract of employment or a civil-type contract is concluded there) 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 country⁷¹; most of them are also fully taxed in the Member State where their employer is established, when their posting missions

⁶⁸ Cf. F. De Wispelaere, L. De Smedt, J. Pacolet, *Posting of workers. Report on A1 Portable Documents issued in 2019*, Luxembourg: Publications Office of the European Union, 2021, p. 9. See also E. Fries-Tersch, M. Jones & L. Siöland (2021), *2020 Annual Report on intra-EU Labour Mobility*, Network Statistics FMSSFE. European Commission; S. Giubboni, *Dopo Viking, Laval e Rüffert: in cerca di un nuovo equilibrio tra diritti sociali e mercato*, [in:] *Libertà economiche e diritti sociali nell’Unione Europea. Dopo le sentenze Laval, Viking, Rüffert e Lussemburgo*, a cura di A. Andreoni e B. Veneziani, Roma 2009, p. 124 et seq.; S. Sciarra, *L’Europa e il lavoro. Solidarietà e conflitto in tempi di crisi*, Roma-Bari 2013.

⁶⁹ Cf. C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, p. 365.

⁷⁰ 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 (manuscript submitted for publication, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939196), p. 5.

⁷¹ See D. Lens, N. Mussche, I. Marx, *The different faces of international posting: Why do companies use posting of workers*, European Journal of Industrial Relations 2021, p. 2-3.

last less than 183 days per 12-month period⁷². Indeed, some Member States – e.g., Slovenia, Slovakia, Hungary, or Poland – collect significant revenues from the outgoing posted workers in relation to their overall labour tax revenues⁷³.

Given the above complex legal framework, posting of workers is far from unambiguous – as rightly noted by Y. Jorens and F. De Wispelaere, who quite rightly also observe that ‘*it is an understatement to say that the topic of ‘posting’ stirs up strong emotions*’⁷⁴.

However, the reason of such unambiguity lies not only in the complex legal framework, but also in the impact which posting of workers exerts in other areas of life, economy and politics. Indeed, it is one of the most salient issues discussed at the EU level during the last decade. It is also an area where the interests pursued by the ‘new’ Member States which joined the European Union in 2004 and after that date, have openly clashed with those of the ‘old’ Member States. The posting debate has traditionally been demonstrated as a clash between the internal market freedom to provide services in the Union and the right to collective action representing the autonomy of states to organize their collective labour law and social systems as they please, independently from the Union⁷⁵.

Indeed, on the one hand, posting of workers is sometimes viewed as a vehicle for labour and social security cost competition on the internal market of the EU, as the comparative advantage enjoyed by some of the Member States might mean that entrepreneurs located on their territories might be in a strong position to win contracts put out to tender by contracting authorities in some of the host Member States⁷⁶ and workers themselves may become detached from the local regulatory and

⁷² G. Davies & D. Kramer, *The Posting of Workers*, op. cit., p. 5. See also A.A.H. van Hoek, *Re-embedding the transnational employment relationship: A tale about the limitations of (EU) law?*, CMLR 2018, p. 459 et seq.

⁷³ Cf. G. Davies & D. Kramer, *The Posting of Workers*, op. cit., p. 5; F. De Wispelaere, J. Pacolet, *Posting of workers: the impact of social security coordination and income taxation law on welfare states*, HIVA-KU Leuven Working Paper, Leuven 2015, p. 15-17 – the latter Authors estimated the percentage for Poland to be as high as 6.8%, with the proviso that the real annual impact of posting of workers on the labour tax revenues would, however, be lower since the posting period will not be equal to 12 months.

⁷⁴ Y. Jorens, F. De Wispelaere, *Intra-EU posting: looking for solutions: a Herculean or a Sisyphean task?* [in:] p. 113. Authors rightly point out to the fact the ‘intra-EU posting is a ‘confused concept’ – as the notion of ‘a posted’ worker / person is used both in the Regulation 883/2004 (hereinafter ‘the Basic Regulation’) and the Posting of Workers Directive, yet with differences in scope – cf. p. 114 et seq.

⁷⁵ Z. Rasnaca, *Identifying the displacement*, op. cit., p. 131-132.

⁷⁶ See F. Costamagna, *Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive* [in:] *Labour Mobility and Transnational Solidarity in the European Union*, a cura di S. Borelli, A. Guazzarotti, Napoli 2019, p. 82; C. Barnard, *EU Employment Law*, Oxford 2012, p. 213 et seq.

institutional context of wage setting, labour rights, industrial relations and social security, or, in other words, the aspirations to equal treatment that Art. 45 TFEU seeks to achieve⁷⁷.

Some commentators challenge this perception, pointing to the limited practical impact of this form of labour mobility if viewed from a more general perspective. In particular, they point to the fact that data, although couched in considerable uncertainty, seem to show that posting is actually quite limited from a quantitative point of view, affecting just 1% of the total number of employees in the EU⁷⁸. Furthermore, labour and social security cost differentials, although certainly very important, are not the only drivers to be taken into account in the very discussion⁷⁹. A substantive amount (even up to 35% of all postings) occurs in high-value chains and concerns a highly skilled workforce. In these cases, labour standards' differentials are not an issue and certainly not the reason why undertakings post their workers in another Member State⁸⁰.

⁷⁷ Cf. G. Davies & D. Kramer, *The Posting of Workers*, op. cit., p. 6 as well as the literature cited therein; I. Wagner, N. Lillie, *European Integration and the Disembedding of Labour Market Regulation: Transnational Labour Relations at the European Central Bank Construction Site* (2014) *Journal of Common Market Studies* 2, p. 403 et seq. See also concerns elaborated in D. Lens, N. Mussche, I. Marx, *Europe's ever expanding mobility patterns – posting, third-country nationals and the single European labour market*, Herman Deleeck Centre for Social Policy Working Paper No. 19.08, July 2020. p. 7-8.

⁷⁸ F. Costamagna, *Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive* [in:] *Labour Mobility and Transnational Solidarity in the European Union*, a cura di S. Borelli, A. Guazzarotti, Napoli 2019, p. 82. F. De Wispelaere, J. Pacolet, *An Ad Hoc Statistical Analysis on Short Term Mobility - Economic Value of Posting of Workers. The Impact of Intra-EU-Cross-Border Services, with Special Attention to the Construction Sector*, Leuven, 2016, p. 17 et seq.

⁷⁹ Cf. generally - M. Kielbasa, *Prawa socjalne w Unii Europejskiej a granice swobód rynku wewnętrznego / Social rights in the European Union and the boundaries of the internal market freedoms*, Warszawa 2017; E. Voss, M. Faioli, J.-P. Lhernould, F. Iudicone, *Posting of Workers Directive - Current Situation and Challenges*, Study for the EMPL Committee, 2016, p. 14 et seq.

⁸⁰ F. Costamagna, *Regulatory Competition in the Social Domain and the Revision of the Posted Workers Directive*, op. cit., p. 83-84; N. Mussche, V. Corluy, I. Marx, *How Posting Shapes a Hybrid Single European Labour Market*, European Journal of Industrial Relations, 2017, p. 7 et seq. Of many, see also: D. Kukovec, *Whose Social Europe?*, Lecture Delivered during the Conference 'Developing Europe: Regional Policy and Free Markets in European Legal Discourse', Harvard Law School, 16 April 2010, IGLP Working Paper Series 2011, no. 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800922; C. Barnard, *A Proportionate Response to Proportionality in the Field of Collective Action*, ELRev 2012, 37(2); S. A. de Vries w: *The protection of fundamental rights within Europe's internal market after Lisbon – An endeavour for more harmony* [in:] *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'tightrope' walker* (eds.: S. A. de Vries, X. Groussot, G. T. Petursson), The Hague 2012, p. 16 et seq.; C. Barnard, *Posting Matters*, Arbeidsrett 2014, vol. II, nr I; D. Leczykiewicz, *Conceptualising Conflict between the Economic and the Social in EU Law after Viking and Laval* [in:] M. Freedland and J. Prassl, (eds), *Viking, Laval and Beyond*, Oxford 2014; p. 312 – 313; cf. also the also the dissenting opinion in this regard- S. Weatherhill, *Viking and Laval: The Internal Market Perspective* [w:] M. Freedland and J. Prassl, (eds), *Viking, Laval and Beyond*, Oxford 2014, p. 23 et seq.; K. Maslauskaite, *Posted Workers in the EU: State of Play and Regulatory Evolution*. Policy Paper No. 107, Notre Europe – Jacques Delors Institute 2014; D. Kukovec, *Taking Change Seriously, The Reticence of Justice and the Reproduction of the Status Quo*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302389; D. Kukovec, *Law and the Periphery*, European Law Journal 2015, Vol. 21, No. 3; D. Lens, N. Mussche and I. Marx, *The different faces of international posting: Why do companies use posting of workers?*, European Journal of Industrial Relations, 2021; N. Rennuy, *Shopping for Social*

Poland has long been among the main ‘sending’ Member States. Actually, until 2019 it was Poland where the most PDs A1 had been issued every year; only then was it surpassed in a number of PDs A1 issued by Germany⁸¹.

1.1. Research questions

The purpose of this study, drawn up within the framework of the POSTING.STAT⁸² is fourfold. Firstly, it is envisaged to contribute to dissipate the above-mentioned uncertainties by analysing data on intra-EU posting of workers from Poland and to Poland, including those on third-country nationals⁸³. Based on data from public institutions, as well as available analyses of other entities and interviews conducted in Poland, the authors analysed the scale, characteristics and impact of intra-EU posting of workers. Indeed, our report aims to be the first systematic study to provide

Security Law in the EU, Common Market Law Review 2021, 58; M. Bottero, *Posting of Workers in EU Law: Challenges of Equality, Solidarity and Fair Competition*, Kluwer Law International, AH Alphen aan den Rijn, 2021.

⁸¹ F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2020*, HIVA-KU Leuven, November 2021, p. 10-11.

⁸² POSTING.STAT brings together a consortium of universities and research centres from 10 different Member States to promote the evidence basis through the collection and analysis of national micro-data. The geographical scope of the project covers the six main ‘sending’ Member States (Germany, Poland, Italy, Spain, Slovenia and Luxembourg) and the six main ‘receiving’ Member States (Germany, France, Belgium, Austria, the Netherlands and Luxembourg) of posted workers. For more see the project’s website: <https://hiva.kuleuven.be/en/news/newsitems/posting-stat-Seenhancing-collection-and-analysis-national-data-on-intra-eu-posting>; see also the Twitter account of the consortium: <https://twitter.com/PostingStat>

⁸³ Please note that for the sake of readership, we sometimes used the term ‘foreigner’ interchangeably with ‘third country national’ throughout the text, as we intended to keep the already-existing structures in the Polish translations used in practice - e.g., the notion of the ‘foreigner’ is used in case of the so-called ‘declarations of entrusting the performance of work to a foreigner’ or a notion of the Polish Act on foreigners’ [PL: ‘Ustawa o cudzoziemcach’]. However, it is worth noting that in keeping with Art. 2(6) of the Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), ‘third-country national’ means any person who is not a Union citizen within the meaning of Article 20(1) TFEU and who is not covered by point 5 of this Article [members of the family of a Union citizen exercising the right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council (21) applies or third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens].

What is more - generally speaking, in the Polish law there are at least 3 different legal acts dealing with employment of non-Poles – and they all use slightly different notions to define ‘a foreigner’. Following especially the law of 15.06.2012 Act of 15.06.2012 on the effects of employing foreigners staying illegally on the territory of the Republic of Poland [*Ustawa o skutkach powierzania pracy cudzoziemcom przebywającym wbrew przepisom na terytorium Rzeczypospolitej Polskiej*] (Journal of Laws 2021, item 769), in all other situations that above we shall use the generic form of ‘a foreigner’ to refer to all persons who are not citizens of Poland and ‘a third-country national’ to refer to persons who are neither citizens of Poland nor citizens of the EU / EEA Member State / Switzerland. In this regard, see also: M. Vah Jevšnik, M. Kiełbasa, S. Danaj, M. Szaraniec, *There and Gone Again? Migration and Posting of Third Country Nationals from the Sending Countries’ Perspective*, forthcoming in the European Labour Law Journal 2022; M. Szypniewski, E. Podgórska-Rakiel, *Zatrudnianie w Polsce cudzoziemców spoza UE*, Warszawa 2018, p. 15 et seq.

such a thorough assessment of the above-mentioned data, which are being (and have been) collected by various domestic authorities, yet to date lacked their full exposition in one separate study dedicated to the intra-EU posting of workers.

Secondly, our report is aimed at providing answers and comments concerning various phenomena, in particular those connected with the posting of workers from Poland (as this is the major flow in intra-EU labour mobility), such as:

- posting of third-country nationals (and the issue of over- / under- representation of third-country nationals posted from Poland as compared to their share in the Polish labour market)⁸⁴;
- war on Ukraine and its effects to both the employment of the third-country nationals in Poland and on their posting abroad.

Thirdly, the aim of our report was also to map the impact of the COVID-19 pandemic on the posting of workers to and from Poland. Indeed, while there has been some data on the impact of the pandemic on the employment and social security coverage in Poland, such data have not been so far presented with regards to posted workers and the objective of the report is to fill in that gap.

Last, but not least, our report aims at shedding some light to the implementation and application of the Revision Directive 2018/957/EU amending the Basic Directive 96/71/EC concerning the posting of workers in the framework of the transnational provision of services⁸⁵. In this regard, while demonstrating and discussing the data obtained from the ZUS, complaints of Poland and Hungary to the Court of Justice of the EU⁸⁶ as well as the Act of 24 July 2020⁸⁷, implementing the Revision Directive into Polish law were tackled and developed.

Given the above, we had conducted analyses in four main research areas and thus we have been able to come up with the following main research questions, corresponding to four main research areas:

⁸⁴ See also the concept of 'EU movers' in: D. Lens, N. Mussche, I. Marx, *Europe's ever expanding mobility patterns – posting, third-country nationals and the single European labour market*, Herman Deleeck Centre for Social Policy Working Paper No. 19.08, July 2020; p. 6.

⁸⁵ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173, 9.7.2018, p. 16–24 ('Revision Directive / Directive 2018/957').

⁸⁶ Actions for annulment brought on the basis of Art. 263 TFEU – C-626/18 Republic of Poland v European Parliament and the Council of the European Union and C-620/18 Hungary v European Parliament and the Council of the European Union (ECLI:EU:C:2020:1001) – see more in Chapter 5 hereof.

⁸⁷ See Chapter 5 hereof.

- 1) What are the scale, characteristics and impact of intra-EU posting from and to Poland? (*Chapter 2*);
- 2) What are the scale and characteristics of ‘irregular’ intra-EU posting from and to Poland? (*Chapter 3*);
- 3) What is the impact of the COVID-19 pandemic on intra-EU posting from and to Poland? (*Chapter 4*);
- 4) What is the impact of Directive 2018/957/EU amending Directive 96/71/EC? (*Chapter 5*).

Given the above-mentioned aims and the research questions, we decided to structure the report into five chapters. Following the introduction, *Chapter 2* describes the scale and characteristics of posting of workers to and from Poland – starting with the structure of foreigners (and third-country nationals⁸⁸) within the Polish labour market and ending with the issue of posting third-country nationals from Poland, including the impact of the Russo-Ukrainian war of 2022.

We decided to employ such a structure, as Poland, which just a decade ago was not an immigration country, has since then become just that, which was both the effect of the mass immigration of Poles following Poland’s accession to the EU and the solution to the lack of domestic workers. It also seems to have influenced indirectly the number of outgoing postings. We describe herein also the incoming postings, which are a low-key phenomenon, both as compared to the outgoing ones as well as given the scale of intra-EU postings altogether. The chapter demonstrates that Poland is primarily a sending (and not receiving) country. The contents of the chapter are rounded up by the description of posting third-country nationals from Poland, that has been a growing phenomenon in the recent years and certainly places Poland as the main provider of third-country work throughout the Union. Since Ukrainian citizens constitute by far the most numerous cohort of such workers, it goes without saying that the impact of the war on posting must have been examined – thus its presence in the last part of this very chapter.

Chapter 3 depicts the scale and characteristics of ‘irregular’ posting to and from Poland. It relies chiefly on data provided by the Polish authorities concerning various violation connected with posting to / from Poland. It shows *inter alia* the numbers (surprisingly low – given especially

⁸⁸ In this report, the notion “foreigners” includes all non-Polish nationals, whereas the notion “third-country nationals” (also abbreviated as “TCNs”) is used in regard to non-EU, EEA or Switzerland citizens.

assumptions made in various fora) of negative decisions / refusals to issue Portable Documents A1 in the context of outgoing postings.

Chapter 4 examines the impact of the COVID-19 pandemic (as well as policies adopted in response thereto) on the posting of workers to and from Poland. Given the lack of targeted data on Poland at the EU level, monthly data are analysed, showing the decline of outgoing postings during the pandemic's peak months, and showing the unquestionable impact of the pandemic on the numbers of outgoing (and to a lesser extent) also incoming postings.

Chapter 5 focuses on the adoption, application, and transposition into the Polish law of the Revision Directive 2018/957. Since Poland and Hungary were the only Member States to contest the very Directive – their actions have been described herein as well. A tentative takeaway of the analysis is that the transposition of the Directive has not impacted adversely (especially the outgoing) posting - yet more data and the studies following their obtainment should be carried out in this regard to further examine this phenomenon.

The carrying out of the above-mentioned research has resulted in the added value of the Report. In particular, it manifests itself in the collection of volumes of additional data on posting to and particularly from Poland, their careful selection, examination and presentation to readers, along with spelling out of the conclusions and (where appropriate) recommendations.

The authors are convinced it will add to the data collected and reported at EU level and will contribute to a better understanding of some processes and latest trends in posting of workers to and from Poland.

1.2. Methodology

To be able to answer the above-mentioned research questions and carry out this Report's aims, we employed a mixed research-based methodology, making use of its quantitative and qualitative dimensions.

Firstly, it goes without saying that the availability of relevant data provided by the competent authorities is not available to the same extent throughout the EU. In Poland, the interesting feature thereof is that data are generally collected by competent authorities (and to some extent also described by them in their various reports), however the challenge is the categorization of the raw data in order to make informed conclusions. At the same time, it needs to be emphasized that the

cooperation from the Polish authorities concerning the collection has always been, despite the time constraints and the above-mentioned data limitations, of the highest quality.

In our report, we made use of data drawn from a plethora of sources. Questions concerning the number and characteristics of the outgoing postings have been answered chiefly using statistical data on Portable Documents A1 (including those issued to third-country nationals) kindly provided to us by the Polish Social Insurance Institution (ZUS) available from 2010, while issues related to the incoming postings were dealt with using primarily data and reports of the National Labour Inspectorate (NLI / PIP) and the Main Labour Inspectorate (MLI / GIP) – which has been gathering such data since 2016⁸⁹.

The processing of data by the Polish team both at the Cracow University of Economics (CUE) and at the European Labour Mobility Institute (ELMI) has been substantively supplemented by the data collected from the other Polish competent authorities, most notably the Statistics Poland (GUS), the Ministry of Family and Social Policy (MRiPS), the Polish Border Guard (BG / SG), Polish Office for Foreigners (UdSC) as well by data publicly available on other websites of offices, as well as through a query of scientific, popularizing and static studies in the present regard.

Last, but certainly not least, several expert interviews were carried out to inquire about the data and phenomena observed throughout the research, as well as to validate the interpretation of the very data and the outcome of the quantitative examinations. Such interviews were carried out with representatives of the ZUS, the NLI, the MLI and other entities as well as with several Members of the European Labour Mobility Institute – for which the authors remain very much indebted.

Finally, the findings of the Report are also based on the review of the existing Polish and foreign literature on the intra-EU posting of workers, as well as on the careful examination of the current regulatory frameworks related to the intra-EU labour mobility and posting of workers.

⁸⁹ See more in Chapter 2.2.

2. Scale, characteristics, and impact of intra-EU posting of workers

In this chapter we present data on the number of workers posted to Poland and from Poland. We take a dynamic approach showing a decade-long trends. Unavoidably, we also pay attention to the effects of the revised Directive on the posting of workers and on the outbreak of the COVID-19 pandemic. The two latter issues are dealt with in greater detail in separate sections further in the Report. Before presenting general data, we calculate first the importance of third-country nationals in the Polish labour market (cf. Chapter 2.1). The importance of the legal employment of third-country nationals in Poland for legal posting stems directly from the jurisprudence of the Court of Justice of the EU. In its judgment in C-477/17 Balandin⁹⁰, the Court held that third country nationals, who temporarily reside and work in different Member States in the service of an employer established in a Member State, may rely on the coordination rules laid down by Regulations Nos 883/2004 and 987/2009 in order to determine the social security legislation to which they are subject, provided that they are legally staying and working in the territory of the Member States. Therefore, legal stay and work in Poland is a precondition to being able to legally post them abroad – hence the role of the issues dealt with in Chapter 2.⁹¹.

We then depict the posting of workers to Poland (which is a relatively marginal phenomenon, as set out below). Then, we present the issues concerning the outgoing postings (Chapter 2.3), including a separate sub-chapter 2.4. on posting of third-country nationals from Poland, in which we assess the importance of posted TCN workers in the total number of posted workers from Poland, to compare both such percentages in order to make an assessment of over- or underrepresentation.

2.1. Increasing number of foreigners (including third-country nationals) living and working in Poland

2.1.1. Introduction

Just a decade ago, Poland was not an immigration country – quite the contrary, due to the post-2004 mass mobility to other European Union Member States, the migration balance of our country

⁹⁰ See the judgment of the CJEU in C-477/17 Balandin [ECLI:EU:C:2019:60], para. 47-48.

⁹¹ Please note that given the scope of our Report, we do not set out herein the full picture of titles of legal stay and work in Poland. For the overviews thereof, cf. e.g., *Outline of Polish Labour Law System* (edited by K. W. Baran), Warszawa 2016; Z. Hajn, L. Mitrus, *Labour Law in Poland*, Warszawa 2018.

was negative⁹², as about 1.2 million Poles (3% of the population) left the country between 2002 and 2013, with a particularly remarkable wave of 0.7 million emigrants to the United Kingdom and Ireland in 2004–2008. According to the 2011 population census, the total number of foreigners staying in the country was estimated at approximately 100,000. Just seven years ago (in 2015), Poland was ranked as one of the last among EU Member States in terms of the share of immigrants in the total population. This changed abruptly and substantially in 2014, after the first war in the East of Ukraine.

From that year onward Poland admitted between one and two million immigrants from Ukraine. This wave of immigration, of an unprecedented scale in Poland's modern history, was significant also from the European perspective. In particular “in 2018, one out of five first residence permits issued in the EU was granted by Poland (635,000, or 20% of total permits issued in the EU)”, and conversely “citizens of Ukraine (527,000 beneficiaries, of which almost 78% in Poland) continued to receive the highest number of permits in the EU”⁹³. In the years 2016–2018 Poland was also the top OECD destination for temporary labour immigrants⁹⁴. The above also translates itself generally into more and more foreigners⁹⁵ working in Poland, as will be demonstrated below. Last, but certainly not least, the Russo-Ukrainian war that started with the Russian aggression on Ukraine on 24 February 2022, opened up a whole new chapter in this regard.

Given those perspectives, it goes without saying that the employment situation of foreigners / third-country nationals should be depicted in the present Chapter.

⁹² See e.g., R. King, M. Okolski, *Diverse, Fragile and Fragmented: The New Map of European Migration*, Central and Eastern European Migration Review 2018, 1–24.

⁹³ Cf. Eurostat (2019), *Residence permits for non-EU citizens: First residence permits issued in the EU Member States remain above 3 million in 2018*, 25 October 2019, retrievable at: <https://ec.europa.eu/eurostat/documents/2995521/10189082/3-25102019-AP-EN.pdf/95e08bc8-476d-1f7d-a519-300bdec438cb>

⁹⁴ P. Strzelecki, J. Growiec, R. Wyszyński, *The contribution of immigration from Ukraine to economic growth in Poland*, Review of World Economics, 2021, Published online on 20 Sept 2021, retrievable at <https://link.springer.com/article/10.1007/s10290-021-00437-y>, p. 2. See also: *OECD, International Migration Outlook 2020*, Paris: OECD Publishing 2020, retrievable at: https://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2020_ec98f531-en

⁹⁵ The divide between free labour mobility by EU citizens on the one hand and nationally controlled labour migration by third-country nationals rightly shed light to *inter alia* by D. Lens, N. Mussche and I. Marx in: *A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants*, International Migration 2021; 00, p. 1 & 14, retrievable at: <https://onlinelibrary.wiley.com/doi/10.1111/imig.12867>

As mentioned before - by the third-country nationals we understand the persons who are not citizens of a European Union (EU) Member State (and thus not persons with the right to free movement within the Union) – following what was rightly pointed out to by K. Kall, A. Brzozowska, N. Lillie, K. Matuszczyk & J. Salamońska, *Regional Case Study. From Ukraine to Finland and Estonia via Poland. Migration and posting of third country nationals*. Work Package 4, Jyväskylä / Warsaw 2020, p. 5.

2.1.1.1. Reasons for the presence (substantially increased in recent years) and posting of TCNs

Workers hailing from third countries and posted in largest numbers from Poland **are mostly nationals of the former USSR countries**. First of all, as mentioned before, these countries share relatively strong historical and societal links, but also common cultural heritage (e.g., Slavic language and relative religious similarity)⁹⁶ as well as are mostly in close geographical proximity to Poland and the languages are considered similar, too⁹⁷.

Secondly, a lot of them, especially from **six former Soviet Union republics (Ukraine, Belarus, Armenia, Georgia, Moldova, and Russia)** have enjoyed a special simplified regime of employment, based on the so-called ‘declarations of entrusting the performance of work to a foreigner’⁹⁸.

⁹⁶ A. Grzymała-Kazłowska, A. Brzozowska, *From Drifting to Anchoring. Capturing the Experience of Ukrainian Migrants in Poland*, Central and Eastern European Migration Review, Vol. 6, No. 2, 2017, pp. 103–122, doi: 10.17467/ceemr.2017.04, p. 108.

⁹⁷ According to data from the representative research of the Institute of Public Affairs in 2013, 41 per cent of Ukrainians claimed that they speak or understand Polish – for more see e.g.: J. Fomina, J. Konieczna-Sałamatin, J. Kucharczyk, Ł. Wenerski (2013). *Poland – Ukraine, Poles – Ukrainians. Look Across the Border*. Warsaw: Institute of Public Affairs.

⁹⁸ This legal instrument is set out in Art. 87(3) in conjunction with Art. 90(10)(1) of the Act on Employment Promotion and Labour Market Institutions (Journal of Laws 2022.690, as amended), as well as § 2 of the Regulation of the Minister for Family, Labour and Social Policy of 8 December 2017 on the countries to whose nationals certain provisions concerning the seasonal work permit and the provisions concerning the declaration on entrusting work to a foreigner apply (Journal of Laws 2017.2349, as amended).

A declaration of entrusting the performance of work to a foreigner (**hereinafter also referred to as ‘a declaration on entrusting work’ / ‘DoEW’** – referred to as ‘*declaration of the intention to entrust work to a foreigner*’ prior to 2018) is the result of the simplification of labour regulations for citizens of a certain group of countries. This group is a closed catalogue for the time being, and the countries with a simplified procedure include Armenia, Belarus, Georgia, Moldova, Russia and, in particular, Ukraine. A declaration is to be submitted by the employer to the relevant Poviat Labour Office ((second (following voivodships [*regions*], lower tier of administrative division of Poland (the lowest are municipalities [*gmina*] – currently there are 16 voivodeships, 308 poviats and 65 cities with poviat rights, 2489 municipalities (including 11 municipalities of the capital city of Warsaw)). Once the declaration is submitted, the authority carries out the procedure for entry into the register of declarations without a standard ‘labour market test’, i.e., verification whether the employer's staffing needs can be met on the local labour market, within the framework of the recruitment conducted by the Poviat Labour Office. This constitutes a significant acceleration of the work permit for a foreigner, as - as a rule - the procedure for entering the employer's statement on entrusting work to a foreigner should take 7 days.

Such a declaration, when registered, used to entitle a third-country national to legally take up employment in Poland for 6 months in the following 12 months. After such a 6-month-long period, a further declaration could not have been registered for the next 6 months (as a result of the 12-month settlement period).

We are expecting increases of numbers of DoEWs following the amendments to the Polish immigration law (including to the Act on Foreigners and the Act on Employment Promotion and Labour Market Institutions – cf. the Act of 17 December 2021 on amending the Act on foreigners and certain other acts, Journal of Laws 2022, item 91), which came into force on 29 January 2022 that extended the period of such declarations from 6 to 24 months and eliminated the 12-month settlement period (therefore declaration may be registered practically one after another) - cf. e.g., *Changes in the Act on Foreigners*, retrievable at: <https://www.gov.pl/web/udsc-en/changes-in-the-act-on-foreigners>.

What is more, the citizens of certain of the above-mentioned countries also enjoy visa-free entry to Poland provided that they hold biometric passports. This is the case of Moldova (since 28 April 2014⁹⁹); Georgia (from March 2017¹⁰⁰); and most notably – Ukraine (since 11 June 2017¹⁰¹). When it comes to Belarusians, although they do not enjoy the visa-free regime, their entry for work purposes has recently been facilitated by a number of legal institutions. They included *inter alia* a special regime of the IT and entrepreneurs-oriented, so-called “Poland. Business Harbour” (“PBH”) programme¹⁰² or simplified procedures of issuing visas to Poland to persons living in Belarus by the Minister of Foreign Affairs¹⁰³.

It goes without saying that the citizens of Ukraine are by far the most numerous group of third-country nationals in Poland. Poland attracts Ukrainians by being neighbours and as a country with a similar language and cultural ties. There are many legal ways for Ukrainians to find a job in Poland. The most popular include studying at a Polish university with the prospect of further employment and remaining in Poland (or going abroad); labour migration to Poland (we describe three most frequently used legal basis (titles) in that regard below); setting up a company or a

⁹⁹ However, it did not result in a significant increase in Moldovan departures to the EU, nor in an increase in the number of refugee status applications submitted to EU countries (as was the case, for example, in the Western Balkan countries). According to the Moldovan Border Service, between 28 April 2014 and 27 April 2015, more than 241,000 holders of Moldovan biometric passports (only such passports entitle to visa-free border crossing) left for EU countries, of which up to 90% have already returned to Moldova - cf. M. Jaroszewicz, K. Całus, *Moldawia: rok po wprowadzeniu ruchu bezwizowego* [Moldova: one year after the introduction of visa-free travel regime], Centre for Eastern Studies, retrievable at: <https://www.osw.waw.pl/pl/publikacje/analizy/2015-05-06/moldawia-rok-po-wprowadzeniu-ruchu-bezwizowego#:~:text=28%20kwietnia%20min%C4%85%C5%82%20rok%2C%20odk%C4%85d,na%20okres%20do%203%20miesi%C4%99cy>.

¹⁰⁰ Since then the number of work permits issued for Georgian citizens in Poland has gone up considerably – cf. *Obywatele Gruzji w Polsce* [Georgia citizens in Poland], <https://www.gov.pl/web/udsc/obywatele-gruzji-w-polsce#:~:text=Wzrost%20liczby%20Gruzin%C3%B3w%20osiedlaj%C4%85cych%20si%C4%99,ruchu%20bezwizowego%20w%202017%20r>.

¹⁰¹ See more: M. Jaroszewicz, *Zniesienie wiz dla Ukraińców – konsekwencje i wyzwania* [Visa Abolition for Ukrainians - consequences and challenges], Centre for Eastern Studies, retrievable at: <https://www.osw.waw.pl/pl/publikacje/analizy/2017-04-26/zniesienie-wiz-dla-ukraincow-konsekwencje-i-wyzwania>

¹⁰² PBH has been addressed to IT experts. Third-country nationals have the opportunity to obtain a visa to Poland on simplified terms. They can undertake work (or commence business activity) without a work permit. In order for a candidate to obtain a visa, the prospective employer from the IT industry must apply to the programme. The notified employer will issue a document confirming their interest in hiring the candidate. This is attached to the visa application – see the Regulation of the Minister of Development, Labour and Technology of 20 November 2020 amending the regulation on cases in which entrusting work to a foreigner in the territory of the Republic of Poland is allowed without the need to obtain a work permit (Polish Journal of Laws 2020 item 2081, as amended).

¹⁰³ Cf. <https://studio.pwc.pl/aktualnosci/alerty/wizy-dla-osob-mieszkajacych-na-bialorusie#:~:text=Wizy%20do%20Polski%20dla%20os%C3%B3b%C3%B3w mieszkaj%C4%85cych%20na%20Bia%C5%82orussi%20wydawane%20przez%20Ministra%20Spraw%20Zagranicznych,-29%2D04%2D2021&text=12%20kwietnia%202021%20r.,ministra%20w%C5%82a%C5%9Bciwego%20do%20spraw%20zagranicznych>

starting business activity (including sole trader's activity), and the issue of the so-called "Card of a Pole" ("Polish Card") based on Polish ancestry¹⁰⁴. It is mostly people who get married in Poland or have a work permit that plan their future life in Poland. Students were often keen to return to Ukraine especially if the political and economic processes will support their self-realisation plans, whereas some labour migrants use their Polish visa to arrive to other European states¹⁰⁵.

The beginning of the tragic events in the form of the Russian annexation of Crimea and the armed conflict in Donbass resulted in that those living in these territories started to look for a safe place to live, particularly in Poland, which contributed to the large number of Ukrainians coming to Poland to flee hostilities and rebuild their lives¹⁰⁶.

Indeed, from 2014 onwards Poland witnessed an unprecedented inflow of immigrant workers from Ukraine. Coupled with strong labour demand, this surge in labour supply provided a major contribution to Poland's economic growth¹⁰⁷. Until 2014 the impact of immigration on GDP growth in Poland remained rather negligible (below 0.1 pp.). Since 2014 the contribution of the labour input of immigrants rapidly grew, though, becoming a significant part of Poland's growth potential. In the period 2013-2018 the contribution of the inflow of Ukrainian workers to Poland's GDP growth ranged between 0.3 pp. to 0.8 pp. per annum (0.5 pp. per annum on average), so that the inflow of Ukrainian workers was responsible for about 13% of economic growth in Poland in 2013-18. In fact, in 2016-18 growth in the labour input of immigrants contributed to GDP growth more than the impact of growth in the labour input of Polish citizens¹⁰⁸.

It is very difficult to actually provide the total number of third-country nationals in Poland, since the existing data are either non-existent or fragmented and tend to overlap. By way of example,

¹⁰⁴ A. Zubik, (2014), *Suthasna trudova mihracia ukrainetskogo naselenia w Polshu*. Ekonomithna ta Socialna Geografia. Naukovi Zapiski, 1, 111. Please note that apart from the above-mentioned three most frequently used titles, there are no coherent and exhaustive data concerning the other employment titles; we deal with this issue below as well.

¹⁰⁵ For the context see especially the comprehensive research of S. Cukut Krilić, K. Toplak, M. Vah Jevšnik, *Posting of third country nationals. A comparative study*, ZRC SAZU Ljubljana, December 2020.

¹⁰⁶ B. Skoczyńska-Prokopowicz, Foreign labour migration of Ukrainians to Poland: statistical research from the perspective of Ukrainian studies, *Zeszyty Naukowe Politechniki Śląskiej, Seria Organizacja i Zarządzanie*, 2018, No. 122, p. 201 et seq. According to the Author, the peak was 2014 when Ukrainians constituted 34% of the entire group of foreigners seeking asylum abroad. The Polish government considered 2,318 applications that year. There were far fewer of them 2,305, in 2015, and in 2016 there were 1,229. There were not many acceptances since the Polish government believed just the territories of Crimea, Luhansk and Donetsk were unsafe, while the rest of Ukraine was regarded as completely safe. That was the dominant reason to decline applications for refugee status.

¹⁰⁷ P. Strzelecki, J. Growiec, R. Wyszyński, *The contribution of immigration from Ukraine to economic growth in Poland*, op. cit.

¹⁰⁸ P. Strzelecki, J. Growiec, R. Wyszyński, *The contribution of immigration from Ukraine to economic growth in Poland*, National Bank of Poland (NBP) Working Paper No. 322, p. 34.

different public authorities and media outlets provide different data based on a mix of indicators – e.g., the number of persons entering Poland (e.g., the Polish Border Guard on 14 July 2022 indicated that its officers cleared as much as 4,775 million Ukrainian citizens since 24 February 2022¹⁰⁹), the number of Ukrainian citizens (not to mention other third-country nationals) living in Poland, which according to the Union of Polish Metropolii at the end of May 2022, amounted to 3.37 million¹¹⁰, or the number of Ukrainians based on a number of their phones logging in to Polish mobile networks (3,463,881 in March 2022, up from 1,277,259 in March 2021¹¹¹).

On top of that, there are diverging figures concerning holders of various titles of legal stay (residence) in Poland (a previously mentioned precondition to a legal outgoing postings). Among the Polish residence titles there are: a visa, a temporary residence permit, a permanent residence permit, a residence permit for a long-term EU resident. In addition, third-country nationals exempt from the visa requirement may enter and stay in Poland under the so-called ‘visa-free regime’. Unfortunately, the statistics on the above-mentioned titles are not centralized, which results in their incompleteness and fragmentation (some of those actually available are not up to date either). The most up-to-date and comprehensive data from the Polish Office for Foreigners (UdSC) show that as of 1 January 2021 more than 457 thousand third-country nationals held valid residence titles in Poland. Out of that number, 272,4 thousand TCNs held temporary residence permits (which can be issued for up to 3 years), whereas 102.1 thousand were entitled to permanent residence. Also, 81.5 thousand citizens of the EU Member States were entitled to registered residence in Poland. Of 457 thousand persons described above, the largest groups were the citizens of Ukraine – 244,2 thousand, Belarus - 28,8 thousand and Germany - 20,5 thousand. What is crucial though, is that the above figures do not take into account persons staying in Poland temporarily under the visa-free regime or on the basis of visas.

Given the above inconsistencies, what seems to be the most valid indicator, providing at least approximated figures, is the data concerning employment of third-country nationals. At the same

¹⁰⁹ See the Twitter account of the Border Guard of 14 July 2022 - https://twitter.com/Straz_Graniczna

¹¹⁰ Cf. J. Krzemiński, *W dużych polskich miastach przebywa już 1,4 mln Ukraińców, a w całej Polsce - 3,4 mln* [There are already 1.4 million Ukrainians in large Polish cities and 3.4 million in Poland as a whole], Portal Samorządowy, 28 June 2022, <https://www.portalsamorzadowy.pl/polityka-i-spoleczenstwo/w-duzych-polskich-miastach-przebywa-juz-1-4-mln-ukraincow-a-w-calego-polsce-3-4-mln,387474.html>

¹¹¹ Cf. D. Pawłowska, D. Uhlig, *Już 3,5 mln Ukraińców w Polsce - policzeni po telefonach komórkowych* [Already 3.5 million Ukrainians in Poland - counted by mobile phones], Wyborcza.pl, 11 April 2022, <https://biqdata.wyborcza.pl/biqdata/7.159116.28317083,juz-3-5-milionow-ukraincow-w-polsce-policzeni-po-telefonach.html>

time, also the data in this regard are not exhaustive – there are no overall and comprehensive data concerning certain situations and statuses of third-country nationals – e.g., holding a valid ‘Card of a Pole’, being a graduate of a Polish upper-secondary school, full time studies, being a spouse of a Polish citizen with a temporary residence permit on the territory of the Republic of Poland granted as a result of marriage, etc.¹¹². Therefore, for the sake of our analysis, we took into account three employment titles, which are most frequently issued to third-country nationals, namely 1) work permits¹¹³; 2) the previously-mentioned declarations on entrusting work; 3) as well as ‘temporary residence permits due to seasonal work’ [‘seasonal work permits’]¹¹⁴.

In 2020, fewer work permits for foreigners were issued in Poland than in the previous year. That marked a difference to 2015-2019, a period of systematic increase in the number of work permits issued in Poland. In our opinion, this was due to COVID-19 pandemic on the one hand but also to the shift in the employment titles issued in Poland to TCNs to declarations on entrusting work, rather than work permits. Altogether, there were 1,519,599 of such declarations issued, and even though they were 120,484 less than in 2019, in 2021 those numbers rebounded considerably and confirmed the trend, visible already in 2019. As mentioned before, all signs seem to weigh in favour of the hypothesis that those numbers are set to go up again after the amendments to the Polish immigration law, applicable from 29 January 2022¹¹⁵.

In 2020, 406,496 work permits were issued in Poland – approximately 38.2 thousand less than in 2019 (yet their number increased by a whopping 340.7 thousand compared to 2015). They were still most often issued to citizens of Ukraine – 72.6% of all work permits were issued to Ukrainian

¹¹² For a list of situations where a third-country national is not obliged to hold a work permit for a legal work in Poland see the information of the Polish Office for Foreigners: <https://archiwalna.udsc.gov.pl/en/cudzoziemcy/obywatele-panstw-trzecich/chce-pracowac-w-polsce/>

¹¹³ A work permit is a decision of a competent authority, entitling a third-country national legally residing in Poland to perform work under the conditions specified in the content of the permit. This document is issued at the request of an entity entrusting work to a foreigner by the voivode (head of regional administration) competent for its seat or place of residence.

¹¹⁴ In existence till 1 January 2018, provided for in the Art. 185a of the Act of 12 December 2013 on Foreigners Article 185a of the Act in conjunction with Art. 88(2) Article 88 (2) of the Act of 20 April 2004 on employment promotion and labour market institutions and the implementing acts. Seasonal work permits are issued to the entity temporary entrusting work performance or for another entity entrusting work performance. Such permits shall be granted for the period of the permit for seasonal work held by the foreigner or extension of seasonal work permit, not longer than 9 months from the day of the first entry, for the purpose of seasonal work, occurring in the given calendar year. The permit may also be granted if the circumstances, which constitute the basis for application for the permit, do not justify the foreigner’s stay within the territory of the Republic of Poland for a period longer than 3 months.

¹¹⁵ Unless a practice of the so-called ‘announcement procedure’ concerning employment of Ukrainian citizens after 24 February 2022 will bring about the increased numbers of persons employed on the basis of such legal title, at the expense of especially the declarations on entrusting work.

nationals, followed by Belarusians (7.6% of all permits). Considerable numbers of the permits were also issued to citizens of Georgia and India (both of 2% of the total permits' number) and Moldavians (1.9%). The most numerous group among those, for whom work permits were issued were workers in industry and crafts (34.4% of the total number of permits issued). A significant share of permits was also issued to workers performing the so-called 'simple work' (30.4%) and for operators and assemblers of machinery and equipment (20.3%). The number of declarations of entrusting work was considerably higher – in 2020, 1,519,365 such declarations were registered. In turn, 2021 was actually a record year in terms of the impact of foreign workers on the Polish labour market. According to data made available by the Ministry of Family and Social Policy, nearly 2 million declarations of entrusting work to a foreigner were entered into the register (1,979,866 declarations were entered into the register, of which 1,635,104 were registered for Ukrainian citizens)¹¹⁶ along with 504,172 work permits (of which – 325,213 – issued to Ukrainian citizens), as well as 113,435 seasonal work permits (overwhelming majority, 111,061 – to Ukrainian citizens) that were issued to third-country country nationals.

In turn, when it comes to 'individual persons' behind the declarations of entrusting work¹¹⁷, the declarations actually concerned 1,055,226 persons of Ukrainian nationality and 1,303,606 persons from third countries in total in 2021. According to the available data of the Ministry of Family and Social Policy, the persons for whom such declarations were registered most frequently, were "labourers performing simple tasks in industry" (264,054 declarations registered), "warehousemen and related workers" (146,751) and "non-industrial blue-collar workers" (144,245)¹¹⁸.

One more set of statistics needs to be mentioned herein - the number of third-country nationals registered in the Polish Social Security Institution (ZUS). Of note is that the ZUS' data in this regard by and large provide information on non-Polish citizens, therefore throwing in the mix also the foreigners (non-Polish citizens of the EU); however, the number of such Union citizens are relatively meagre.

¹¹⁶ See the data provided by the Polish Ministry of Family and Social Policy: <https://psz.praca.gov.pl/web/urzad-pracy/-/8180211-oswiadczenia-o-powierzeniu-wykonywania-pracy-cudzoziemcowi-wpisane-do-ewidencji-oswiadczen-obowiazujace-od-2018-r>

¹¹⁷ This issue is relevant as until 29 January 2022 more than 1 declaration could have been issued to a given third-country national (after that date, this too, could be possible, however in practice the declarations issued for a maximum period of 24 months will dominate the spectrum).

¹¹⁸ See the data of the Ministry of Family and Social Policy as well as: A. Błaszcza, *Rekordowa liczba imigrantów zarobkowych w Polsce. Niezaspokojony popyt / A record number of economic immigrants in Poland. Unsatisfied demand*, Rzeczpospolita, 25 January 2022, retrievable at: <https://www.rp.pl/rynek-pracy/art19323661-rekordowa-liczba-imigrantow-zarobkowych-w-polsce-niezaspokojony-popyt>

Such comprehensive numbers have also been breaking records - according to the latest data from the Polish Social Insurance Institution, it reached 1,011,820 million non-Polish citizens registered at the ZUS for retirement and pension disability pension *insurance* [“ubezpieczenie emerytalne i rentowe”] as of 30 June 2022, including 729,002 Ukrainian citizens¹¹⁹. This is almost one-third more than at the end of 2020¹²⁰. Indeed, the number of such insured persons has never been so high. For the sake of comparison, in February 2020, just before the outbreak of the pandemic, the number of non-Polish citizens reported for insurance in ZUS slightly exceeded 688 thousand¹²¹ and as of 31 January 2022 there were 871,559 such persons (including 620,771 Ukrainian citizens). When it comes to legal bases of the insurance (subjection to social security), the complete breakdown as of 30 June 2022 pursuant to the basis for insurance (social security) is not available yet, however, one could take into account in this regard percentages inferred from the figures as of 31 March 2022. Nearly 59% were persons who were workers (employed on the basis of an employment contract pursuant to the Polish Labour Code¹²²), while only 2.6% were ‘persons running a non-agricultural business activity’; the basis for the rest (some 38.5%) were civil law contracts – mainly – contracts of mandate, service contracts (to which the provisions on mandate apply) and agency contracts¹²³.

2.1.1.2. Legal employment of foreigners (third-country nationals) in Poland

Immigration and employment of foreigners and third-country nationals in Poland are governed by a score of legal acts, most importantly by the Act of 20 April 2004 on Employment Promotion and Labour Market Institutions¹²⁴, the Act of 12 December 2013 on Foreigners¹²⁵, Act of 15 June 2012

¹¹⁹ The number of non-Polish citizens, who are subject to retirement and disability pension insurance as of that date, cf.: <https://psz.zus.pl/kategorie/ubezpieczenia/ubezpieczenia-emerytalne-i-rentowe>

¹²⁰ A. Błaszczyk, *A record number of economic immigrants in Poland*, op. cit.

¹²¹ Cf. <https://www.zus.pl/o-zus/aktualnosci/-/publisher/aktualnosci/0/niemal-15-7-mln-osob-ubezpieczonych-w-zus/4240661>

¹²² For more – see Chapter 2.1.1.6. herein.

¹²³ Please note another type of civil law contract – a contract for specific work („Umowa o dzieło” - Art. 627 of the Polish Civil Code) does not constitute an independent title for social insurance and health insurance in Poland. Therefore, a person employed on its basis is not entitled to pension, disability, sickness, accident, or health insurance. However, in the case of concluding a contract for specific work with a person with whom an entrepreneur also has concluded an employment contract, all mandatory contributions will have to be paid on the concluded contract for specific work, too, as it is the case of an employment contract. Apart from that case, no social security contributions are levied on a contract for specific work.

¹²⁴ Journal of Laws 2021.1100, as amended.

¹²⁵ Journal of Laws 2021.2354, as amended.

on consequences of entrusting work to foreigners residing on the territory of the Republic of Poland in violation of the regulations¹²⁶, as well as of implementing regulations.

The regulatory framework concerning labour immigration to Poland distinguishes between three categories: EU/EEA and Swiss nationals, special categories of third-country nationals, and the rest of third-country nationals. In accordance with the EU law, EU/EEA and Swiss nationals have free access to the Polish labour market, whereas the other two categories must obtain an official permit (in its various forms) to access it under diverse conditions depending on which category they belong to. What is more, as mentioned before, a special regime concerning employment of TCN workers which includes nationals of Ukraine, Belarus, Russia, Armenia, Georgia, and Moldova – namely - declarations on entrusting work - is in place, being made even more flexible lately, with the coming into force on 29 January 2022 of previously-mentioned amendments of Polish immigration law.

Adding to the full picture are also the provisions of the so-called ‘Special Law on assistance to Ukraine’¹²⁷, which provided for a new, special procedure of employing Ukrainian citizens (and their spouses). In particular, its Art. 22 is worth quoting here:

“Art. 22. (1) A citizen of Ukraine shall be entitled to work in the territory of the Republic of Poland during the period of stay in accordance with the applicable legislation if:

1) his/her stay in the territory of the Republic of Poland is considered legal pursuant to Article 2, paragraph 1 or

2) is a citizen of Ukraine legally residing in the territory of the Republic of Poland

- if the entity commissioning work to a Ukrainian citizen notifies within 14 days from the date of taking up employment by the Ukrainian citizen the Poviat Labour Office competent for the seat or place of residence of the entity about commissioning work to that citizen.

(2) In the case referred to in paragraph 1, the notification is made through the ICT system - praca.gov.pl.”

Essentially - this provision enables the legal and super-flexible employment of every Ukrainian citizen (not necessarily escaping war – also those who legally stayed in Poland beforehand!) – provided that the online (!) notification pursuant to Art. 22(2) is carried out.

¹²⁶ Journal of Laws 2012.769, as amended.

¹²⁷ Adopted by the Polish Parliament and signed into law by the President on 12 March 2022 as ‘*the Law on assistance to citizens of Ukraine in connection with the armed conflict on its territory*’ (Journal of Laws 2022, item 583, hereinafter referred to also as: ‘**the Special Law on assistance to Ukraine**’ / ‘**Special Law on Ukraine**’).

Against the above-mentioned background, generally speaking, third-country nationals are allowed to work in Poland if they have obtained an employment title – being a work permit, including an 'S-type permit' (seasonal work permit) or the so-called 'single permit', unless specific provisions of law allow for exemptions therefrom or for carrying out work without the need to hold a permit. The most important of exemptions have since 2018 been declarations on entrusting work.

Moreover, the Polish system distinguishes between employment contracts and civil law contracts¹²⁸.

However, immigration procedures generally require third-country nationals to obtain an employment title regardless of the type of contract they have been offered. It is the job-offerer that must apply for the work permit¹²⁹. The latter is issued by the administrative authorities in the municipality where the employer is registered¹³⁰.

The precondition to obtaining a work permit in Poland for a third-country national is the so-called 'labour market test', which is the screening procedure of the Polish labour market for eligible Polish or EU/EEA/Swiss nationals for the open position carried out by Poviat Labour Offices prior to allowing the permit application to proceed. Some professions are exempted from the test, but exemptions to the labour market screening are made *inter alia* based on shortage occupations lists issued by authorities, as well as based on the characteristics of the employee, such as foreigners already residing in Poland uninterruptedly for 3 years or nationals of Ukraine, Belarus, Russia, Armenia, Georgia, and Moldova in certain professions or having worked at least 3 months on the basis of a registered declaration on entrusting work¹³¹.

Apart from other pull factors¹³², after liberalizing its immigration policy in the recent years, Poland created attractive conditions to pull workers from third countries who, in addition to taking up employment in Poland, are increasingly being sent by employers to other EU countries.

Given the plethora of limitations (including various and overlapping employment titles as well as residence titles) and the lack of centralized databases, we tried to examine three major employment

¹²⁸ For more in this regard – see Ch. 2.1.1.6.

¹²⁹ Except for 'the single permit' – to be applied for by the third-country national themselves.

¹³⁰ In the case of the 'single permit' the permit is issued by the voivode (head of the highest level of administrative division in Poland – equivalent to a region), whereas the S-type permit, is issued by the starost [Poviat Labour Office].

¹³¹ For a list of the various residence titles – see e.g., 'Residence in Poland', retrievable at: https://www.migrant.info.pl/Residence_in_Poland.html

¹³² For other pull as well as push factors in this regard – see M. Vah Jevšník, M. Kiełbasa, S. Danaj, M. Szaraniec, *There and gone again*, op. cit.

titles of third-country nationals within the total employment in Poland¹³³ (numbers of the other titles¹³⁴, relatively small, are either unavailable or very much fragmented). Taking into account the figures for 2020, they show the share of three such major employment titles of TCNs in Poland in the grand total number of the employed in Poland at above 12.8%, while the table below shows also the breakdown by three major sectors of activity. Of course, one needs to mention an important limitation in this regard - a third-country national in a given year could have e.g., obtained both a declaration on entrusting work and subsequently – also a work permit (or a so-called ‘unique permit’) – therefore the above-mentioned data do not show 100%-exact numbers of ‘unique’ (‘individual’) TCNs in employment, rather – may serve as a valid approximation.

Table 1. Number of major employment titles and share of third-country nationals employed in Poland by year and sector of activity

Year	Major employment titles of TCNs in total employment in PL		Employed TCNs by sector of activity					
	Number	Share of TCNs (% in the total empl. in PL)	Transportation and storage		Construction		Activities in the field of administrative and support services (including temporary employment agencies)	
			Number	Share (% of total empl. titles)	Number	Share (% of total empl. titles)	Number	Share (% of total empl. titles)
2020	2,063,498	12.7%	327,273	15.8%	366,318	17.7%	313,328	15.1%
2019	2,216,267	14.0%	291,804	13.1%	435,859	19.6%	351,925	15.8%
2018	2,045,594	12.9%	236,444	11.5%	401,948	19.6%	336,053	16.4%
2017	2,060,090	13.1%	119,863	5.8%	283,849	13.7%	717,679*	34.8%
2016	1,441,521	9.4%	80,406	5.5%	87,010	6.0%	378,759*	16.3%

Source: Own calculations, based on data from Ministry of Family and Social Protection

* Only data on declarations of intention to entrust a foreigner with work have been made available for 2017 and 2016

¹³³ As mentioned before, for the sake of the analysis, we took into account the by-far most numerous attestations: 1) work permits; 2) ‘declarations on entrusting work, as well as 3) ‘seasonal work permits’] – the latter only available for 2018-2020 (data unavailable for previous periods as the very legal institution came into being only on 1 Jan 2018). The above-mentioned figures were included in the column ‘**major employment titles of TCNs in total employment in PL**’ of the table above.

¹³⁴ E.g., numbers of third-country nationals holding ‘the Card of a Pole’ and of those who hold such a Card and work on its basis, are unavailable.

The above data clearly show that Ukrainian citizens constitute an overwhelming majority of labour migrants to Poland (the war in Ukraine which started on 24 February 2022 and facilitations introduced because of it in the Polish law, will undoubtedly contribute even further to that trend), irrespectively of their employment title in Poland. At the same time, figures seem to show that large percentage of Ukrainians actually decide to settle in Poland.

Some interesting conclusions could also be drawn, as indicated above, from the ZUS data on persons (including foreigners / third-country nationals) who are subject to social security in Poland. However, before we get to that conclusion, apart from calculating the importance of third-country nationals within the Polish labour market (herein, in Chapter 2.1), we shall also take stock of **the importance of posted third-country nationals in the total number of workers posted from Poland** (Chapter 2.3) and then we shall strive to compare both the percentages in question to be able to make an assessment on whether they constitute over- or perhaps under-representation in the entire group.

2.1.1.3. Foreigners / third country nationals¹³⁵ subject to social security in Poland

Pursuant to the provisions on the Polish social security system¹³⁶, all persons who are, *inter alia*, employees, contractors, conducting non-agricultural (business) activities are compulsorily subject to retirement and disability insurance. This kind of social security coverage (except in special cases) is also applicable to foreigners (third-country nationals) who work in Poland.

In this part of the Report, we generally provide information on foreigners / third-country nationals subject to the social security in the ZUS with data as of the end of 2019. We also provide an analysis of significant changes in the number and structure of non-Polish citizens reported to social security at the ZUS that occurred between December 2018 and December 2019. We supplement the above-mentioned with the latest available data (which unfortunately to date are fragmentary) where applicable¹³⁷.

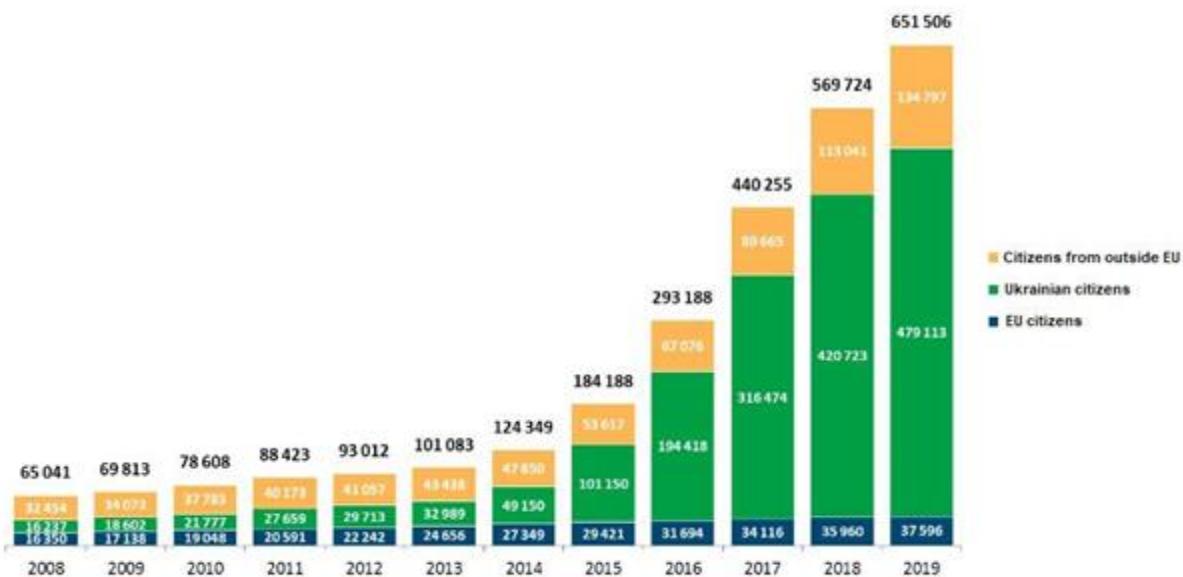
¹³⁵ Unless specifically provided – in this sub-Chapter we refer to ‘foreigners’ as meaning all non-Polish citizens, subject to social security in Poland.

¹³⁶ In particular – we are referring here to the Law on social security system (Journal of Laws 2017, item 1778, as amended). For more on the structure thereof see: The Social Insurance Institution (ZUS), *Social Security in Poland*, Warsaw 2019, retrievable at: <https://www.zus.pl/documents/10182/167615/Social+Security+in+Poland/71ffe1b1-c142-48fa-a67b-0c7e1cec6eb6>.

¹³⁷ Please note that we strive to provide the latest data where applicable and where they are available. However, this is not the case in all situations, hence ‘a patchwork’ of data in some parts of the Report and this Chapter.

According to the data of the Register of Insured Persons (former Central Register of Insured Persons)¹³⁸, the number of natural persons who were subject to retirement and disability pension insurance and who have citizenship other than Polish¹³⁹ increased from 65.0 thousand in December 2008 to 651.5 thousand in December 2019 (as indicated in Figure 1 below) and it kept increasing, to reach 932,126 persons subject to that very insurance as of 31 March 2022 and even 1,011,820 million as of 30 June 2022.

Figure 1. Change in the number of foreigners registered for retirement and disability pension insurance by country citizenship - as of the end of the year, 2008-2019



Source: ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2]*, Warszawa lipiec [July] 2021, p. 9.

This means a more than a tenfold increase in the number of non-Polish persons subject to the Polish social security, while the number of foreigners from EU countries has increased more than 2 times and the number of third-country nationals - more than 12 times.

¹³⁸ It is a collection of all natural persons registered for social security in Poland, irrespective of their title for such security. The data of each insured person are placed in a file (Insured person's file).

¹³⁹ Please note that given the nature of the register – we shall be using the term 'foreigner' herein, encompassing a larger category than 'third-country nationals' as explained before in this Report.

As of 31 December 2019, the number of foreigners from EU countries amounted to 37,596 people, while the number of third-country nationals amounted to 613,910 people, including 479,113 people with Ukrainian citizenship¹⁴⁰.

As anticipated above, the above figures may now be compared with the latest, yet only fragmented ones. Indeed, according to the latest data from the Polish Social Insurance Institution, they reached almost 970 thousand at the end of April 2022 and 1,011,820 million as of 30 June 2022. Ukrainian citizens were mainly ‘responsible’ for such an increase – at the end of March 2022, the number of Ukrainians subject to retirement and disability pension insurance contributions was 25,467 more than in February 2022 and the figures for the end of June 2022 show a further increase – 62,259 more than at the end of March. According to the latest data, Ukrainians account for 72% of all non-Polish citizens registered with the ZUS¹⁴¹.

Since 2008, the number of foreigners (including third-country nationals) reported to ZUS for retirement and disability insurance and their share in the total number of ZUS insured persons has been constantly growing, especially since 2015. In December 2019, the number of foreigners registered for retirement and disability pension insurance was over 3.5 times higher than in December 2015. In 2008-2014, foreigners accounted for less than 1% of all ZUS-insured persons. However, at the end of 2019, the share of foreigners in the total number of ZUS-insured persons (subject to social security in Poland) **at the level of 4.0%; at end of 2020 – it amounted to 4.6%** of all ZUS-insured persons.

Since then, the number of foreigners who are subject to social security in Poland increased further - to over 1 million and **has now exceeded 6% of the grand total number of the insured persons in Poland** (at the end of March 2022 that number amounted to 16,140,220¹⁴²).

Of particular note is also another trend: **the share of foreigners (non-Polish citizens of other EU / EEA countries / Switzerland) in the grand total amount of all persons who are subject to social security in Poland has been systematically decreasing** - from 25.1% in December 2008 to 5.8% in 2019, as shown in the table below. It went further down to 5.3% at the end of 2020 and

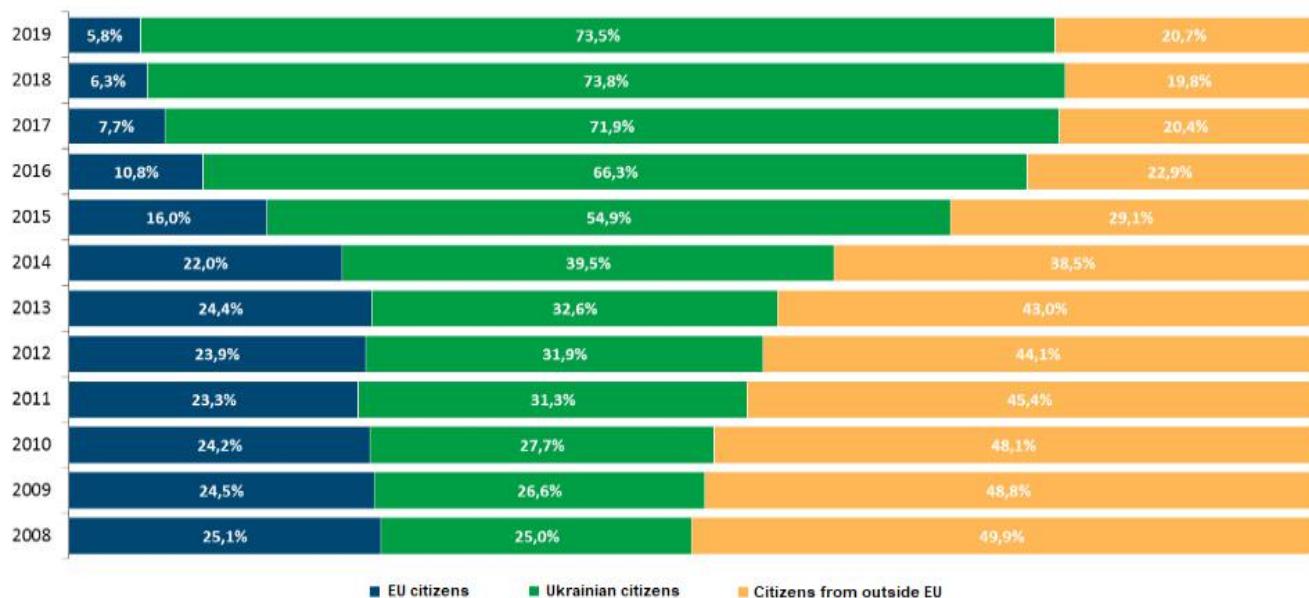
¹⁴⁰ The other citizenships with the highest numbers were also non-EU ones, i.e., Belarusian (42,797), Georgian (10,611), Russian (9,117) and Moldovan (8,901).

¹⁴¹ Cf.: *Rośnie liczba płatników składek i ubezpieczonych*, 13 May 2022, <https://www.zus.pl/-/ro%C5%9Bnie-liczba-p%C5%82atnik%C3%B3w-sk%C5%82adek-i-ubezpieczonych>; Cf. also the latest ZUS data at: <https://psz.zus.pl/kategorie/ubezpieczeni/ubezpieczenia-emerytalne-i-rentowe>

¹⁴² Cf. the latest ZUS data at: <https://psz.zus.pl/kategorie/ubezpieczeni/ubezpieczenia-emerytalne-i-rentowe>

to 4.4% at the end of 2021. Conversely, the share of third-country nationals in that number of non-Polish citizens who are subject to the Polish social security, amounted to a record-high 95.6%. Therefore, although for now we only know the number of non-Polish citizens subject to social security in Poland as of 30 June 2022 (we don't know the precise breakdown yet, save for the number of Ukrainian citizens, set out above) – that is 1,011,820; if we apply the above-mentioned percentage, we could assume that the number of third-country nationals subject to the Polish social security system at the end of June 2022 may amount to a record-high number of persons in the region of 967,299 persons.

Figure 2. Changes in the structure of foreigners registered for retirement and disability pension insurance by country citizenship - as of the end of the year, 2008-2019



Source: ZUS Departament Statystyki i Prognoz Aktuarialnych, Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2], Warszawa lipiec [July] 2021, p. 10

The biggest changes are mainly observed in the increase in the share of Ukrainian citizens (from 25.0% in December 2008 to 73.8% in December 2018). In December 2019, there was a slight decrease in the share of Ukrainian citizens in the general cohort of the insured foreigners (up to

the level of 73.5%), further down to 72.0% of all foreigners registered with the ZUS as of the end of June 2022¹⁴³.

In the sub-chapters that follow, we present changes in the number and structure of non-Polish citizens (including third-country nationals) registered for social security from 2015 to 2019 at the end of the year (with data for further years, where applicable). Foreigners have been characterized by sex and age, selected insurance titles and PKD sections of the payer registering a given foreigner (third-country national).

2.1.1.4. Characteristics by gender

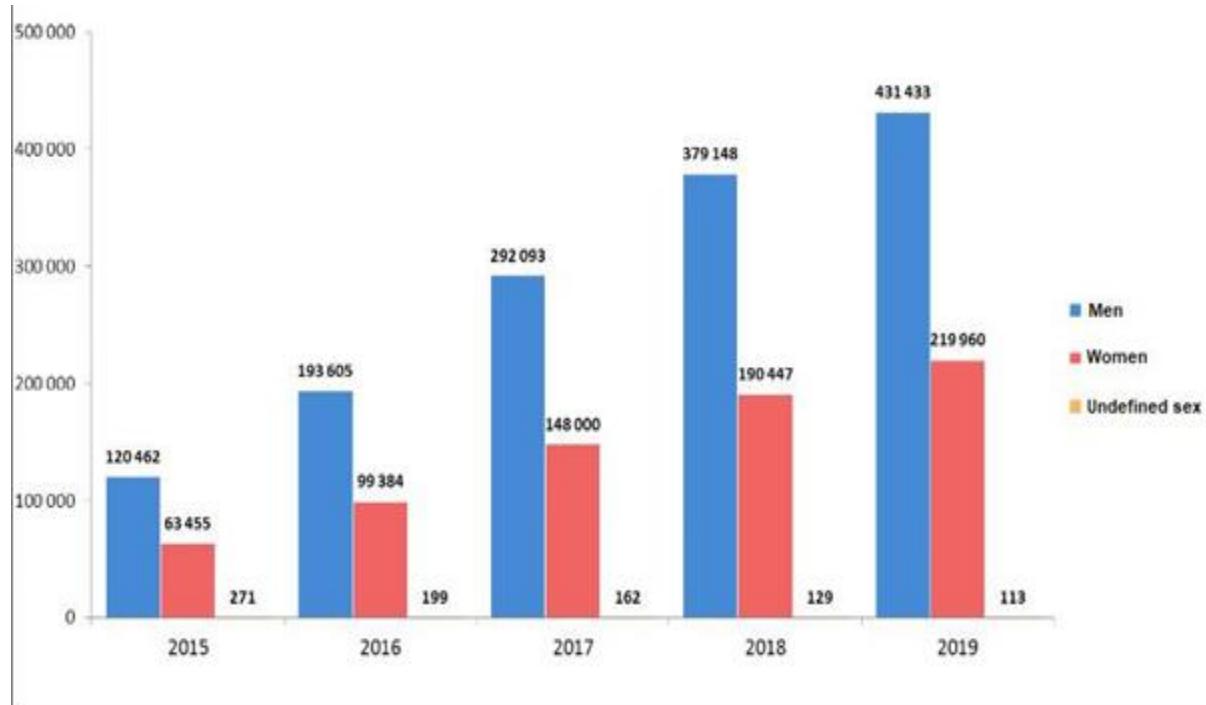
Herein, we present the breakdown of foreigners (including third-country nationals) by gender, as we believe it is indicative for the workforce composition in view of posting abroad. In the period at hand, those who dominated the statistics of the foreigners registered for retirement and disability pension insurance were men. The structure of the population of foreigners by gender has not changed significantly - the percentage of men in the respondent period slightly increased from 65.5% in 2015 to 66.6% in December 2018, and then slightly decreased in December 2019 to 66.2%¹⁴⁴, to go down to 66.1% at the end of 2021¹⁴⁵.

¹⁴³ See T. Żołciak, G. Osiecki, *Praca szuka cudzoziemca. Rośnie liczba płatników ZUS [Labour awaits foreigners. The number of ZUS payers is growing]*, *Dziennik Gazeta Prawna*, 12 May 2022, <https://praca.gazetaprawna.pl/artykuly/8416744,rosnie-liczba-platnikow-zus-obcokrajowcy-ukraincy.html>

¹⁴⁴ Also compare P. Strzelecki, J. Growiec, R. Wyszyński, *The contribution of immigration from Ukraine to economic growth in Poland*, NBP Working Paper no. 322, 2020, p. 25.

¹⁴⁵ ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021, [Foreigners in the Polish social security system – XII 2021]*, Warszawa, June 2022, p. 11.

Figure 3. Change in the number of foreigners registered for retirement and disability pension insurance by gender - state at the end of the year, 2015-2019



Source: ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2]*, Warszawa lipiec [July] 2021, p. 11.

Also, in selected groups of citizenship (outside the group of EU countries) the percentage of men in 2019 is higher than in 2015. There are differences in the gender structure between the selected groups of citizenship. **Percentage of men - citizens of EU countries is higher than the percentage of men – third-country nationals** (at the end of December 2019, 73.8% and 65.8%, respectively). That trend was the case also at the end of December 2021 – amounting to 73.8% and 65.7% respectively¹⁴⁶.

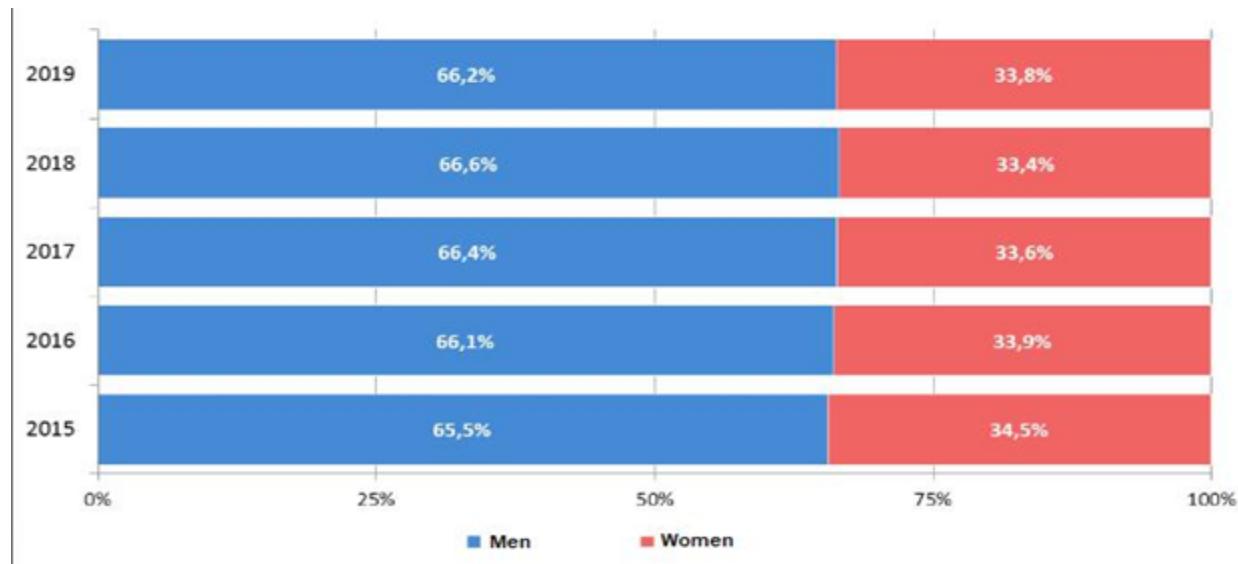
In December 2019, the lowest percentage among the major five citizenships of men was recorded among the citizens of Russia and the highest among the citizens of Georgia (52.1% and 82.6% respectively) – this was also the case at the end of 2021, however with different percentage shares (57.9% and 81.6% respectively)¹⁴⁷.

¹⁴⁶ ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021, [Foreigners in the Polish social security system – XII 2021]*, op. cit., p. 10.

¹⁴⁷ ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021, [Foreigners in the Polish social security system – XII 2021]*, op. cit., p. 10.

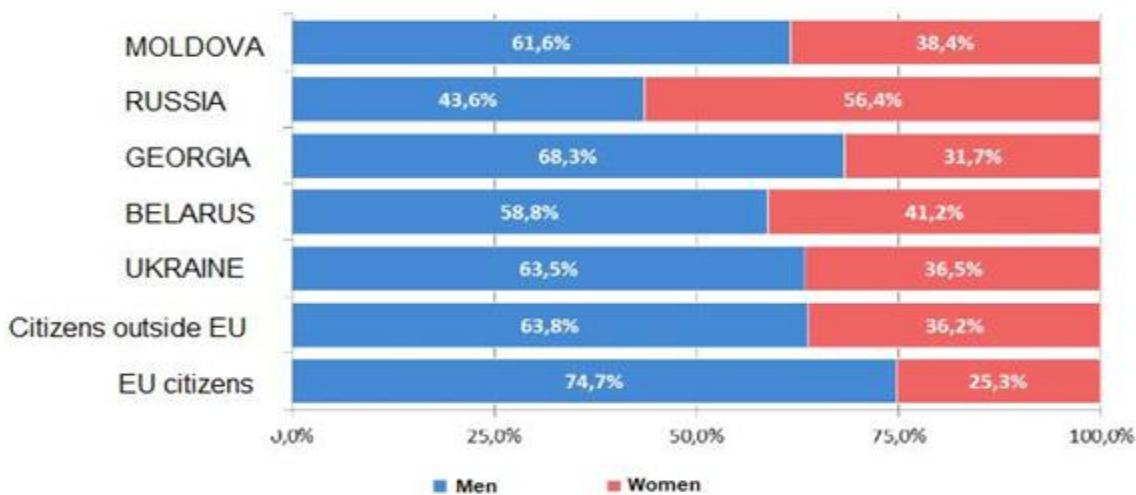
At the end of December 2019, compared to the end of December 2018, the largest absolute increase in the number of both men as well as women reported for retirement and disability insurance was noted for Ukrainian citizens (respectively by 34.7 thousand people and 23.7 thousand people.)

Figure 4. Changes in the structure of foreigners registered for retirement and disability pension insurance by gender - at the end of the year, 2015-2019



Source: ZUS Departament Statystyki i Prognoz Aktuarialnych, Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2], Warszawa lipiec [July] 2021, p. 12.

Figure 5. Changes in the structure of foreigners by country of citizenship and gender



Source: ZUS Departament Statystyki i Prognoz Aktuarialnych, Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2], Warszawa lipiec [July] 2021, p. 12.

What is particularly important and undoubtedly influenced by the Russo-Ukrainian war, is that in the latest fragmented data the gender structure change may be visible – already in the March 2022 data. Then, according to the ZUS, 39.3% of insured Ukrainian citizens were women, while in February and January this year the percentage was slightly lower - at 37%.

Interestingly, the share of women among employees (hired on the basis of the Polish Labour Code) was similar - they accounted for 33.5% of employees in March this year (32% in February and January 2022).

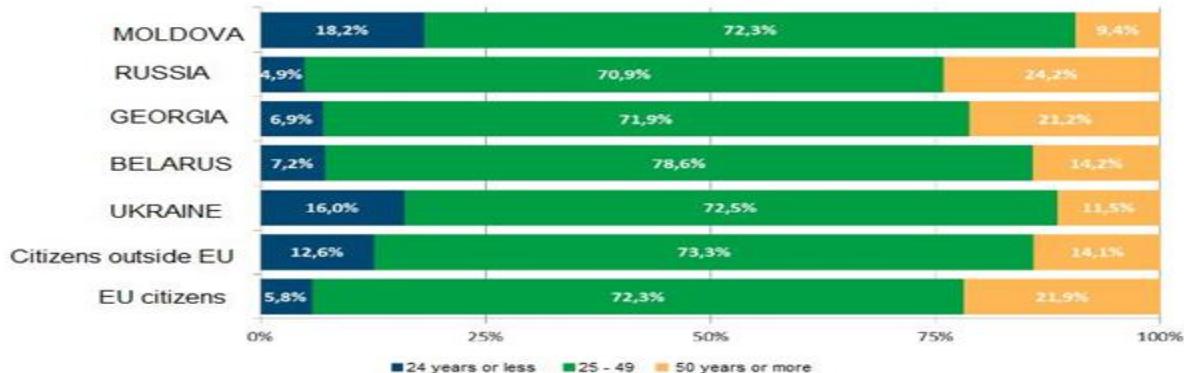
In turn, among persons employed on the basis of civil law contracts¹⁴⁸, women accounted for between 46.8% (persons employed on the basis of a contract of mandate), and among persons employed on the basis of the so-called contract for a specific work (by and large, as mentioned before - providing no title for retirement and disability pension insurance coverage at the ZUS) - 53.5%. Meanwhile, these shares were 43.6% and 51.2% in February, and 44.0% and 53.7% in January. One could therefore infer that the incoming third-country nationals (overwhelmingly – Ukrainians) are rather employed on civil law contracts than on the employment contract – which results in lesser social security coverage for them (the issue further discussed in Ch. 2.1.1.6, too). The phenomenon probably has to do with the flexibility of their employment in sectors where such contracts are preferred – which seems to be understandable given their lack of fluent command of Polish and the specificity of respective sectors. At the same time, it is worth emphasizing that such workers may still be posted abroad by their employers (where appropriate).

¹⁴⁸ For more on a difference between ‘civil law contracts’ and ‘employment contracts’ see *inter alia* Chapter 2.1.1.6. herein.

2.1.1.5 Characteristics by age

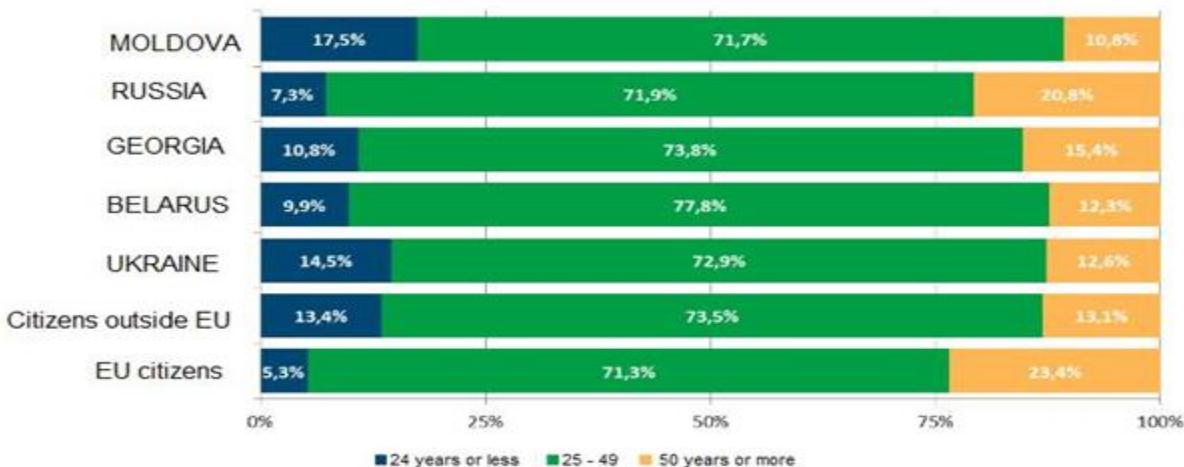
Figure 6. A and B. Structure of foreigners registered for retirement and disability pension insurance by country citizenship and age

A. As of December 31, 2019



Source: ZUS Departament Statystyki I Prognoz Aktuarialnych, Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2], Warszawa lipiec [July] 2021, p. 15.

B. As of December 31, 2019



Source: ZUS Departament Statystyki I Prognoz Aktuarialnych, Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2], Warszawa lipiec [July] 2021, p. 15.

In 2015-2019, the structure of the insured foreigners by age did not change significantly. During the period 2015 -2020 the population of non-Polish citizens who were subject to the social security

in Poland was dominated by people aged 20-49, and their percentage over the last five years ranged from 83.5% in 2015 to 84.9% in 2019 and 84.7% at the end of 2021¹⁴⁹.

The highest increase in the share was recorded for non-Polish citizens aged 20-24 (an increase by 1.1 percentage point), while for foreigners aged over 49, their share decreased from 15.4% in 2015 to 12.6% in December 2017, then increased to 13.7% in December 2019. As of 31 December 2019, differences can be noticed in the age structures of selected citizenship groups. In the group of foreigners from EU countries, people under the age of 25 represent a much lower percentage than in the group of third-country nationals (5.3% and 13.4%, respectively¹⁵⁰), while the percentage of EU citizens aged over 49 is higher than in the group of foreigners from outside the EU (23.4% and 13.1% respectively). Among the citizens of Ukraine, who enjoyed the largest absolute increase in the number of insured persons between December 2018 and December 2019, a marked reduction in the growth rate of the number of people aged 20-24 was observed; this was the case also in the period between the end of December 2020 and end of December 2021.

The shares of the non-Polish citizens subject to the Polish social security who were under the age of 40 for men and under 30 for women are higher than the shares of the total of the insured persons (in December 2019, 62.9% and 48.3% for men, and 31.5% and 19.7% for women, respectively). while the shares of the insured foreigners over 49 are much lower than the shares of the total of the insured at ZUS (in December 2019, respectively 13.0% and 28.2% for men, and 15.1% and 26.6% for women)¹⁵¹.

The war in Ukraine is set to change the above-mentioned picture – as shown in the estimations coming from the early information on the registration process, as Ukrainians are expected to register to obtain the Polish ID number (PESEL), necessary to get access to public goods and services. As of 15 May, the number of registered persons was as high as 1.1 million, with a very

¹⁴⁹ Cf. ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021*, [Foreigners in the Polish social security system – XII 2021], op. cit., p. 12.

¹⁵⁰ As of the end of 2021 – those percentage shares amounted to 5.0% and 11.5% respectively - see ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021*, [Foreigners in the Polish social security system – XII 2021], op. cit., p. 12-13.

¹⁵¹ See also – for the structure of the age and sex of the third-country nationals whom the work permits were issued in the first half of 2021: Ministerstwo Rodziny i Polityki Społecznej Departament Rynku Pracy, *Informacja o zatrudnieniu cudzoziemców w Polsce (stan na 1 lipca 2021 r.)* [Ministry of Family and Social Policy Labour Market Department, *Information on employment of foreigners in Poland (as of 1 July 2021)*] – p. 8 et seq.; Centrum Badań i Edukacji Statystycznej GUS, *Cudzoziemcy na krajowym rynku pracy w ujęciu regionalnym* [Centre for Statistical Research and Education of the Statistics Poland, *Foreigners on the national labour market – regional approach*], Warsaw 2018, p. 21 et seq.

specific demographic structure: over 47% children (persons aged 0-18), with a majority of them (34% of the total) aged 3-14, 42% females (at working age) and roughly 7% elderly (persons at retirement age, defined as 60+ for females and 65+ for males).

2.1.1.6. Characteristics by selected social security titles

The analysis herein covered four selected groups of foreigners registered for retirement and disability pension insurance, distinguished based on the insurance title code, assigned thereto, i.e.:

- ♣ employees [under employment contracts] (code 01xx),
- ♣ persons conducting non-agricultural activity (code 05xx),
- ♣ persons performing work under civil law contracts - a contract of mandate or an agency contract¹⁵² (code 04xx),
- ♣ unemployed persons (code 09xx)

Before analysing the results of our analysis, it would be appropriate **to outline the basics of the Polish labour market system, including the difference between employment contracts and civil law contracts**. Indeed, the most widespread forms of paid work performance are ‘traditional’ employment contracts, as well as self-employment, and also civil law contracts on rendering services. Indeed, in Poland a binary model of labour market organisation prevails. On the one hand, employees are protected by labour law and social security provisions, on the other – those who perform economically dependent work ‘outside’ an employment relationship are only entitled to limited labour and social rights¹⁵³.

When it comes to an employment contract – it is the main basis for provision of paid labour in Poland labour market. It is governed by Art. 22 § 1 of the Polish Labour Code¹⁵⁴, providing especially for the so-called subordination of the employee. It is indeed the very subordination of the employee, who undertakes, by establishing an employment relationship, to perform a specific work for the benefit and under the instructions of the employer and at a place and time designated by the employer (who undertakes to employ the employee in exchange for remuneration) that is a

¹⁵² Those are civil law contracts and do not necessarily equal work offered by the temporary employment agencies (TEAs).

¹⁵³ See L. Mitrus, *Social security in Poland in times of corona* [in:] S. Devetzi, E. Stergiou [Eds.], *Social security in times of corona. A legal comparison of selected European countries*, Athens – Thessaloniki 2021, p. 110-111.

¹⁵⁴ The Law of 26 June 1974 of Labour Code, consolidated text in: Journal of Laws 2020, item 1320, as amended.

key difference to self-employment and civil law contracts in Polish law. In case of the latter, the self-employed person or a civil law contractor has (at least theoretically) leeway to act with a certain degree of flexibility in a relation with their contracting parties, not being subordinated to them.

Moreover, as provided by Art. 22 § 1 (1) of the Labour Code, employment of a person under the conditions specified in Art. 22 § 1 constitutes employment on the basis of an employment relationship, regardless of the name of the contract entered into by the parties. Therefore, the presence of subordination entails that a given contract is an employment contract, even though it has e.g., been disguised as a civil law contract. Given the above, the employees are entitled to the full range of both labour and social security rights in Poland¹⁵⁵.

In turn, **self-employment** has been governed by the Entrepreneurs' Law¹⁵⁶ of 2018. Subject to some exceptions, self-employment activity must be registered in the National Court Register or in the Central Register and Information on Economic Activity, administered by the Ministry of Economic Development. A natural person who pursues an economic activity on a small scale is not required to register and is not considered to be an entrepreneur – provided that the monthly revenue does not exceed half of the statutory minimum wage¹⁵⁷. Moreover, the Entrepreneurs' Law includes certain exemptions from the duty for new entrepreneurs to pay social security contributions. Alongside genuine self-employment, cases of bogus self-employment do occur in practice¹⁵⁸.

When it comes to the next legal basis, namely **civil law contracts** – they are quite common in Poland; sometimes these are actually disguised employment relationships, which in the light of the above-mentioned Art. 22 § 1 (1) of the Labour Code means that they formally constitute situations of employment on the basis of an employment contract.

¹⁵⁵ Employees are mandatorily covered by retirement, invalidity, sickness and accidents at work schemes – cf. L. Mitrus, *Social security in Poland in times of corona*, p. 111. For more, especially given that the Labour Code definition of the employment contract is not exhaustive see e.g., L. Mitrus, *The Concept of 'Employee': The Position in Poland*, [in:] B. Waas, G. H. van Voss [Eds.] *Restatement of Labour Law in Europe. Volume I. The Concept of Employee*, Oxford and Portland, Oregon, 2017, p. 525 et seq.

¹⁵⁶ Of 6 March 2018, consolidated text: Journal of Laws 2019, item 1292, as amended. Article 3 of the Law stipulates that economic activity is organised, profit-gaining activity carried out in one's own name and without interruption. Pursuant to its Art. 4 of the Law, the notion of 'an entrepreneur' shall refer *inter alia* to a natural person, a legal person, or an organisational unit that is not a legal person and is endowed with legal capacity under a separate statute.

¹⁵⁷ Currently it amounts to PLN 1,505 (roughly EUR 315 at the National Bank of Poland average exchange rate) – 50% of the PLN 3010 statutory minimum wage in Poland in 2022.

¹⁵⁸ Cf. L. Mitrus, *Social security in Poland in times of corona*, op. cit., p. 112 et seq.

Civil law contractors have the same duties as employees; however, they are not entitled to all labour and social rights. For instance, they are not protected against dismissals (formally, there are no periods of notice of termination of such contracts), and termination of such contracts do not require justification. Civil law contractors do not enjoy the statutory right to a paid holiday leave; they are not entitled to very many benefits, which employees are entitled to – e.g., parental leave, paid sick leave, unemployment compensation, benefits from a company's social fund etc. In case of civil law contracts, there is no limitation of civil liability when a damage is inflicted in the course of carrying out the activities under the contract (in case of employment contracts, liability of an employee, if applicable, is limited to their three-month remuneration, to which they were entitled on a day when the damage was inflicted, save for situations where the employee has inflicted the damage intentionally¹⁵⁹). Recently, the level of protection for civil law contractors has been expanded, for instance in terms of equal treatment, social security coverage¹⁶⁰ and certain parental-related entitlements. However, the majority of rights granted to specific groups of civil law contractors, however, entail minimum statutory wage, as well as the right to unionise and to bargain collectively¹⁶¹. At the same time, the social security contributions paid by civil law contractors are lower than the contributions based on an employment contract.

The Polish Civil Code¹⁶² establishes a legal framework for civil law contracts. The most widespread type of civil law contract are mandate contracts¹⁶³. Art. 734 of the Civil Code sets out that by entering a contract of mandate, the mandatary undertakes to perform a specified legal action for the mandator. In turn, pursuant to Art. 750 of the Civil Code, the provisions on mandate shall apply accordingly to contracts on the performance of services not regulated in other provisions. Two other civil law contracts for rendering services should be mentioned, namely contracts for a specific work (sometimes also referred to as 'contract for a specific assignment') and contracts of agency. Under Art. 627 of the Civil Code, by entering a contract for a specific work, the contractor undertakes to complete a specified assignment or task, and the client commits to paying them the

¹⁵⁹ Cf. *inter alia* Art. 117 in conjunction with Art. 119 and Art. 122 of the Polish Labour Code.

¹⁶⁰ Civil law contractors, apart from those ones who are party to a contract to perform a specific work (see also below in the text) are mandatorily covered by retirement, invalidity and accidents-at-work social security schemes. The sickness scheme, on the other hand, is voluntary – see L. Mitrus, *Social security in Poland in times of corona*, op. cit, s. 115.

¹⁶¹ Cf. L. Mitrus, *Social security in Poland in times of corona*, op. cit., p. 112.

¹⁶² Cf. the Law of 26 April 1964 Civil Code, consolidated text: Journal of Laws 2019, item 1145. For the English version thereof, see: M. Kielbasa, T. Bil, A. Broniek, A. Cincio, *Kodeks cywilny. Civil Code*, Warszawa 2011.

¹⁶³ To be more specific, these are unnamed civil law contracts to which the provisions on mandate shall apply.

agreed remuneration. When it comes to the contract of agency, Art. 758 of the Civil Code provides that stipulates that by entering into it, the agent who accepts the mandate undertakes to act as an intermediary against remuneration within the scope of the activities of their enterprise and concludes contracts between the principal (enterprise) and his or her own clients or concludes such contracts in the principal's name. The agent may conclude contracts in the name of the principal and may only assume such responsibility for the latter if he or she has authorisation to do so.

When it comes to contracts for a specific work, if it is the only source of income of a given person, the total cost will be the same as for an employment contract, i.e., the social security contributions paid by the employer will be added to the net salary. In a situation where the employee additionally works for another company, or if it is a student under 26 years of age, the cost of employment will be equal to a gross salary.

An important difference between a contract of mandate and a contract for a specific work is that in case of the former, minimum hourly rates have been applicable since 1 January 2017; currently they amount to PLN 19.70 per hour (EUR 4.12); in case of the latter – such minimum hourly rates do not apply. What is more, in the situation of a contract for a specific work, the client does not bear any additional costs. This is all because by and large - no social security contributions are levied in this case. Thus, the only cost is the gross remuneration of the contractor. Social security contributions are paid on the contract for a specific work only if the contract for a specific work is signed exclusively with the employer of a given contractor.

It is indeed not uncommon in practice for long-term work to be performed on the basis of a civil law contract, particularly if it represents the contractor's basic source of income¹⁶⁴.

Now, when it comes to the breakdown of the most important social security titles and person being subject to them, in 2015-2019, the largest group of non-Polish citizens who were subject to social security in Poland were employees (59.9% at the end of December 2019; 59.2% at the end of 2021)¹⁶⁵.

The second largest group were people working on the basis of a mandate contract or an agency contract - in December 2019 36.9%; at the end of December 2021 this share increased to 38.0%. In turn, people engaged in non-agricultural activities constituted a small percentage in the analysed

¹⁶⁴ Cf. L. Mitrus, *Social security in Poland in times of corona*, op. cit., p. 112.

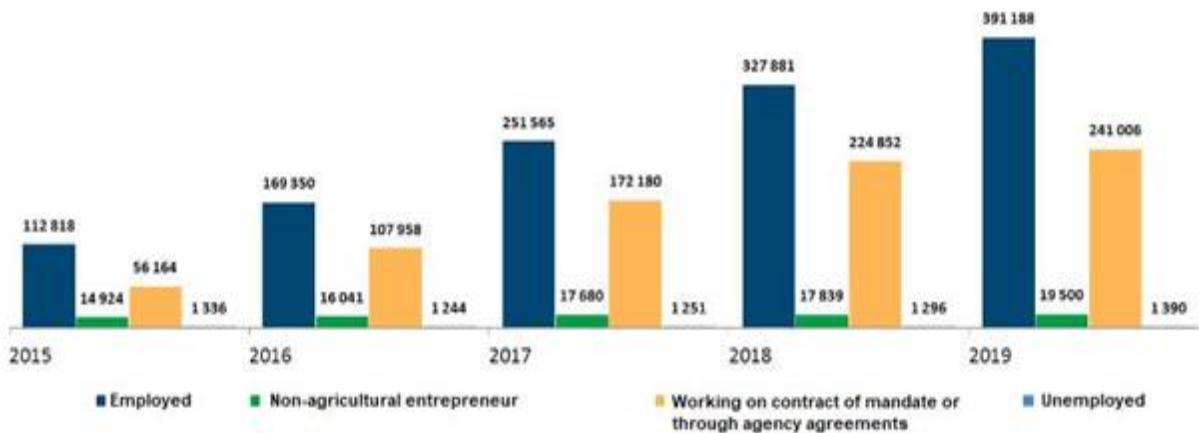
¹⁶⁵ ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021*, [Foreigners in the Polish social security system – XII 2021], op. cit., p. 16.

cohort – at the end of December 2019 - 3.0%; two years later – 2.7%, and the share of the non-Polish citizens reported to the ZUS as unemployed was below 1%.

Moreover, certain changes in the structure of non-Polish citizens by selected social security titles can be observed. Until 2018, their share reported to the retirement and disability pension insurance scheme for work under a mandate contract or an agency contract ranged from 30.3% in 2015 to 39.3% in December 2018. In 2019, this share dropped to 36.9%, however in 2021 another small increase occurred to 38.0%. The percentage of non-Polish citizens working under a contract of employment decreased from 60.9% in 2015 to 56.8% in December 2017, then increased to 59.9% in December 2019, to subsequently decrease to 59.2% at the end of 2021¹⁶⁶.

As indicated above, more Ukrainian citizens coming over to Poland after the outbreak of the Russo-Ukrainian war are set to be employed under the civil law contracts than under employment contracts based on the provisions of the Polish Labour Code.

Figure 7. Change in the number of foreigners registered for retirement and disability pension insurance by the selected social security titles - at the end of the year, 2015-2019



Source: ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych*. Wyd. 2, [Foreigners in the Polish social security system. Edition 2], Warszawa lipiec [July] 2021, p. 22

There are differences between the selected groups of citizenship in the structure according to selected social security titles. In the group of non-Polish EU/EEA and Switzerland citizens, people

¹⁶⁶ ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021*, [Foreigners in the Polish social security system – XII 2021], op. cit., p. 17.

working under an employment contract constitute a much higher percentage than in the group of third-country nationals (as of 31 December 2019 68.3% and 59.4% respectively; and as of 31 December 2021 67.8% and 58.8% respectively¹⁶⁷).

EU/EEA/Swiss citizens much more often than third-country nationals used to conduct non-agricultural self-employment activities (as of 31 December 2019 16.8% and 2.1%, respectively; 16.1% and 2.2% respectively as of 31 December 2021¹⁶⁸). In turn, third-country nationals much more often than citizens of EU/EEA/Switzerland perform work under a contract of mandate or an agency contract (as of 31 December 2019 38.3% and 14.5% respectively; as of 31 December 2021, TCNs' share went further up to 38.8%; this along with the other indicator to 15.7%).

It is at the same time worth noticing that in the general working population only 6.5% may be estimated to be carrying out work on the basis of a contract of mandate or an agency contract¹⁶⁹. The research further shows that over 1 million Poles worked on the basis of the civil law contracts as the second quarter of 2020¹⁷⁰; approximately 1.1 million taxpayers actually paid the personal income tax solely on the basis of a civil law contract¹⁷¹.

Differences can also be observed in the structures of selected five citizenships from non-EU countries in December 2019. For example, the structures of citizens of Belarus and Russia are similar to those of EU countries. Contrary to citizens of other selected nationalities, they are characterized by a higher percentage of people working under a contract of employment (71.6% and 72.4% respectively) and a lower percentage of people working under a mandate contract or an agency contract (respectively 24.2% and 18.9%). Over the past five years, the greatest changes have occurred in the structure of Moldovan and Georgian citizens. Among Moldovan citizens, the share of people working under a contract of employment decreased from 71.9% in December 2015 to 33.0% in December 2019, while the share of people working under a mandate or agency contract increased from 26.1% in December 2015 to 66.3% in December 2019. Among Georgian citizens,

¹⁶⁷ ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021*, [Foreigners in the Polish social security system – XII 2021], op. cit., p. 17.

¹⁶⁸ ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych – XII 2021*, [Foreigners in the Polish social security system – XII 2021], op. cit., p. 17.

¹⁶⁹ Own calculation on the basis of data from Statistics Poland, BAEL-Badanie Aktywności Ekonomicznej Ludności [Labour Force Survey (LFS)]. <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/>

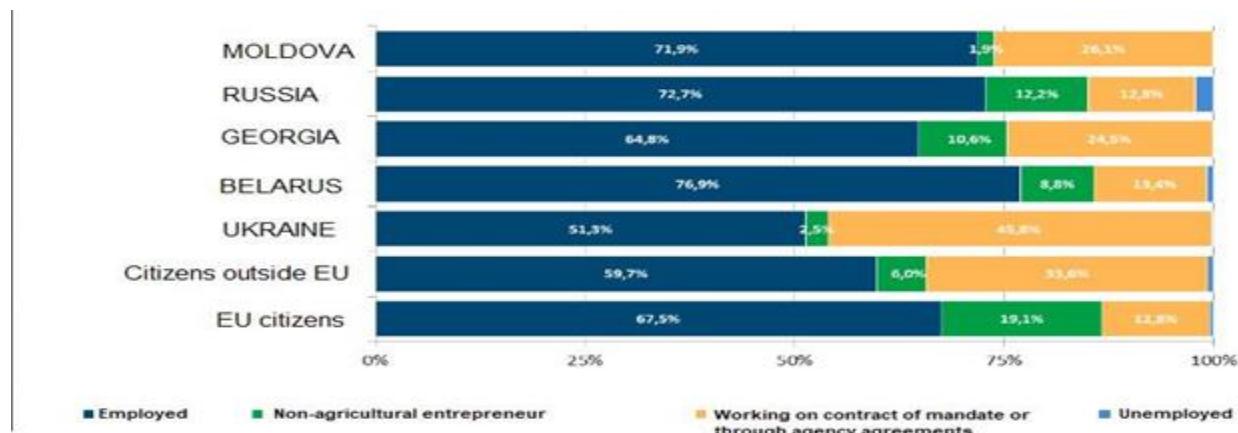
¹⁷⁰ https://pie.net.pl/wp-content/uploads/2022/01/28_09_2020_Informacja_prasowa_Dualizm_rynkupraczy.pdf

¹⁷¹ Cf. Dualizm polskiego rynku pracy w dobie pandemii COVID-19. Debata ekspercka 28 września 2020 r. [Dualism of the Polish labour market in the era of the COVID-19 pandemic. Expert debate on 28 September 2020], at: https://pie.net.pl/wp-content/uploads/2022/01/28_09_2020_Informacja_prasowa_Dualizm_rynkupraczy.pdf

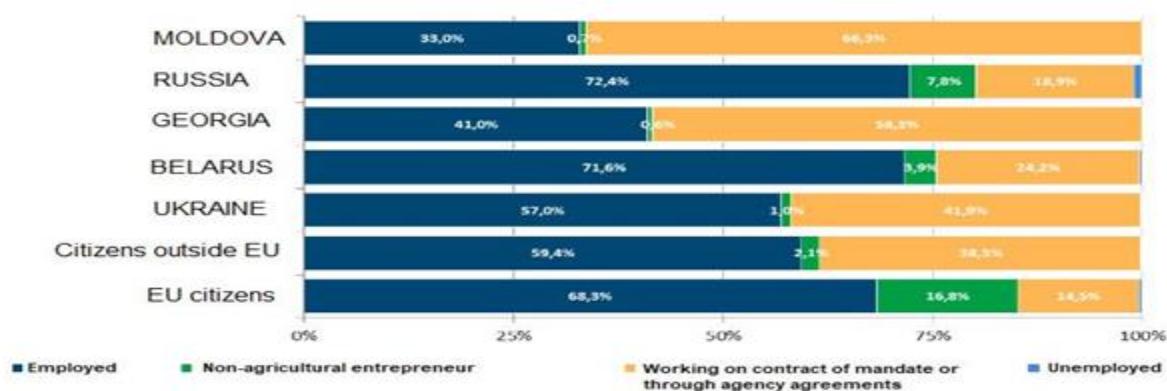
the share of people working under a contract of employment decreased from 64.8% in December 2015 to 41.0% in December 2019, while the share of people performing work under a contract of mandate, or an agency contract increased from 24.5% in December 2015 to 58.3% in December 2019. In December 2019, among the selected five citizenships, the highest share of employees in the total number of insured foreigners of a given citizenship was observed for citizens of Russia and Belarus (72.4% and 71.6% respectively), and the lowest for citizens of Moldova (33.0%). The largest share of people engaged in non-agricultural activities is observed among Russian citizens (7.8%), and the largest share of people who work under a contract of mandate or an agency contract among citizens of Moldova (66.3%) and Georgia (58.3%).

Figure 8. A and B. Changes in the structure of foreigners registered for retirement and disability insurance by selected insurance titles

A. As of December 31, 2015



B. As of December 31, 2019.



Source: ZUS Departament Statystyki i Prognoz Aktuarialnych, Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2], Warszawa lipiec [July] 2021, p. 23

2.1.1.7. Characteristics by sector of activity

In this subchapter, the characteristics of the non-Polish citizens covered by the Polish social security system are presented – by sectors of activity.

It should be noted at the outset that the largest group of them were in the period at hand employed within the framework of activities in the field of administrative services and supporting activities. Indeed, The PKD¹⁷² sections with the highest growth dynamics in the number of insured foreigners are:

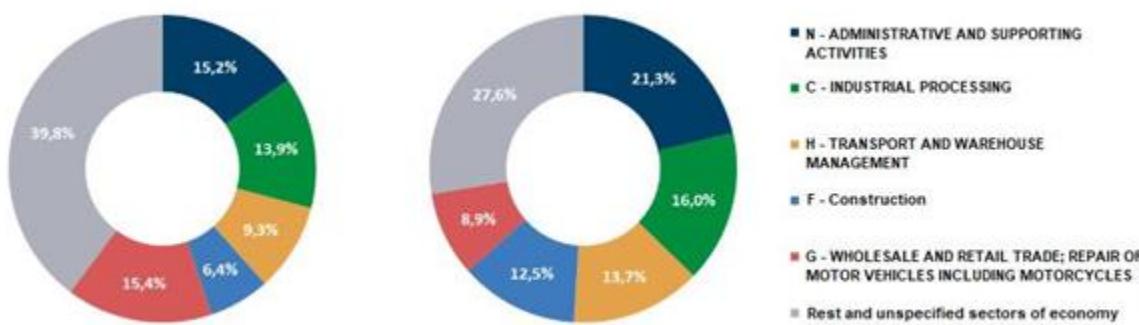
- **Section N - Activities in the field of administrative services and supporting activities**
- in 2019, the number of insured foreigners increased almost 5 times compared to 2015. The percentage of foreigners insured in this section increased from 15.2% in 2015 to 24.8% in December 2018, and then decreased in 2019 to 21.3%. This section includes, among others temporary work agencies and service activities related to maintaining order in buildings and developing green areas; at the end of 2021, there were 186,680 non-Polish citizens (20.9% of all non-Polish citizens) subject to social security in this section; 23.5% of all Ukrainian citizens registered in the ZUS worked in that section's activities;
- **Section C - Industrial processing** - in 2019 there was an almost fourfold increase in the number of insured foreigners compared to 2015, while the percentage of insured foreigners in this section increased from 13.9% in 2015 to 16% in December 2019; at the end of 2021 there were 141,953 persons (15.9% of all non-Polish citizens) subject to social security in this section;
- **Section H - Transport and warehouse management** - in 2019 there was a 5-fold increase in the number of insured foreigners compared to 2015, while the percentage of insured foreigners in this section increased from 9.3% in 2015 to 13.7% in December 2019; at the end of 2021 there were 134,744 persons (15.1% of all non-Polish citizens) subject to social security in this section; 15.5% of all Ukrainian citizens registered in the ZUS worked in that section's activities;
- **Section F - Construction** - in 2019, the number of insured foreigners increased more than 6 times compared to 2015, while the percentage of insured foreigners in this section increased from 6.4% in 2015 to 12.5% in December 2019; at the end of 2021 there were

¹⁷² 'Polish Classification of Activity - Polish equivalent to NACE classification.

117,991 persons (13.2% of all non-Polish citizens) subject to social security in this section; 13.6% of all Ukrainian citizens registered in the ZUS worked in that section's activities.

In the remaining sections of the Polish Classification of Activities, the number of insured foreigners also increased, but their share in the structure according to the Polish Classification of Activities decreased compared to 2015.

Figure 9. Changes in the structure of foreigners registered for retirement and disability insurance by the payer's PKD section as of 31 December 2015 and 2019



Source: ZUS Departament Statystyki i Prognoz Aktuarialnych, *Cudzoziemcy w polskim systemie ubezpieczeń społecznych. Wyd. 2, [Foreigners in the Polish social security system. Edition 2]*, Warszawa lipiec [July] 2021, p. 29

2.1.1.8. The impact of the war in Ukraine on the flow of Ukrainian posted worker

2.1.1.8.1. Introduction

On 24 February 2022, Russian armed forces launched a large-scale invasion of Ukraine at multiple locations from the Russian Federation, from Belarus and from non-government-controlled areas of Ukraine. As a result, substantial areas of Ukrainian territory now constitute areas of armed conflict from which thousands of persons have fled or are fleeing. The European Council, already in its conclusions of 24 February 2022, condemned Russia's unprovoked and unjustified military aggression against Ukraine in the strongest possible terms, underlining the gross violation of international law and the principles of the United Nations Charter. In solidarity with Ukraine, the

European Council agreed on further sanctions¹⁷³, called for work to be taken forward on preparedness at all levels, and invited the Commission to put forward contingency measures¹⁷⁴.

It goes without saying that the war and its implications have already had implications for the Union, including the likelihood of high migratory pressure on its Eastern borders as the conflict unfolds, including a huge flow of migrants into the EU, especially into Poland (and to minor extent – in absolute numbers – into other Ukraine’s neighbouring countries) and may, for obvious reasons have repercussions regarding the posting of the Ukrainian citizens from Poland (as well as immigration – in its various capacities, demonstrated herein – to Poland).

In the light of the above, in this subchapter we are presenting firstly the facts and figures on migration flows, then the response of the EU, coupled with the insight into the latest developments.

2.1.1.8.2. War in Ukraine and inflow of displaced persons – basic facts and figures

The unprovoked military aggression and Russian invasion of Ukraine proved to be shocking as indiscriminate attacks, including on civilians, have led to massive loss of life, countless human tragedies and mass exodus from areas of hostilities. Indeed, they sparked what the United Nations agency described as the fastest and largest displacement of people in Europe since World War II, as large numbers of Ukrainians have fled, most heading west and toward eastern members of the European Union—Poland, Romania, Hungary, and Slovakia—that have pledged assistance. In the short time since Russia’s invasion of Ukraine, more displaced persons have crossed into the EU than in all of 2015, when some 1.3 million arrived from the Middle East and elsewhere in a wave of migration that tested the bloc’s solidarity and placed pressure on leaders including former German Chancellor Angela Merkel¹⁷⁵.

¹⁷³ Three successive packages of sanctions were agreed between 23 February and 2 March – see: Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions *European solidarity with refugees and those fleeing war in Ukraine*, 8.3.2022 COM(2022) 107 final (hereinafter also referred to as ‘**the Commission Communication on European solidarity**’).

¹⁷⁴ See motives 1-3 of the Preamble of the Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection (OJ of the EU, L 71/1 of 4 March 2022, hereinafter also referred to as ‘**the Implementing Decision 2022/382**’ / ‘**Council Implementing Decision 2022/382**’).

¹⁷⁵ Cf. M. Luxmoore, B. Pancevski, *Refugees Fleeing Ukraine Now Represent Biggest Movement of People in Europe Since World War II*, The Wall Street Journal 5 March 2022, retrievable at: <https://www.wsj.com/articles/refugees-fleeing-ukraine-now-represent-biggest-movement-of-people-in-europe-since-world-war-ii-11646493910>

Indeed, as of 1 March 2022, more than 650,000 displaced persons had arrived in the Union from Ukraine through Poland, Slovakia, Hungary, and Romania (majority of them had reached Poland). This was in line with the expectations of the Polish government, which in the Impact Assessment accompanying its draft of the so-called ‘Special Law on assistance to Ukraine’ stated that ‘the estimated number of refugees is between 486,000 and 972,000, of which children are between 95,000 and 190,000’¹⁷⁶. However, the reality soon exceeded the wildest expectations. By 6 March 2022, 1.8 million people had fled the war in Ukraine. In addition to the arrivals in Ukraine’s direct neighbours, people are moving on to other Member States: some Member States have given estimates (such as Czechia 100,000, over 40,000 to Bulgaria, over 17,000 to Italy), and these numbers change still further as people continue to transit to other Member States¹⁷⁷.

According to latest available data, as of 16 June 2022, the numbers went up very substantially as presented in Table 2.

Table 2. Number of war displaced persons from Ukraine

Countries neighbouring Ukraine

Country	Data Date	Individual refugees from Ukraine recorded across Europe	Refugees from Ukraine registered for Temporary Protection or similar national protection schemes	Border crossings from Ukraine*	Border crossings to Ukraine**
Russian Federation***	16 czerwca, 2022	1 230 800	Not applicable	1 230 800	Data not available
Poland	15 czerwca, 2022	1 169 497	1 169 497	4 001 921	1 877 811
Romania	16 czerwca, 2022	90 297	37 832	659 009	309 136
Republic of Moldova	16 czerwca, 2022	85 497	Not applicable	502 716	132 371
Slovakia	16 czerwca, 2022	78 302	78 113	510 014	239 599
Hungary	16 czerwca, 2022	24 452	24 452	782 742	Data not available
Belarus	15 czerwca, 2022	9 006	Not applicable	16 655	Data not available
Suma		2 687 851	1 309 894	7 703 857	2 558 917

***The figure for individual refugees recorded in the country is an estimate as potential further movements or returns cannot be factored for the time being.

Source: Ukraine Refugee Situation, Operational Data Portal, UNHCR,
http://data2.unhcr.org/en/situations/ukraine#_ga=2.163621176.626845688.1646743309-493322706.1646743309

¹⁷⁶ The authors of the Impact Assessment assumed that ‘38.7% of Ukraine’s population live in the western part of Ukraine (western oblasts to Kiev), from where the influx is expected. 30.4% of them live in rural areas and 69.6% in urban areas (see: World Bank data for Ukraine for 2020). The population of Ukraine is assumed to be 43,499,744 (<http://populacja.population.city/ukraina/#1>). Of the urban population, residents of the smallest cities up to 20,000 inhabitants are less likely to leave - 21.4% (share of smallest cities in total cities according to BBGD of the Statistics Poland for 2020). Out of the remaining urban population, it is assumed that about 10% of the inhabitants will leave (921 thousand). Of the rural population it is assumed that 1% (51 thousand) will leave. Total 972 thousand, of which 190 thousand children (0-17 years)’ – see the Impact Assessment accompanying the draft law on assistance to citizens of Ukraine in connection with the armed conflict on its territory’ (dated 2 March 2022).

¹⁷⁷ See - the Commission Communication on European solidarity, p. 2.

2.1.1.8.3. The EU response to Ukrainians' displacement

At the outset, it should be noted that Ukraine is listed in Annex II to Regulation (EU) 2018/1806 (2), and nationals of Ukraine are exempt from the requirement to be in possession of a visa when crossing the external borders of Member States for stays of no more than 90 days in any 180-day period. Based on the experience gained from the aftermath of the 2014 Russian illegal annexation of the Autonomous Republic of Crimea and the city of Sevastopol, and from war in the east of Ukraine, the expectation is that half of the Ukrainians coming to the Union, benefitting from visa-free travel for short-stays, will join family members or seek employment in the Union, whilst the other half will request international protection. Depending on how the conflict evolves, based on current estimations, the Union is likely to be faced with a very large number of displaced persons, potentially between 2.5 million and 6.5 million as a consequence of the armed conflict, of whom it is anticipated that between 1.2 and 3.2 million would be persons seeking international protection. The United Nations (UN) High Commissioner for Refugees estimates that, under the worst-case scenario, up to 4 million people may potentially flee Ukraine¹⁷⁸.

In the light of the situation, the Member States of the Union established that **there was a mass influx of displaced persons within the meaning of Directive 2001/55/EC**¹⁷⁹, in order to provide temporary protection for them. **Their response took the form of the Council Implementing Decision 2022/382**¹⁸⁰. It 'awoke' the Temporary Protection Directive 2001/55 – which was a smart and pragmatic response of the EU institutions. Member States unanimously agreed to do so at the meeting of the Justice and Home Affairs Council on Thursday, 3 March 2022. The final text of Council Implementing Decision (EU) 2022/382 was published the following day¹⁸¹.

¹⁷⁸ Cf. motive 6 of the preamble of the Council Implementing Decision 2022/382. Given the seriousness of the situation, the UN has launched a Humanitarian Flash Appeal for protection and assistance needs in Ukraine, and a Regional Refugee Response Plan for Ukraine providing details on the numbers of people in need and those to be targeted by assistance. The UN has launched a Humanitarian Flash Appeal for protection and assistance needs in Ukraine, and a Regional Refugee Response Plan for Ukraine providing details on the numbers of people in need and those to be targeted by assistance.

¹⁷⁹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12–23 (hereinafter referred to also as '**Council Directive 2001/55**' / '**Temporary Protection Directive**' / '**TPD**'). See in this regard: J. Fitzpatrick, *Temporary protection of refugees: elements of a formalized regime*, (2000) 94(2) AJIL 279.

¹⁸⁰ It confirmed in its Art. 1 that the existence of a mass influx into the Union of displaced persons who have had to leave Ukraine as a consequence of an armed conflict has been established.

¹⁸¹ Cf. D. Thym, *Temporary Protection for Ukrainians The Unexpected Renaissance of 'Free Choice'*, Verfassungsblog, 5 March 2022, retrievable at: <https://verfassungsblog.de/temporary-protection-for-ukrainians/>. See also: M. I. Ciger, 5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection

The aim of the very Decision was to introduce temporary protection for Ukrainian nationals residing in Ukraine who have been displaced on or after 24 February 2022 as a result of the military invasion by Russian armed forces that began on that date. Temporary protection should also be introduced for nationals of third countries other than Ukraine, who have been displaced from Ukraine on or after 24 February 2022, and who were benefiting in Ukraine from refugee status or equivalent protection before 24 February 2022. In addition, it is important to preserve the unity of families and to avoid diverging statuses among members of the same family. Therefore, it was considered as necessary to also introduce temporary protection for family members of those persons, where their families were already in, and residing in, Ukraine at the time of the circumstances surrounding the mass influx of displaced persons¹⁸².

The adoption of the Council Implementing Decision came with some obligations and rights – for both Member States (and their institutions) and the displaced Ukrainian citizens – below we briefly analyse those ones, which are relevant for the intra-EU posting (from Poland but may be of universal application).

First of all – entry to the Schengen area - the Commission has called upon Member States to authorise the entry and stay of those without biometric passports on humanitarian grounds. Member States had done so relatively quickly, at least for Ukrainians, including of course Polish Border Guard, despite the fact that formally, admission on humanitarian grounds covers the territory of the Member State concerned only, since it does not qualify as a residence permit in the meaning of EU migration law. However, this caveat has proved largely irrelevant. The Commission openly invited state authorities to set aside this condition - free movement for persons displaced from Ukraine within the Schengen area was ‘the motto of the day’. The ‘welcome culture’ proved to be back, across Europe. With the entry into force of the Implementing Decision 2022/382 on 4 March 2022, Member States became obliged to facilitate the entry of Ukrainians from abroad. Ukrainian nationals on visits or holidays elsewhere may arguably rely on this proviso to travel safely and legally to the EU. Such generous admission scheme is unprecedented in the history of EU migration¹⁸³.

Directive in 2022, EU Immigration and Asylum Law and Policy, retrievable at: <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>

¹⁸² Motive 11 of the preamble of the Council Implementing Decision 2022/382.

¹⁸³ D. Thym, *Temporary Protection for Ukrainians The Unexpected Renaissance of 'Free Choice'*, op. cit.

Such conclusions could have been a result of *inter alia* the fact that Member States have agreed in a statement that they will not apply Article 11 of Directive 2001/55¹⁸⁴, which provides that '*[a] Member State shall take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision referred to in Article 5*'¹⁸⁵. That agreement reached by the Member States seemed on the face of it to be unlocking the full potential of Art. 12 of the Temporary Protection Directive, which reads that '**[t]he Member States shall authorise, for a period not exceeding that of temporary protection, persons enjoying temporary protection to engage in employed or self-employed activities, subject to rules applicable to the profession, as well as in activities such as educational opportunities for adults, vocational training and practical workplace experience. For reasons of labour market policies, Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third-country nationals who receive unemployment benefit. The general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply**'.

The above provision, implemented into national laws by respective domestic acts¹⁸⁶ should be allowing to employ a person displaced from Ukraine on or after 24 February 2022 as a result of the military invasion by Russian armed forces that began on that date (and therefore crossing the Ukrainian-Polish border).

Technically, the Implementing Decision 2022/382 enabled such displacement persons to avail themselves of their right derived from temporary protection only in the Member State that issued them a residence permit (conclusion drawn from motive 17 thereof), which could be disabling posted workers from being legally posted. However, since the latter are not seeking access to host Member States, but their rights are 'derivative' (as confirmed by the case law of the Court of Justice¹⁸⁷), 'shadowing' rights of entrepreneurs posting them from Poland to other EU Member

¹⁸⁴ See motive 15 of the Council Implementing Decision 2022/382.

¹⁸⁵ Member States may, on the basis of a bilateral agreement, decide that this Article should not apply.

¹⁸⁶ In Poland – it was transposed by the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Journal of Laws 2003, no. 128, item 1176, as amended).

¹⁸⁷ See for more: M. Kielbasa, *Prawa socjalne w Unii Europejskiej a granice swobód rynku wewnętrznego [Social rights in the European Union and the boundaries of the internal market freedoms]*, Warszawa 2017.

States. Therefore, a situation of posting could not be equated with seeking employment as ‘a migrant’ displaced person and therefore it should be allowed pursuant to the European law.

Paradoxically, the question however remained, whether it could be allowed ... under the Polish law – we discuss this matter in *Chapter 2.5.3.* below.

2.2. Posting to Poland

In this section we focus on quantifying the volume of workers posted to Poland. We also provide insights into their profile, by setting out their characteristics, described in the light of various factors (sending country, legal basis of their posting, as well other indicators). The data provided herein are based largely on information provided by the NLI in its ‘Reports on the activities of the National Labour Inspectorate’ published for respective years¹⁸⁸, which, despite the limitations, constitute the most reliable source thereof. The numbers in this regard are sourced from the so-called ‘employer’s statement on the posting of a worker to the territory of the Republic of Poland’, which employers are obliged to file with the National Labour Inspectorate at the latest on the day of commencement of services in Poland (on the basis of the Act of June 2016 on the posting of workers in the framework of the provision of services)¹⁸⁹.

2.2.1. Volume and trends in posting of workers to Poland

Unlike the outgoing posted workers, the number of workers posted to Poland, despite being on a steady rise until 2020¹⁹⁰ had not been (nor are) among the most significant on the EU-wide scale, nor they are significant when compared to a number of foreigners (including third-country nationals) employed in Poland¹⁹¹.

Pursuant to the latest available data, in 2020 24,373 persons were posted to Poland, down by 6,844 (21.92% y/y) as compared to 2019. The obvious reason was the COVID-19 pandemic, causing the workers for all countries, bat the Ukrainian citizens, to drop significantly, by comparison to 2019 figures. Indeed, the share of respective nationalities decreased at least by 10% (Italian citizens).

¹⁸⁸ The most up-to-date report currently available demonstrates figures for 2020.

¹⁸⁹ Cf. the Polish Journal of Laws 2016, item 868, hereinafter also referred to as ‘the Polish Act on the posting of workers’; see art. 24(3) hereof. An interesting feature of the Polish Act is that the statement may be filed in paper form or electronically, in Polish or in English language (up to the employer’s choice). Given the date of the Act’s adoption, only fractional data are available for 2016.

¹⁹⁰ The COVID-19 pandemic indeed had, limited their numbers, as it will be demonstrated below.

¹⁹¹ Please note that numbers provided herein concern actual persons posted to Poland and not a number of certificates issued to such persons as it is the case in some other parts of the report. This however does not alter the conclusion regarding their meagre numbers.

But in the case of the United States' citizens, it had dropped by a staggering 87.4%. An interesting feature of the decreases is that the largest percentage decreases concern mostly third-country nationals and not EU foreigners. There are two special cases which break this pattern: On the one hand the increase of the number of Ukrainian citizens posted to Poland and substantial decrease of the number of posted Germans (EU citizens). The latter might be due to restrictive provisions regarding also German nationals, returning to the Federal Republic of Germany after stays in the so-called 'high-risk areas'¹⁹² – which Poland was counted among for prolonged periods of the COVID-19 pandemic). Our supposition (*further developed also in Chapter 4 hereof*) is that the general decreases in the number of persons posted to Poland were due to the fact that, generally speaking, the provisions of the Polish law aimed at tackling COVID-19 were more restrictive (e.g., with regards to imposing quarantine obligations upon arrival to Poland) towards persons crossing the **external borders of the EU** when entering Poland.

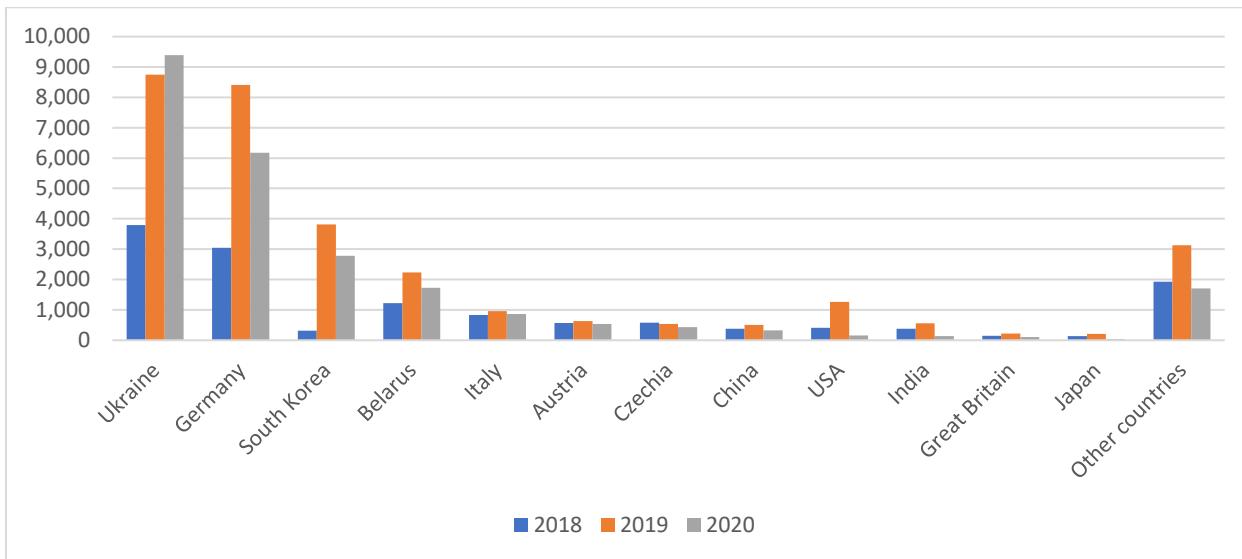
Table 3. Number of foreigners (including third country nationals) posted to Poland

Country posting workers	2018	2019	2020 (+ % share of the grand total)	% Share of the change 2019 vs. 2020 (+/-)
Ukraine	3,788	8,745	9,389 (38.5%)	+ 7.36%
Germany	3,048	8,405	6,170 (25.3%)	- 26.59%
South Korea	313	3,812	2,785 (11.4%)	- 26.94%
Belarus	1,223	2,232	1,730 (7.0%)	- 22.49%
Italy	834	953	858 (3.5%)	- 10.53%
Austria	572	631	537	- 14.9%
Czechia	579	541	435	- 19.59%
China	376	504	322	- 36.11%
USA	415	1,267	159	- 87.45%
India	382	556	139	- 75%
Great Britain	145	225	101	- 55.11%
Japan	133	212	41	- 80.66%
Other countries combined	1,923	3,134	1,707	- 45.53%
Grand total:	13,731	31,217	24,373	- 21.92%

Source: *Sprawozdanie z działalności Państwowej Inspekcji Pracy w 2020 roku [Report on the activities of the National Labour Inspectorate in 2020]*, p. 179.

¹⁹² For this and other designations see the website of the Robert Koch Institute: www.rki.de or that of the German Federal Ministry of Health: <https://www.bundesgesundheitsministerium.de/en/service/gesetze-und-verordnungen/guv-19-lp/coronavirus-einreiseverordnung.html>

Figure 10. Number of foreigners (including third-country nationals) posted to Poland, as reported to the NLI, 2018-2020



Source: *Sprawozdanie z działalności Państwowej Inspekcji Pracy w 2020 roku [Report on the activities of the National Labour Inspectorate in 2020]*, p. 179.

To complete the picture, one needs to emphasize that posting nationals of some of third countries is made easier by the existence of bilateral agreements on social security, concluded by Poland with several countries¹⁹³; most notably with Ukraine, the USA, the Republic of Korea, Germany, and Austria. It is worth mentioning that third-country nationals referred to in this section are actually posted to Poland on the basis of such bilateral agreements unlike workers posted from fellow EU Member States, being posted on the basis of appropriate EU posting provisions.

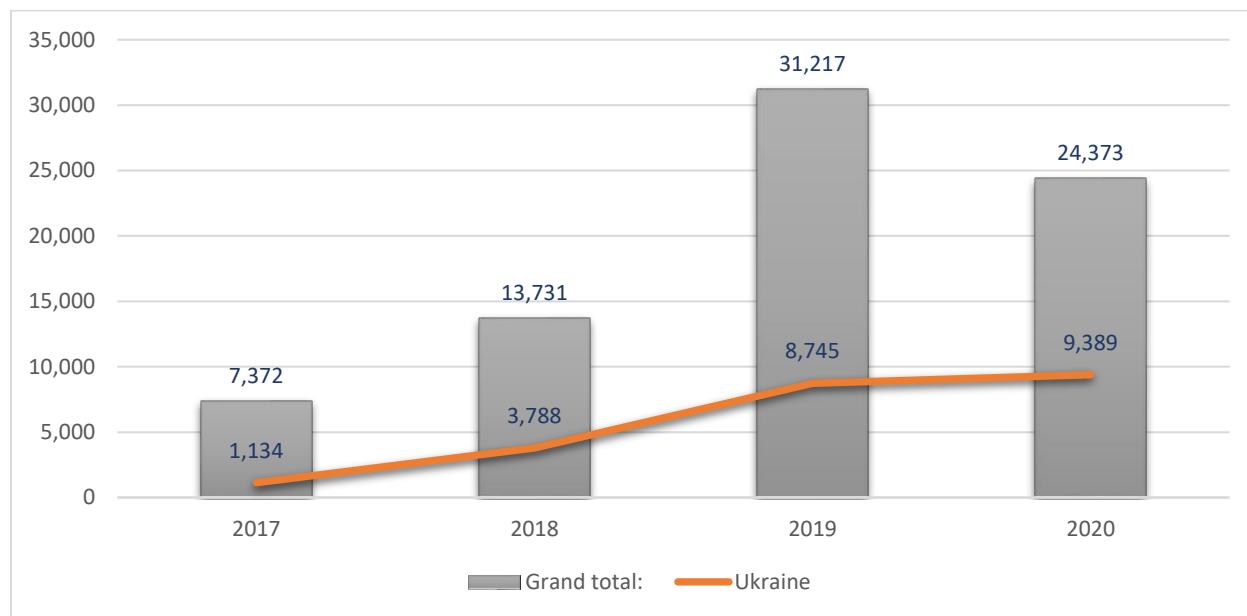
With Ukraine leading the pack since 2016, the other three countries from which most workers were posted to Poland were Germany, South Korea, and Belarus. When one takes those four countries into account, a clearly visible difference between them may be observed. Ukraine and Belarus share strong historical links from the older (between themselves and with Poland, as a part of the Polish-Lithuanian Commonwealth¹⁹⁴) and the recent (part of the Communist bloc with Poland, although Poland did not form part of the infamous USSR) past. Moreover, as mentioned before in *Chapter 2*, a special simplified regime had been introduced, allowing for an easier employment of

¹⁹³ See the list of such bilateral agreements at the website of Ministry of Family, Labour and Social Policy: <https://archiwum.mrips.gov.pl/en/social-security-system-cooperation/bilateral-agreements-on-social-security/#:~:text=Bilateral%20social%20security%20agreements%20causes,right%20to%20social%20security%20benefits>.

¹⁹⁴ See e.g., J. Malec, *The Commonwealth of Poland-Lithuania at the time of the Noble Democracy – a Polish Anomaly?*, Studies in History of Polish State and Law XXIII – 2020, p. 99 et seq.

citizen of six former USSR countries on the basis of the declarations on entrusting work¹⁹⁵. In short, a third-country national, holding the above-mentioned declaration, issued within the framework of the above-mentioned special simplified regime may be easily employed in Poland¹⁹⁶, provided that they are in possession of an appropriate residence title (e.g., a biometric passport – in case of Ukrainians). Such a relative easiness of commencing employment relation in our opinion actually influences the number of third-country nationals employed in this manner, driving the numbers of workers posted from such countries down, as in certain cases it might simply be easier to apply for such a regime and have a given person employed in Poland (either via the above-mentioned simplified regime or by ‘a regular’ work permit), rather than have them posted to the Polish territory.

Figure 11. Number of foreigners (including third-country nationals) posted to Poland, as reported to the NLI, 2017-2020



Source: own study and calculations, based on the NLI data.

¹⁹⁵ As mentioned before, period of such declarations, issued initially for up to 6 months out of 12 months, extended to up to 24 months from 29 January 2022 by a major amendment to the Polish immigration law, which entered into force on 29 January 2022.

¹⁹⁶ A new, so-called ‘Special Law on Ukraine’ introduced further facilitations in March 2022 – the so-called ‘notification procedure’ – see further below in this Report.

Table 4. Changes in the number of persons reported to the National Labour Inspectorate, posted to Poland during a reference year, 2015 - 2020

Reference year	Number of postings	% Change y/y
2020	24,373	- 22%
2019	31,217	+ 127%
2018	13,731	+ 86%
2017	7,372	+ 78%
2016	4,148	+ 4%
2015	~4,000	

Source: own study & calculations, based on the NLI data.

Indeed, a simple comparison¹⁹⁷ of numbers seems to corroborate such a conclusion. In 2020, the year with the latest record concerning the number of workers posted to Poland, there were 24,373 such persons, while the same year as many as 406,496 work permits and 1,519,599 declarations on entrusting work (issued for a grand total of 989,030 'individual' persons) were issued the very same year. Given the number of 16.8 million persons in employment, workers posted to Poland constituted 0.1% of that grand total, whereas foreigners and third-country nationals constituted roughly 8.7% of that number.

Equally striking is the comparison of Ukrainian citizens alone. While in 2020 there were 9,389 Ukrainians posted to Poland (38.5% of the total number of workers posted to Poland), there were 295,272 work permits issued to Ukrainian citizens and 1,329,491 declarations on entrusting work issued thereto (for a grand total of 857,622 'individual' persons of Ukrainian nationality).

The above-mentioned figures clearly show that posting of workers to Poland is an institution which is rarely used, compared to a direct employment (on various legal bases) of foreigners and third-country nationals in Poland. We expect that the ongoing Russo-Ukrainian war (dealt with in greater detail in the section) will make posting of workers from Ukraine obsolete and direct employment will grow rapidly.

¹⁹⁷ For the sake of the present comparison, we take into account only those legal titles of employment, which are single most numerous ones. For the overview of legal titles see e.g.:

https://www.migrant.info.pl/Documents_entitling_a_foreignner_to_work_in_Poland.html

2.2.2. Characteristics of posting of workers to Poland

2.2.2.1. By sending country: Ukraine by far the leader

One may say that there are few interesting features of profiles of workers posted to Poland. First of all, workers posted to Poland are mainly (up to 60% in 2020) third-country nationals¹⁹⁸, with citizens of Ukraine the leading country since the beginning of the record in 2016. As shown in the graph below, the number of Ukrainian citizens posted to work in Poland was going up steadily and unfailingly, even in 2020 (when, however, the growth has been really meagre).

Apart from Ukraine (38.5% of all persons posted to Poland in 2020), workers from third countries posted to Poland in relatively large numbers included *inter alia* South Koreans (they came as a third¹⁹⁹ nationality of all the workers posted to Poland in 2020 with 2,785 third country nationals posted and third in 2019 (3,812 posted – a whopping increase from 313 in 2018), as well as Belarussians (with 1,730 in 2020 and 2,232 in 2019 respectively). The ‘podium’ third country nations are then followed by the Chinese, citizens of the US, India, Japan, and other countries – with minor numbers of workers posted to Poland.

As mentioned before, the number one country for workers posted to Poland is Ukraine (followed by Germany, South Korea, and Belarus – it is clearly visible in the table and figures below. Ukraine is at the same time the only country in whose regard the number of workers posted to Poland has increased between 2019 and 2020, as shown in the figures below. Of course, the percentage of the increase was not as it could have been expected on the basis of previous years (as shown in the table and figures below), nonetheless, despite the pandemic, number of Ukrainian citizens posted to Poland still rose by 7% when we compare 2020 to 2019. Such a small increase could be down to the COVID-19 pandemic (most probable cause), but factors like other legal bases for relatively easy employment in the territory of Poland could be relevant, too.

It is also worth noting that the number of foreigners (including third-country nationals) posted to Poland increased by 88.7% from 2018 to 2019. If such a percentual tendency was maintained in 2020, there should have been more than 48 thousand persons posted to Poland (in various capacities and on various legal bases). Instead, the numbers for 2020 indicated that there were 6,844 persons posted to Poland less than a year before. It goes without saying that such a slump was caused by the COVID-19 pandemic.

¹⁹⁸ This Chapter follows the logic of differentiation between ‘third-country nationals’ (being non-EU/EEA/Switzerland nationals) and foreigners (including all non-Polish nationalities), as anticipated in Chapter 1.

¹⁹⁹ Posted workers from Germany were a second nation from 2017 to 2020.

Another interesting feature of the 2018-20 data has been a growing share of workers posted to Poland from EU / EEA / Switzerland. While in 2018 the majority of persons posted to Poland (50.8%) were third-country nationals, already in 2019, the persons posted from EU / EEA / Switzerland had prevailed, with 57.8% of the total persons posted to Poland. That percentual share even went up to 60.8% in 2020. Given that the overwhelming majority of third-country nationals posted to Poland are Ukrainian citizens (and the simultaneous growth of their numbers in employment in Poland – see elsewhere in this Report) one could conclude that posting Ukrainians (and other third-country nationals) to Poland seems to be losing its allure – for the benefit of migration to Poland, rendered easier by the Polish provisions, as mentioned before.

2.2.2.2. By legal bases

As mentioned before, posting workers to Poland from third countries may be subject to bilateral agreements on social security, concluded by Poland with the sending third countries. The most telling in this regard is the agreement between the Republic of Poland and Ukraine on social security²⁰⁰.

Its Article 7(1) provides as follows:

If a person employed by an employer registered in the territory of one Contracting Party is sent to the territory of the other Contracting Party to perform work on behalf of this employer, he/she shall be subject to the legislation of the first Contracting Party, provided that the anticipated period of work does not exceed 24 months. If the period of employment extends beyond 24 months, the legislation of the first Contracting Party shall continue to apply for a further period not exceeding 36 months, provided that the competent authority of the other Contracting Party, or an institution authorised by that authority, so authorises.

Therefore, an employer registered in Ukraine may post ('send') their workers to perform work on their behalf in Poland for a period of maximum 24 months, after which the Ukrainian social security legislation could continue to apply up to further 36 months if the period of employment extends beyond the initial time and given the authorisation of Polish authorities. One could observe that the provision of Art. 7(1) of the Polish and Ukrainian agreement resembles the norm of Art. 12 of the Basic Regulation 883/2004; at the same time, the agreement does not have the equivalent of

²⁰⁰ Made at Kyiv on 18 May 2012, Journal of Laws 2013 item 1373, it came into force on 1 January 2014.

Art. 13 of the Basic Regulation (in other words – a person posted under the agreement may not pursue their activities as an employed person in two or more countries).

That said, we can observe that workers posted to Poland are subject to at least two types of legal regimes – the one created by the EU law ('purely' intra-EU posting) and the one based on other legal bases – such as the Polish and Ukrainian agreement described above. In our opinion, such diversity of legal bases does not adversely influence postings into Poland, as evidenced by numbers of workers posted from other EU Member States (in particular from Germany).

2.2.2.3. By other indicators

Table 5. Other indicators concerning posting to Poland

Feature / Year	2018		2019		2020	
	Grand total	Limited to EU/ EEA /Switzerland	Grand total	Limited to EU/ EEA /Switzerland	Grand total	Limited to EU/ EEA /Switzerland
Number of declarations on posting to Poland which were sent over	4,130	2,872	7,793	4,394	7,521	4,151
Number of foreign entities posting workers to Poland	1,110	833	1,591	413	1,525	345
Number of countries from which workers were posted to Poland	61	26	65	39	49	23

Source: own calculations based on the NLI data.

The common denominator of all the data above is a slight decrease visible when comparing 2019 data with those from 2020. Indeed, all numbers decrease, with a highest slump in a number of foreign entities posting workers to Poland (still by a very modest 4.15%); also, the decrease in the number of declarations on posting to the territory of Poland was noticeable. We might speculate on the reasons, but the most viable one seems to be the restrictions on all kinds of mobility introduced during the pandemic. At the same time, the above speculation could be relevantly falsified only by 2021 data, not available to date in regard to incoming postings.

Moreover, it is interesting to see how the number of foreign entities posting workers to Poland has been shrinking and the biggest decrease actually took place in 2019 as compared to 2018 (and not

in 2020). It might be the indication that entrepreneurs posting workers to Poland carry out consolidation procedures, as the number of declarations on posting and the number of persons posted to Poland has not been subject to such substantive decreases.

Last, but not least, it goes without saying that the Russo-Ukrainian war, started by the Russian aggression will undoubtedly have impact on the number of third-country nationals posted to Poland. The influence in question will of course concern Ukrainians in the first place, as there will be less postings to Poland and instead more of a direct employment of Ukrainian citizens. The reasons are twofold – first of them is a practical one – some of the businesses posting workers to Poland have either ceased to exist or moved westwards (to Poland or elsewhere)²⁰¹. The other is of legislative nature – on 12 March 2022 Poland adopted the already-mentioned Special Law on assistance to Ukraine²⁰², providing for a super-easy so-called ‘notification procedure’ of employment of Ukrainian citizens. Given the adoption of that Law, employing Ukrainian citizens in Poland has been incentivised and the posting of workers from Ukraine into Poland will likely bear the brunt of that incentive.

So may also be the case for citizens of Belarus and possibly Russia (although the latter are not among the most numerous nations posted to Poland). In case of Belarus the decrease is likely to concern the major private sectors of the economy, responsible for the most postings to Poland.²⁰³

2.3. Posting from Poland

In this section we focus on quantifying the volume of workers posted from Poland. The insights into their profile are provided, too by setting out their characteristics, described in the light of various factors (sending country, legal basis of their posting, as well other indicators). The data

²⁰¹ Some tentative estimates suggest that 50 per cent of businesses are closed – cf. *ILO Brief. The impact of the Ukraine crisis on the world of work: Initial assessments*, 11 May 2022, p. 2; see also: *reliefWeb, The Development Impact of the War in Ukraine: Initial projections*, 16 March 2022.

²⁰² See further – Chapter 2.4 hereof.

²⁰³ The situation of private companies (which generate around 25% of Belarus’s GDP) deteriorated considerably following the 9 August 2020 presidential election as many of them were targeted for supporting the protests or taking part in them. The problem is particularly evident in the IT sector, which up until the election was considered the most promising sector of the Belarusian economy, generating 25% of the country’s export of services (worth US\$2.5 billion). The repression, which targeted this group, forced a portion of IT specialists to relocate their operation to neighbouring Lithuania, Ukraine and Poland (around 10,000 Belarusian IT specialists are now working in Poland) – see K. Kłysiński, *The cost of a police state: Belarus’ economic problems*, OSW Commentary, 11 May 2021, retrievable at: https://www.osw.waw.pl/en/publikacje/osw-commentary/2021-05-11/cost-a-police-state-belarus-economic-problems#_ftn14

provided herein are based largely on information provided by the ZUS²⁰⁴, which, despite the limitations, constitute the most reliable source thereof. The numbers in this regard are sourced from Portable Documents A1 issued in respective years in Poland. In the last section of this subchapter, we analyse posting of legally residing and working third-country nationals posted from Poland.

To start with, one needs to emphasize Poland has always been among the Member States sending abroad the largest number of posted workers in the entire European Union. In fact, this was the case up until 2019, when it was surpassed in a number of PDs A1 by Germany²⁰⁵. According to the data available that year, two main issuing Member States were Germany (1.8 million PDs A1 issued) and Poland (~ 648 thousand PDs A1 issued). These two Member States issued more than half of the total number of PDs A1. Poland is the main Member State issuing PDs A1 to persons covered by Article 13²⁰⁶. Only in Slovenia (3.7%), Luxembourg (2.9%), and Poland (2.0%) more than 2% of the employed population is active in two or more Member States²⁰⁷.

The very position of Poland as the Member State mainly posting workers (second-in-line, following Germany) has also been confirmed by the latest research²⁰⁸.

2.3.1. Analysis of data obtained from the Polish Social Insurance Institution (ZUS)²⁰⁹

As emphasized above - it should be borne in mind that Poland is among the nations posting the largest number of workers in Europe, as measured by the number of Portable Documents A1 issued in respective years. In 2019, the number of PDs A1 issued was 647,969. In 2020, a decrease to 619,127²¹⁰ should be noted, however coupled with a substantive rebound to 676,775 the year after.

²⁰⁴ The most up-to-date data currently available (in most categories) demonstrate figures for 2021.

²⁰⁵ F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2020*, op. cit., p. 10-11.

²⁰⁶ F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2019*, op. cit., p. 10-11.

²⁰⁷ F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2019*, op. cit., p. 44.

²⁰⁸ Cf. F. De Wispelaere, L. De Smedt & J. Pacolet, *Posting of workers, Report on A1 Portable Documents issued in 2020*, op. cit., p. 10-11.

²⁰⁹ The following part of the report was prepared on the basis of data received directly from the Social Insurance Institution in Poland (ZUS).

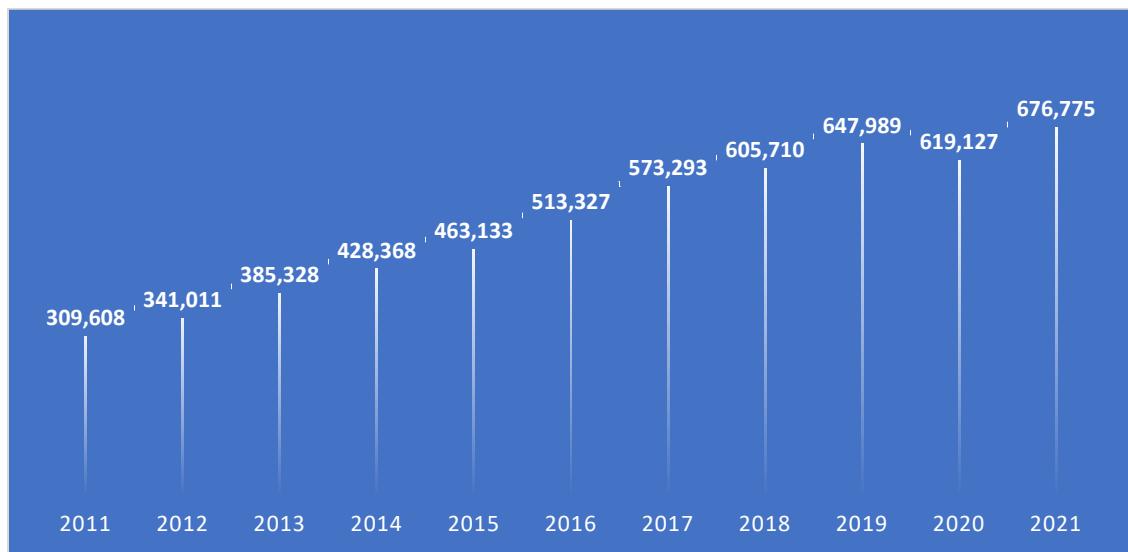
²¹⁰ This figure contains workers posted to Great Britain (without them – 617,709 PDs A1 were issued that year in Poland).

Table 6. Total number of PDs A1 (E101s) issued in respective years

Reference year	Attestation type	Number of postings	% Change y/y
2011	PDs A1 and E101	309,608	
2012	PDs A1 and E101	341,011	+ 10.1%
2013	PDs A1 and E101	385,328	+ 13%
2014	PDs A1 and E101	428,368	+ 11.2%
2015	PDs A1 and E101	463,133	+ 8.1%
2016	PDs A1 and E101	513,327	+ 10.8%
2017	PDs A1	573,293	+ 11.7%
2018	PDs A1	605,710	+ 5.7%
2019	PDs A1	647,989	+ 7%
2020	PDs A1	617,709/619,127	- 4.5%
2021	PDs A1	676,775	+9.3%

Source: ZUS data, 2021

Figure 12. Total number of PDs A1 issued 2011 – 2021



Source: ZUS data, 2011-2021

According to the data presented by the ZUS, the decrease in 2020 actually constituted the first decline in the last 10 years. As can be seen above, in previous years the number of PDs A1 had been increasing steadily year on year. However, it should be borne in mind that the data for 2020 may not be fully adequate due to the overlapping situation related to the COVID-19 pandemic. The data presented by the ZUS also show that the decrease in the number of PDs A1 related primarily to **workers posted under Art. 12(1)** [*a person pursuing an activity as an employed*

person in a Member State n employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf]. The difference in the number of those posted workers between 2019 and 2020 is 35,422, while the number of workers posted under that legal basis steadily increased upwards in previous years. This trend was observed also in 2021, when the number of PDs A1 issued under Art. 12(1) of the Basic Regulation rose by 8.1% as compared to 2020. It could therefore mean that the decline in 2020 had to do with the COVID-19 pandemic, rather than with the transposition of the Revision Directive (perhaps apart from the PDs A1 issued in August 2020 and September 2020²¹¹ – we are dealing with it below).

Table 7. Number of PDs A1 issued to workers posted under Art. 12(1) of the Basic Regulation, 2018 - 2021

Reference year	Number of postings	% Change y/y
2018	220,906	
2019	230,034	+4.13%
2020	194,612	-15.40%
2021	210,307	+8.1%

Source: own calculation, based on ZUS data

In turn, both in 2020 and 2021 an increase was recorded among workers who normally pursue an activity as an employed person in two or more Member States – that is under Art. 13(1) of the Basic Regulation. The number of PDs A1 issued to such workers increased by about 15,000 between 2019 and 2020, which followed a pattern of systematic increase in previous years. This group includes in particular transport drivers, for whom around 15,000 PDs A1 more were issued on that very legal basis year on year. This naturally indirectly confirms the lack of the negative impact of the Directive the posting on transport services.

Moreover, the 2021 figures show in turn a spectacular increase – by almost 90 thousand PDs A1 issued on that basis more year on year (more than 26% growth). This further corroborates the lack of the Directive's negative impact (as well as that of the COVID-19 pandemic).

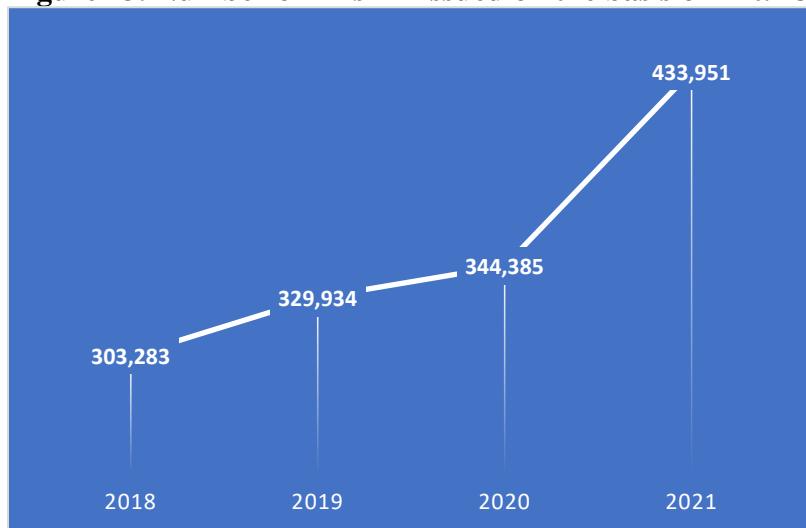
²¹¹ Unfortunately, when it comes to monthly figures, only the overall ones (and not divided by the legal bases) have been made available to us.

Table 8. Number of PDs A1 issued to workers posted under Art. 13(1) of the Basic Regulation, 2018 - 2021

Reference year	Number of postings	% Change y/y
2018	303,283	
2019	329,934	+8.79%
2020	344,385	+4.38%
2021	433,951	+26.01%

Source: data from ZUS, 2021 and own calculations

Figure 13. Number of PDs A1 issued on the basis of Art. 13 Basic Regulation (2018-2021)



Source: Own calculations based on ZUS data, 2021

In turn - there was a decrease (not much in absolute terms - of around 2,500 – but rather of significant percentage) among the posted self-employed persons (subject to Art. 12(2) of the Basic Regulation) between 2019 and 2020. In the graph below (we show figures since 2011 to show a larger trend here), we are demonstrating that the downward tendency was not always the case – it started around 2016 and has continued to 2021 ever since.

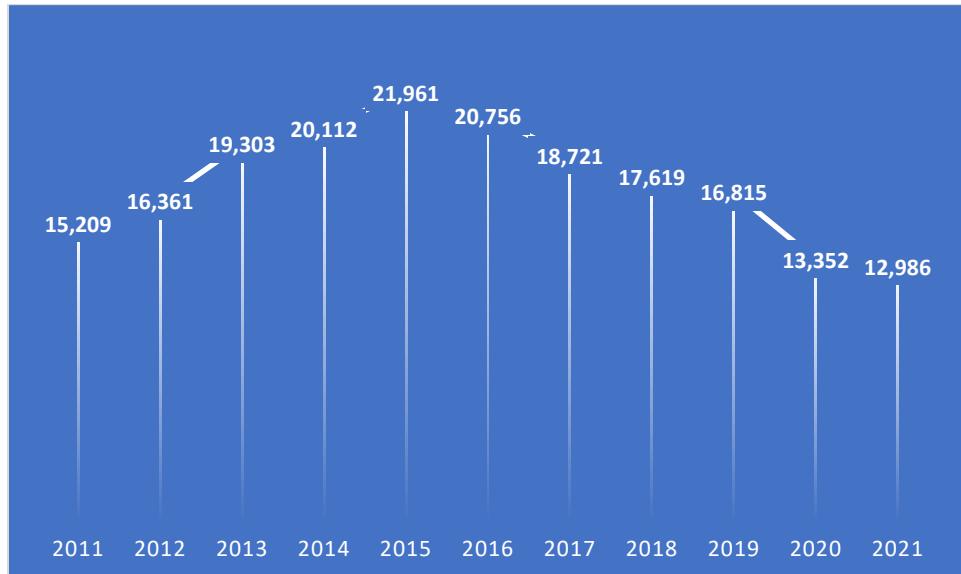
Given that slight fluctuations also occurred in previous year and the largest decline was observed in 2020 (a pandemic year, too) as well as that the decrease between 2020 and 2021 was smaller than in previous years, we are inclined to conclude that the transposition of the Directive did not influence the trends significantly.

Table 9. Number of PDs A1 issued to posted self-employed persons (Article 12.2 of the Basic Regulation)

Reference year	Number of postings	% Change y/y
2011	15,209	
2012	16,361	+ 7.57%
2013	19,303	+ 17.98%
2014	20,112	+ 4.19%
2015	21,961	+ 9.19%
2016	20,756	- 5.49%
2017	18,721	- 9.80%
2018	17,619	- 5.89%
2019	16,815	- 4.56%
2020	13,352	- 20.59%
2021	12,986	- 2.74%

Source: own study & calculations, based on ZUS data

Figure 14. Number of PDs A1 for self-employed on the basis of Art. 12(2) of the Basic Regulation



Source: ZUS data, 2021

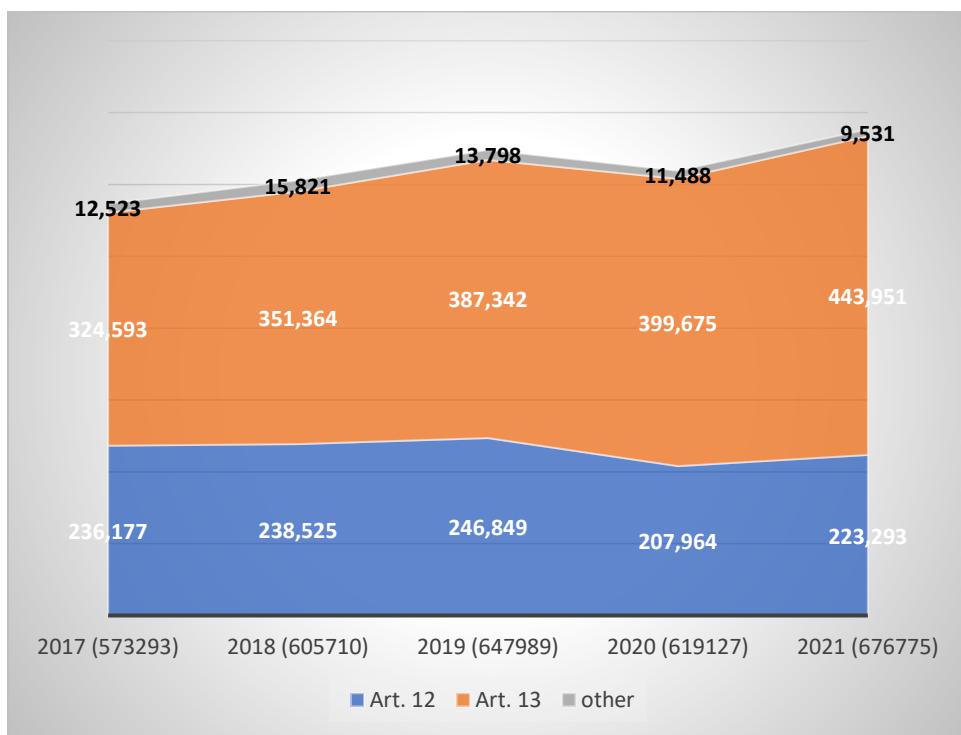
To gather a ‘helicopter view’ with regard to the real impact of the Revision Directive on the posting of workers and given the far-more substantive role of posting from Poland, it is worth to analyse the number of outgoing PDs A1. The comparison of the grand total number of PDs A1 issued in Poland in the last five years, one may clearly observe, both the increase in attestations issued prior to 2020, a substantive drop in 2020 and a rebound in 2021.

Table 10. PDs A1 issued in Poland, grand total, Art. 12 and Art. 13-based, 2017-21

	2017	2018	2019	2020	2021
Grand total number of PDs A1 issued	573,293	605,710	649,969	619,127	676,775
Art. 12 (12(1), (2))	236,177	238,525	246,849	207,964	223,293
Art. 13 (13(1), (2), (3), (4))	324,593	351,364	387,342	399,675	443,951

Source: own study & calculations, based on ZUS data

Figure 15. Changing trends between outgoing postings under Art. 12 and 13 of the Basic Regulation



Source: own study & calculations, based on ZUS data

An interesting tendency is observable of relatively steady number of PDs A1 issued for posted workers (Art. 12 BR) and a growing number of PDs A1 issued for persons carrying their activities in two or more Member States (Art. 13 BR). There is no qualitative evidence to support the statement that this is due to easier conditions for Art. 13 than for Art. 12. Neither is it possible to prove that simply the number of highly mobile workers is growing in Europe. The first hypothesis might be supported by no time limit, lack of non-replacement condition, or even lack of normal

activity or prior coverage by the legislation of a posting Member State - in the case of Art. 12. The latter hypothesis is supported by the emergence of new highly mobile professions and forms of work (e.g., remote work) combined with lower costs of mobility. More qualitative research is needed to provide definitive answers to this issue. It is of utmost importance, because the ongoing revision of the Regulations on coordination of social security systems (see Interinstitutional File: 2016/0397(COD) for details) is based on the first hypothesis without any proof thereof.

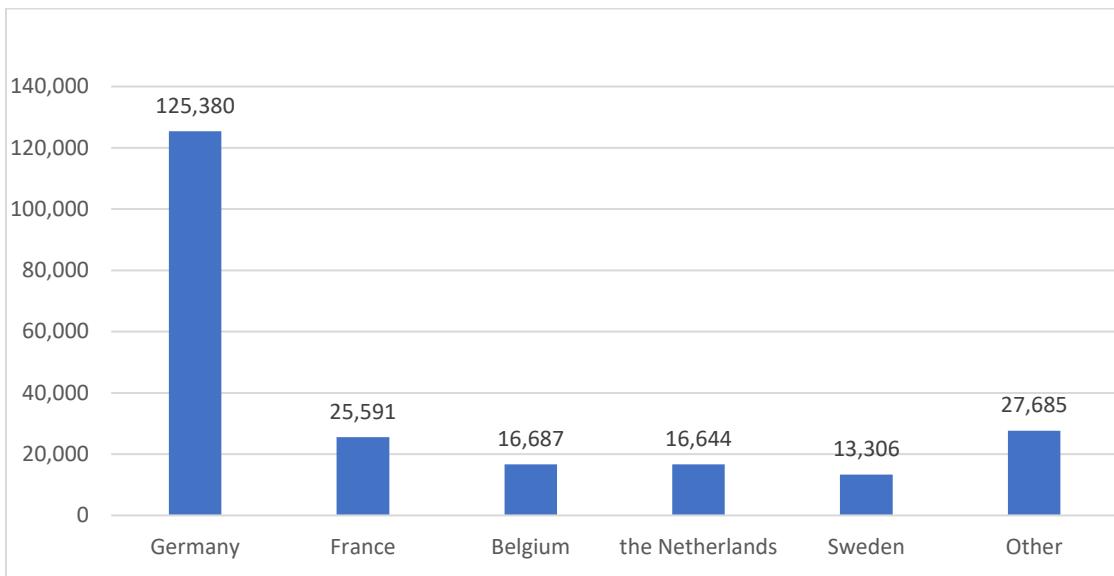
2.3.2. Posting by the host Member States

In the present subchapter we aim to take stock of the outgoing postings from Poland individuated by the host Member States. It needs to be recalled here that **such an exercise is possible only on the basis of PDs A1 issued pursuant to Art. 12 of the Basic Regulation**, as no information is produced concerning the place so cross-border activities under Art. 13 thereof, hence no data are available regarding the receiving Member States in that regard.

Seen in that light, according to data obtained from the Polish Social Insurance Institution, in 2017-2020, the largest number of PDs A1 for the economic activity sector was issued for Germany, this number systematically increased year by year, the decrease occurred in 2020, which could be caused by the COVID-19 pandemic. The next places were taken by France, Belgium, and the Netherlands, although, as shown in the charts below, the number of Polish workers posted to these countries was, however, 3-4 times lower than to Germany.

Such was also the composition of the main Member States receiving posted workers with PDs A1 issued on the basis of Art. 12 of the Basic Regulation - pursuant to the latest available data for 2021. As it can be seen below - 'the usual suspects' – Germany (125,380 PDs A1 issued - up from 113,138 in 2020), France (23,591 – up from 21,199), Belgium (16,687 – down from 17,038) and the Netherlands (16,644 – down from 17,877) were joined by Sweden (13,306 – up from 10,758). The largest increases year on year were in the case of Sweden (by 23.7%) and Germany (by 10.8%).

Figure 16. Number of PDs A1 issued by ZUS by a host Member State (2021)

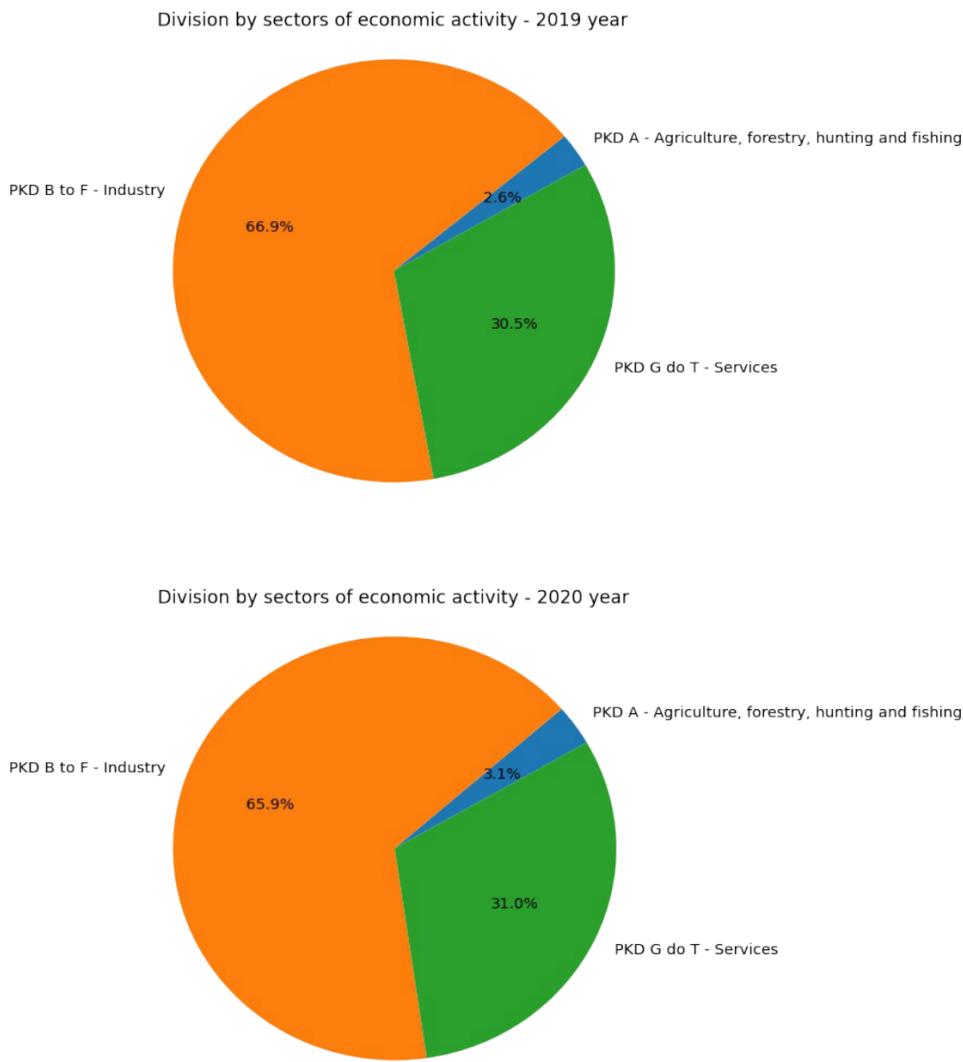


Source: own calculations based on ZUS data

2.3.2.1. Posting within individual sectors of activity

In the present subchapter, we intend to demonstrate the features and trends within the individual sectors of activity the years 2020-2017, the sector with the highest number of posted workers was the industry sector, for which posting accounted for over 60% of all other sectors. The second place was occupied by the services sector (approx. 30%). The lowest percentage of posted workers by sector was agriculture, forestry, hunting and fishing. A good and telling example are the graphs below, which clearly demonstrate the breakdown of the respective sectors of activity:

Figure 17. PDs A1 by sector of economic activity 2019 and 2020



Source: own calculations based on data from the ZUS, 2021

Moreover, the extent of intra-EU posting in sectors that receive less attention in public debate (e.g., education, healthcare, social assistance, arts, other services) – has been growing a little from 2017. The share of this service was 17-22% of all number of PDs A1 issued pursuant to Art. 12 of the Basic Regulation, while the share of healthcare PDs A1 ranged from 3.5% to 8.5% of all number of services.

Table 11. Education, healthcare, social assistance, arts, other services PKD P, Q, R, S, including healthcare and social assistance PKD Q

Year	The total number of PDs A1 issued pursuant to Art. 12	Education, healthcare, social assistance, arts, other services - PKD R-S	Healthcare – PKD Q
2017	236,177	40,741 (17%)	8,424 (3.5%)
2018	238,525	46,973 (20%)	11,089 (5%)
2019	246,849	51,674 (21%)	17,831 (7%)
2020	207,964	45,565 (22%)	17,758 (8.5%)

Source: data from ZUS, 2021

2.3.3. The number of the self-employed in the number of persons posted

This subchapter is dedicated to the number of the posted self-employed persons, covered by art. 12(2) of the Basic Regulation.

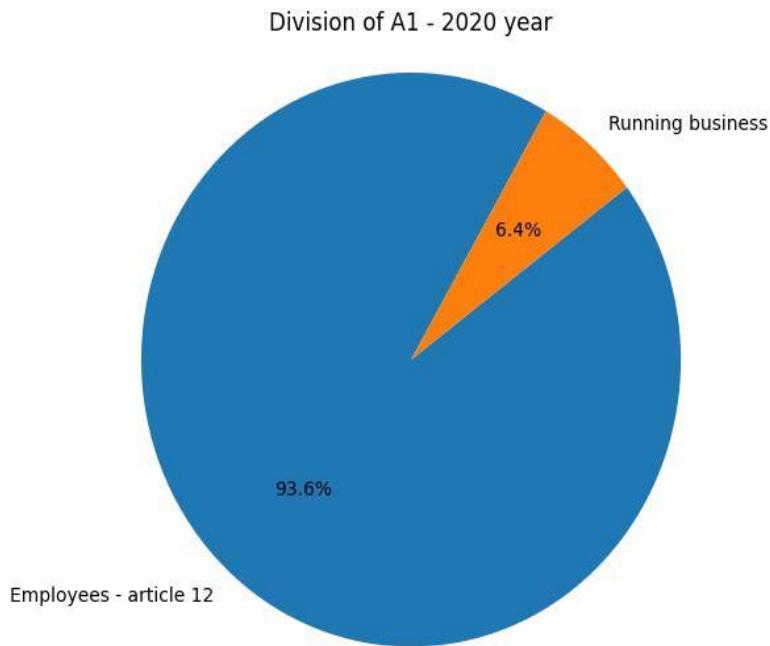
Table 12. Number of PDs A1 issued to posted self-employed persons (Article 12.2 of the Basic Regulation)

Reference year	Number of postings	% Change y/y
2011	15,209	
2012	16,361	7.57%
2013	19,303	17.98%
2014	20,112	4.19%
2015	21,961	9.19%
2016	20,756	-5.49%
2017	18,721	-9.80%
2018	17,619	-5.89%
2019	16,815	-4.56%
2020	13,352	-20.59%
2021	12,986	-2.74%

Source: Data from ZUS, 2021

As it can be seen from the table above, among the persons for whom PDs A1 were issued, workers covered by Art. 12(1) of Regulation 883/2004 dominated over the self-employed, whose share rarely constituted more than 8% of the grand total of PDs A1 issued by Poland (save for the period between 2014 and 2016 when the percentage of posted self-employed persons amounted to approximately 8-9% the total number of persons posted). The graph below, concerning 2020, clearly corroborates that very trend.

Figure 18. PDs A1 issued to employees and to self-employed under Art. 12 of the Basic Regulation



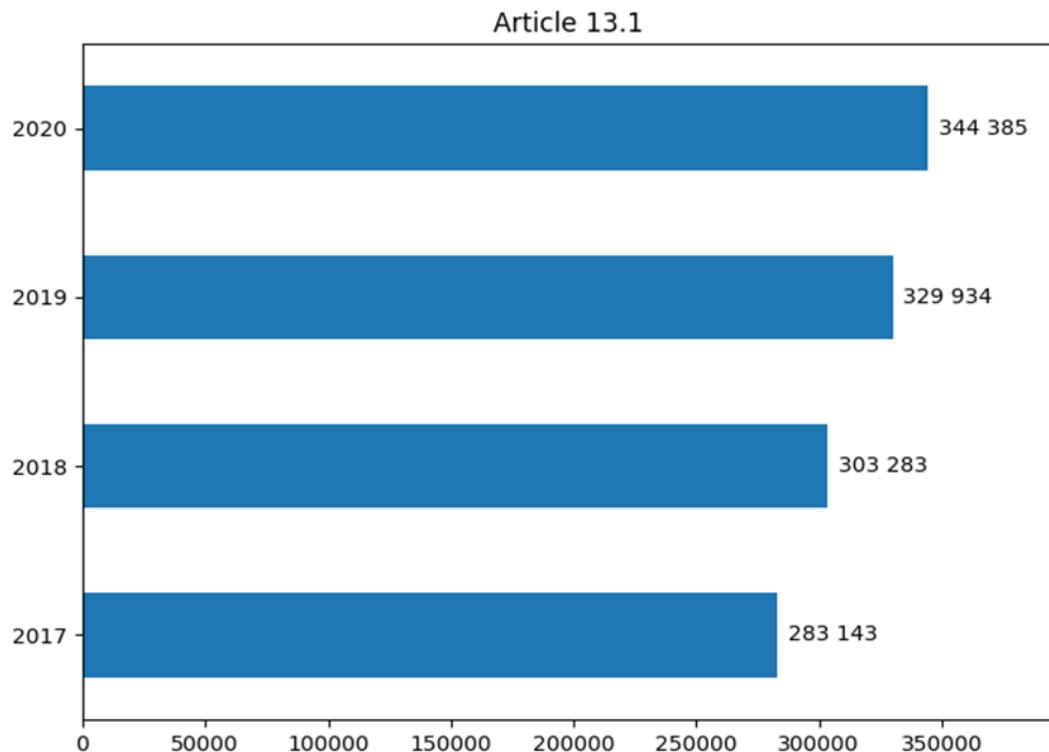
Source: own calculations based on data from ZUS, 2021

Unfortunately, the data collected from the ZUS does not enable us to differentiate between the sectors of activity within which self-employed persons were posted. We may in turn state the major receiving Member States in 2021 – these were Germany (6,139 PDs A1 issued under Art. 12(2) BR – up from 5,695 in 2020), Belgium (2,950 – down from 3,252), Sweden (1,552 – down from 1,788) and the Netherlands (1,014 – down from 1,151).

2.3.4. Persons pursuing activity in two or more Member States (Art. 13(1) of the BR)

The number of persons working in two or more Member States had steadily increased since 2017, and was also increasing in 2020, when the COVID-19 pandemic started.

Figure 19. PDs A1 issued on the basis of Art. 13 (1) of the Basic Regulation

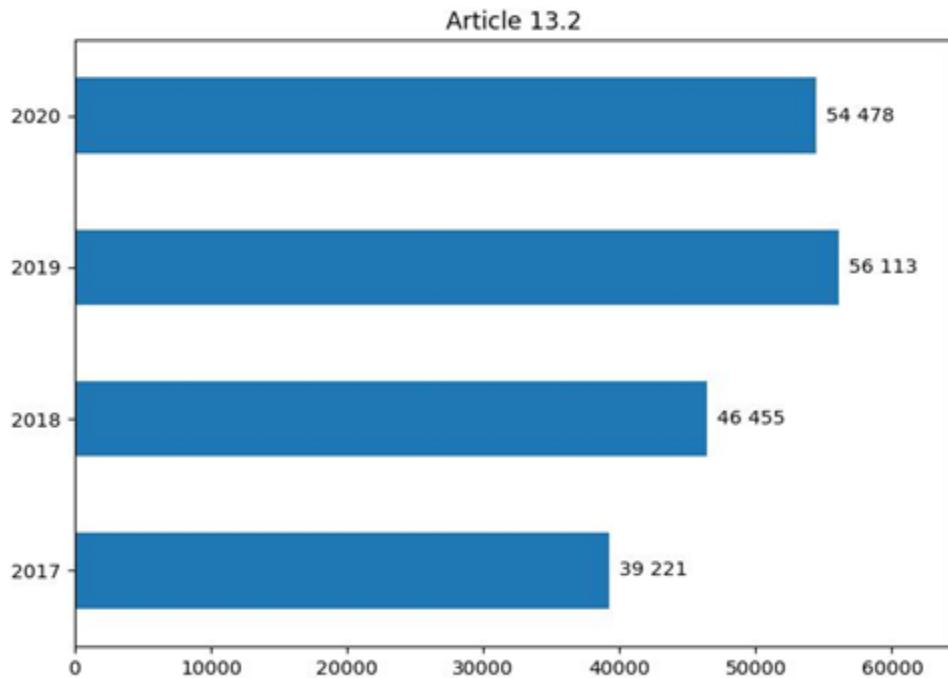


Source: own calculations based on data from ZUS, 2021

2.3.5. Self-employed persons working in two or more Member States (Art. 13(2) BR)

Between 2017 and 2020, the number of persons who normally pursue an activity as a self-employed person in two or more Member States increased systematically. The largest increase (around 10,000) took place between 2018 and 2019; the outbreak of the COVID-19 pandemic slightly slowed down the growth, but the upward trend continues.

Figure 20. PDs A1 issued on the basis of Art. 13 (2) of the Basic Regulation

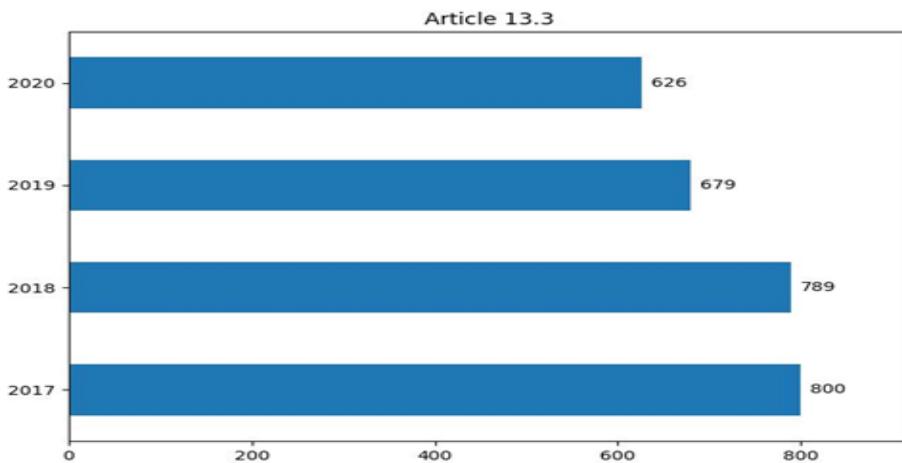


Source: own calculations based on data from ZUS, 2021

2.3.6. Persons pursuing activity as an employed person and as a self-employed in different Member States (Art. 13(3) BR)

A downward trend can be observed in the case of employed and self-employed persons in various countries. As shown in the chart below, the number of such people has been clearly declining year by year since 2017.

Figure 21. PDs A1 issued on the basis of Art. 13 (3) of the Basic Regulation

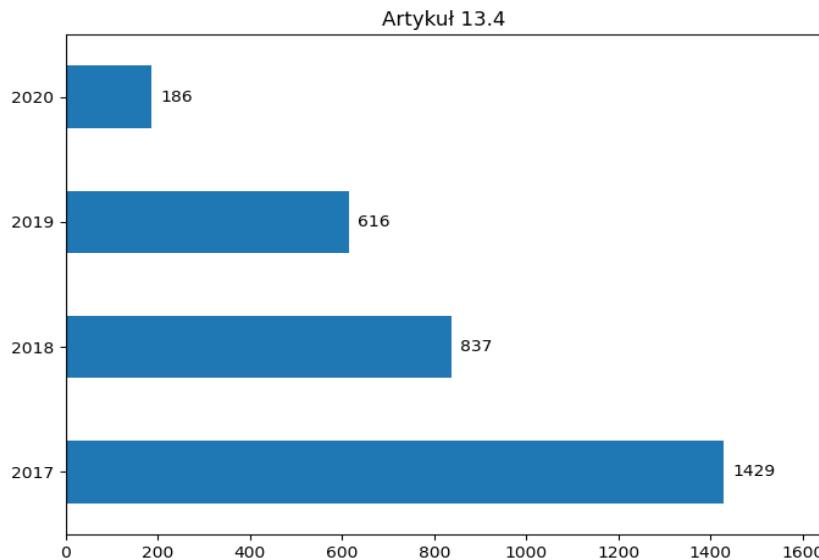


Source: own calculations based on data from ZUS, 2021

2.3.7. Civil servants employed by one Member State and pursuing activity as an employed and/or self-employed person in one or more Member States (art. 13.4)

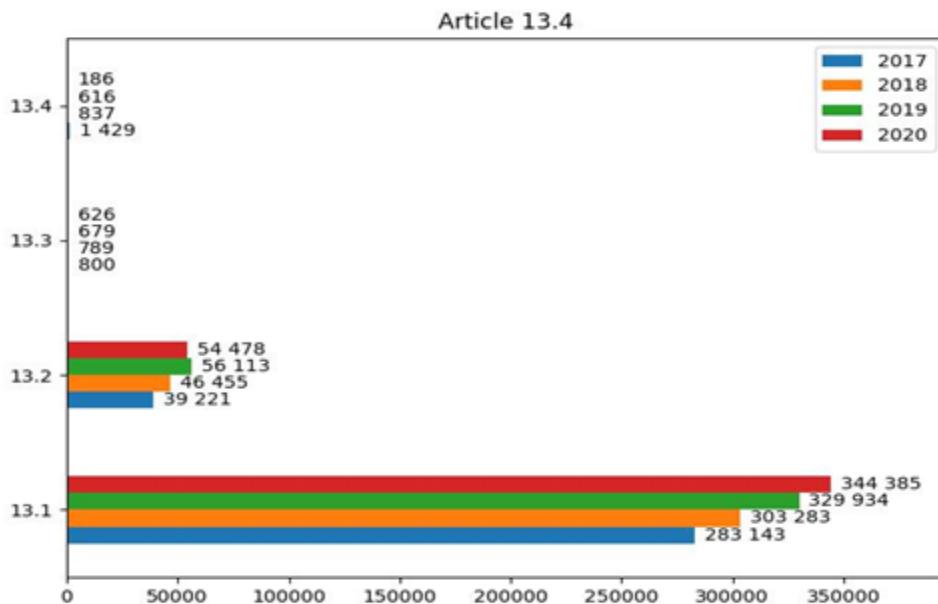
There is a clearly downward trend in the number of civil servants employed by one country and working as an employed / self-employed person in one or more other Member States (art. 13.4).

Figure 22. PDs A1 issued on the basis of Art. 13 (4) of the Basic Regulation



Source: own calculations based on data from ZUS, 2021

Figure 23. Summary PDs A1 issued on the basis of Art. 13 (2-4) of the Basic Regulation



Source: own calculations based on data from ZUS, 2021

2.3.8. Average duration of PDs A1 per number of days

This short subchapter deals with the average duration, in days, of all PD A1 issued pursuant to Art. 12 of the Basic Regulation. Between 2017-2019 was at a similar level of around 124 days, while in 2020 there was an extension by approximately 20 days to an average length of 147 days. 2021 (somewhat fragmented in this regard) data show the average duration rise to 175 days.

Table 13. Average duration of a posting assignment (mission)

Year	2017	2018	2019	2020
Average duration (days)	127	122	124	147
The longest posting periods	Poland - 215 Czechia - 221 Liechtenstein - 239	Belgium - 156 Germany - 147 Sweden - 139	Sweden - 169 Belgium - 167 Germany - 140	Belgium - 179 Austria - 204 Sweden - 210
The shortest posting periods	France - 58 Switzerland - 66 Italy - 69	Poland - 0 Liechtenstein - 24 Malta - 24	Poland - 0 Malta - 21 Romania - 33	Liechtenstein - 31 Slovenia - 35 Hungary - 51

Source: own calculations based on data from ZUS, 2021

2.4. Posting third-country nationals from Poland

2.4.1. Introduction and background

One may say that the upward trend in posting of workers from Poland to other Member States of the Union had been continuing for several years now, also despite the COVID-19 pandemic (*we are dealing with it in detail in Chapter 4 hereof*). Posting of third-country nationals²¹² has played a significant role in that process; in fact, the available figures clearly corroborate it that the number of third-country nationals being posted from Poland to other EU Member States has been going up at a steady pace. In this subchapter, we take into account the most up-to-date figures available, including those for 2021.

Despite the fact that some of the trends were influenced (to varying extent) by the pandemic, the number of PDs A1²¹³ increased substantially in 2021 year on year.

²¹² As demonstrated below, the figures concerning posting of foreigners (non-Poles, citizens of EU / EEA / Switzerland) – are negligible.

²¹³ Please note that in this section we provide data mostly based on numbers of PDs A1. Where appropriate (and data permitting), figures concerning unique persons are provided, too.

Indeed, in 2021 a total of 115,240 PDs A1 were issued in Poland under both Art. 12 and Art. 13 of the Basic Regulation²¹⁴ to third-country nationals, **constituting 17.2% of all such attestations issued by the Polish authorities under those two legal bases; 13.8% of all PDs A1 issued under the two above legal bases were issued to Ukrainians.**

The above numbers were clearly an upward departure from 2020 figures. Indeed, that year 607,639 PDs A1 were issued under the two above-legal bases, with 10.5% issued to third-country nationals – overwhelming majority of those attestations were issued to Ukrainian citizens – amounting to 8.7% of all PDs A1 in 2020.

This, too, constituted larger figures than those from 2019. That year, data encompassing PDs A1 issued pursuant to both Art. 12 and Art. 13 of the Basic Regulation demonstrate that approximately 8.2% of all attestations issued to workers posted from Poland were for third-country nationals - by far the most (approximately 7% of the total PDs A1 issued in Poland) being issued to Ukrainian citizens²¹⁵.

When compared to the previous years, shown in the ZUS and other authorities' record, the percentage of posted workers who are nationals of Poland (or nationals of other Member States of the Union) has in fact been decreasing, while the share of third-country nationals has been increasing at a steady pace. Looking back at the figures, one might say at first sight that the process was slowed down by the COVID-19 pandemic with regards to the majority third-country nationalities. That being so (up to a point, as we demonstrate below), the marked difference concerns Ukrainian citizens, in whose regard growth was registered also in 2020.

2.4.2. Facts and figures, including origin of third-country nationals posted abroad from Poland

2.4.2.1. PDs A1 issued to third-country nationals 2018 -2021

In this subchapter we aim to take stock of the increasing number of third-country nationals being posted abroad from Poland from 2018 to 2021. The substantive basis for the analysis is data concerning PDs A1 obtained from the ZUS following our requests. It is therefore important to

²¹⁴ Please note that this is the overwhelming majority of all PDs A1 issued that year – other PDs A1 were issued under Art. 11(3)(b), Art. 11(4), Art. 11(5), Art. 16(1) as well as to ‘persons employed / self-employed in the country referred to in point 2.1 of the PD A1 certificate’.

²¹⁵ Measured by comparison of PDs A1 issued pursuant to those two provisions to the total amount of attestations issued on their basis to all TCNs.

emphasize that the conclusions drawn here concern a number of those attestations and not ‘unique’ (‘individual’) persons posted²¹⁶.

Another assumption we made in this subchapter is to take into account PDs A1 issued under Art. 12 and 13 of the Basic Regulation 883/2004 for the sake of drawing conclusions²¹⁷.

The mapping of third-country nationals’ postings seems to be of particular relevance, since their numbers increase every year and reach a substantive percentage in the last few years, justifying conclusions that third-country nationals posted from Poland are actually overrepresented in the cohort of all workers posted from Poland, when compared to the national total workforce. Given the above, the structure of the following subchapters is as follows. First, we describe the trends in posting of third-country nationals from Poland from 2019 to 2021, including figures, main nationalities thereof as well as indicating legal bases (Art. 12 or Art. 13). Secondly, we demonstrate the division of outgoing postings of TCNs by sectors of activity. Finally, we show main directions (in the form of the receiving Member States under Art. 12 BR) of the outgoing postings of TCNs from Poland.

2.4.2.2. Outgoing postings of TCNs from Poland – figures, nationalities & breakdown by legal bases

The aim of this subchapter is to shed some light to outgoing postings of third-country nationals from Poland – showing figures of PDs A1 issued to them in respective years, their main nationalities and the breakdown by the main legal bases, anticipated above – Articles 12 and 13 of Regulation 883/2004. In order to cover all major trends (including especially related to the COVID-19 pandemic), figures from 2019 to 2021 (latest available) have been taken into account, while 2018 figures are also provided in tables (and in discussion) for the sake of comparison. They are discussed commencing from 2019 – all the way to 2021, while at the end of the subchapter, relevant tables are provided.

Finally, it is worth-mentioning already at this point that three major nations, whose citizens Article 12 and 13 BR PDs A1 were issued to – were Ukraine (by far the leader), Belarus and

²¹⁶ Share of ‘unique’ persons is available only with regard to PDs A1 issued under Art. 12.

²¹⁷ This first, most practical reason for this is the impossibility of obtaining data concerning PDs A1 issued on other, than Art. 12 and 13 BR, legal bases. Besides, PDs A1 issued on such other legal bases are already negligible in general, therefore we assess those issued to third-country nationals to be of very minor importance, too.

Russia. These three nations clearly outpaced the other ones (a trend clearly visible especially between 2018 and 2019).

First of all, when it comes to the Portable Documents A1 issued to third-country nationals pursuant to Art. 12 and Art. 13 of the Basic Regulation **in 2019**, the highest number of those attestations issued to third-country nationals posted from Poland were by far those issued to citizens of Ukraine to whom 43,362 PDs A1 were issued pursuant to the above-mentioned legal bases. Majority of them (38,303) were issued under Art. 13 and the rest (5,059) under Art. 12 of the Basic Regulation. The above attestations issued to Ukrainians constituted 85.6% of the grand total of PDs A1 issued to third country nationals under the two legal bases; they were followed by the attestations issued to citizens of Belarus (5,856, 11.5%) and Russians (465 PDs A1, 0.91%), while the rest (956, 1.88%) fell to citizens of other third country nations.

Compared to 2018, the number of PDs A1 issued to Ukrainian citizens under Art. 12 in 2019 grew by 135% (from 2,149 to 5,059). The increase was even more pronounced when figures combining PDs A1 issued under both Art. 12 and Art. 13 of the Basic Regulation are concerned. In 2019, 43,366 PDs A1 were issued to Ukrainian citizens, up from 17,958 in 2018 (an increase by a staggering 141% year on year).

PDs A1 issued to the next-in-line, Belarusians and Russians, were significantly less numerous. However, one should note that the numbers of the attestations issued under Art. 12 and 13 to them (and especially to Belarusians) were growing at a fast pace year on year. This phenomenon coincided the slowly decreasing overall share of the Ukrainians in the grand total number of PDs A1 for outgoing posted workers.

Also, the overall number of PDs A1 issued on the two above-mentioned legal bases increased from 2018 to 2019 from 23,269 to 50,643. The latter figure meant that **PDs A1 issued to third-country nationals on those bases constituted 8.2% of all PDs A1 issued by Poland in 2019** (while PDs A1 issued to Ukrainians amounted to 7% of all the PDs A1 issued in Poland that year).

Interestingly, PDs A1 issued in Poland to third-country nationals **in 2020** proved to be somewhat ‘immune’ to COVID-19 pandemic. Indeed, one could see the increases practically in PDs A1 in case of all three major nations described above and both Article 12 and 13. Of course, the increases are lower than in the comparison between the years 2018 to 2019 (sometimes even by two-thirds) and therefore – somewhat lower than expected, but the figures for outgoing TCNs’ postings went up anyway. This needs to be put in the perspective, where, according to the latest substantive

research, in 2020 the overall number of PDs A1 decreased by almost 900,000 PDs A1 or almost one-fifth compared to 2019²¹⁸. Indeed, in 2020, the number of PDs A1 issued according to Article 12 decreased by some 780,000 PDs A1 (all major issuing Member States showed a decline, including Poland) and those issued according to Article 13 by approximately 120,000²¹⁹. Seen in this light and given dramatic consequences to human life throughout the EU Member States, the lower-than-expected rise in PDs A1 issued to third-country nationals may well be summed up with a well-known saying that ‘every cloud has a silver lining’.

Indeed, in 2020, as compared to 2019, the total amount of PDs A1 issued pursuant to Art. 12 and 13 to third-country nationals went up from 50,643 to 63,640 (constituting the increase by a respectful 20.4%). In absolute numbers, the greatest increase concerned the Ukrainians (9,612 PDs A1 more than in 2019), however when it comes to the percentage rise, the highest was noted in case of Belarusians, which may be partially explained by their increased presence in Poland in the third and fourth quarter of 2020, as many of them took refuge there, following the presumably falsified Belarus’ presidential elections of 9 August 2020²²⁰.

Given that in 2020 607,639 PDs A1 were issued pursuant to Art. 12 and Art. 13²²¹, **10.5% of all PDs A1 issued pursuant to those two provisions were actually issued to third country nationals** (PDs A1 issued under those provisions to Ukrainians amounted to 8.7% of all the PDs A1 issued in Poland that year).

Interestingly and importantly, **the 2021 ZUS data** demonstrate that the numbers in question rebounded further (that time, it meant a surge indeed). That year, 115,240 PDs A1 under both Art. 12 (14,500) and 13 (100,740) of Regulation 883/2004 were issued to third-country nationals (up from 63,640 in 2020, a whopping 81.08% increase). Given the fact that the total number of PDs A1 issued in 2021 in Poland amounted to 676,775 and those issued on the basis of Art. 12 and

²¹⁸ F. De Wispelaere, L. De Smedt, J. Pacolet, *Posting of workers, Portable Documents issued in 2020*, Luxembourg: Publications Office of the European Union, 2022, p. 11. See also F. De Wispelaere & D. Gillis, *COVID-19 and the fight against undeclared work. Lessons learned and to be learned*, HIVA-KU Leuven Working Paper 2021; S. Stefanova-Behlert, M. Menghi, *The impact of Covid-19 on posted workers...*, op. cit.

²¹⁹ F. De Wispelaere, L. De Smedt, J. Pacolet, *Posting of workers, Portable Documents issued in 2020*, op. cit., p. 11-12.

²²⁰ On that topic, see e.g., S. Bedford, *The 2020 Presidential Election in Belarus: Erosion of Authoritarian Stability and Re-politicization of Society*, Cambridge University Press, Nationalities Papers (2020), Volume 49, Issue 5, September 2021, pp. 808 – 819.

²²¹ Out of the total amount of 619,127 (including 1,418 PDs A1 issued to the persons employed / self-employed posted to the UK). The other PDs A1 forming the balance were issued on the basis of art. 11(3)(b), Art. 15, Art. 11(4), Art. 11(5), Art. 16(1) as well as to ‘persons employed /self-employed in the country referred to in point 2.1 of the A1 certificate’ (34 attestations).

Art. 13 of the Basic Regulation were 667,244²²², **17.2% of the very attestations were issued under Art. 12 and 13 in 2021 to third-country nationals**. 91,933 of those PDs A1 were issued to Ukrainian citizens (12,064 under Art. 12 and 91,933 under Art. 13), which meant that **13.8% of all PDs A1 issued under Art. 12 and 13 of Regulation 883/2004 in 2021 in Poland concerned Ukrainian citizens**.

Table 14. Number and share of PDs A1 issued to third-country nationals posted from Poland, by nationality, years 2018-2021, Art. 12 [(1) & (2)] of the Basic Regulation only

Nationality of posted workers	2018		2019		2020		Change 2019 vs. 2020		2021	
	No.	% Share of total no. TCNs posted from Poland	No.	% Share of total no. TCNs posted from Poland	No.	% Share of total% share of total	No. (A1 PDs under Art. 12 only)	% Change 2019 vs. 2020 (+ / -)	No.	% Share of total no. TCNs posted from PL
Ukrainian	2,149	88.3%	5,059	88.3%	6,188	82.3%	+1,129	+ 22.32%	12,064	83.2%
Belorussian	148	6%	424	7.4%	988	13.1%	+564	+133.02%	1,740	12.0%
Russian	22	0.9%	51	0.89%	72	0.95%	+21	+41.17%	159	1.0%
Other ²²³	114	4.6%	195	3.4%	268	3.5%	+73	+37.43%	537	3.7%
Total	2,433	100%	5,729	100%	7,516	100%	1,787	+31.19%	14,500	100%

Source: own calculations based on ZUS data

²²² The others were issued on the basis of art. 11(3)(b), Art. 15, Art. 11(4), Art. 11(5), Art. 16(1) as well as to '*persons employed /self-employed in the country referred to in point 2.1 of the A1 certificate*' (97 attestations).

²²³ Other included citizens *inter alia* of: Afghanistan, Albania, Armenia, Bosnia and Herzegovina, Bahamas, Bangladesh, Brazil, Burkina Faso, Cameroon, Canada, Chile, China, Montenegro, Egypt, Ethiopia, Egypt, Ethiopia, Georgia, Iran, Iraq, Israel, Japan, , Kazakhstan, Mexico, Morocco, Moldavia, Montenegro, Nepal, Nigeria, North Macedonia, Puerto Rico, Syria, Thailand, Tunisia, Turkey, Uganda, USA, Uzbekistan, Venezuela, Zimbabwe.

Table 15. Number and share of PDs A1 issued to third country nationals posted from Poland, by nationality, year 2018-2020, Art. 12 & Art. 13 of the Basic Regulation

Nationality of posted workers	2018		2019		2020		Change 2019 vs. 2020	
	No.	% Share of total no. TCNs posted from Poland	No.	% Share of total no. TCNs posted from Poland	No.	% Share of total	No.	% Change
Ukrainian	17,958 [2,149+ 15,716]	77.1%	43,366 [5,059 + 38,307]	85.6%	52,978 [6188 + 46,790]	83.27	9,612	+22.2%
Belorussian	2,510 [148+ 2,362]	10.8%	5,856 [424+ 5,432]	11.5%	8,735 [958 + 7,777]	13.7	2,879	+49.2%
Russian	176 [125+51]	0.79%	465 [51 + 414]	0,91%	581 [72 +509]	0.92%	116	+24.9%
Other	2,625	11.3%	956 [195 +761]	1.88%	1,346 [268 + 1,078]	2.11%	390	+40.8%
Total	23,269 [2,433+ 20836]	100%	50,643 [5,729 + 44,910]	100%	63,640 [7,486 + 56,154]	100%	+12,997	25.7%

Source: own calculations based on ZUS data

The question arises finally, whether the above-mentioned figures demonstrate that there is an over-representation of posted third-country nationals as compared to their share in the labour market of Poland as a ‘sending’ (‘posting’) Member State?

Naturally, trying to answer the very question is burdened with the risk that this be dubbed an exercise in ‘comparing apples with oranges’ – as on the one hand we have figures concerning PDs A1 issued to third-country nationals and on the other - actual persons who are employed in various capacities in the sending Member State (a third category might even be thrown in the mix, namely – those non-Polish citizens, who are subject to the Polish social security at the ZUS).

Each of the above-mentioned cohorts is somehow burdened with limitations, given fragmentation of data and sometimes the lack of certain indicators: PDs A1 taken into consideration are attestations issued on the basis of Art. 12 and 13 of the Basic Regulation (and not on the others – even though small in size – legal bases); third-country nationals employed in Poland are calculated not pursuant to absolutely all legal bases in existence (as there is no available resources for some

of them, even though their numbers might be meagre) but only on the basis of three most numerous legal bases [work permits, declarations on entrusting work and seasonal work permits]; finally there are also gaps in the knowledge concerning persons registered at the ZUS.

However, while fully aware of the above-mentioned limitations, we still consider such an exercise to be appropriate and useful.

Thus, if we consider that in 2021 share of PDs A1 issued under Art. 12 and 13 BR to TCNs amounted to 17.2% of all PDs A1 and we compare it with the figure of 12.7% (or 11.4%) of TCNs' share in the Polish labour market, we may conclude that third-country nationals (at least in 2021) are overrepresented compared to their share in the labour market of Poland. The same would hold true when we consider the number of the TCNs who are subject to the Polish social security.

2.4.2.3. By sectors of activity

For the breakdown by the sector of activity we took into consideration those sectors of activity, in which the numbers of PDs A1 issued to third-country nationals posted from Poland were the largest in absolute numbers or in percentage of TCNs posted therein or dealt with issues of utmost importance for the societal interests. In 2020 and 2021 this was the case of transportation and storage (Polish PKD classification code H²²⁴), construction (Polish PKD classification code F – placed within the larger activity of 'Industry' [under the PKD classification codes]), temporary employment agencies (PKD classification code N) as well as human health and social work activities (PKD classification code Q).

We firstly demonstrate and describe figures for 2020 and then for 2021, comparing them at the end thereof.

²²⁴ As compared with the NACE codes, previously mentioned herein.

Table 16. Number and share of PDs A1 issued by sectors of activity and nationality, 2020

Sector of activity	Total PDs A1 issued in 2020 under Art. 12 & 13 BR	PDs A1 issued to TCNs		PDs A1 issued to UA nationals		PDs A1 issued to EU nationals (incl. PL citizens)	
		No.	Share in total PDs A1 issued	No.	Share in total PDs A1 issued	No.	Share of total PDs A1 issued
Transportation and storage (PKD H)	211,926 [1,489 + 210,437]	44,363 [116+ 44,247]	20.9%	36,927 [111 + 36,816]	17.4%	167,563	79.1%
Construction (PKD F)	266,694 [93,492 +173,202]	10,216 [4.184 + 6,032]	3.8%	7,857 [3,263 +4,594]	2.9%	256,478	96.2%
Temporary Employment Agencies (PKD N)	20,938 [8,077 + 12,861]	1,362 [1,132 + 230]	6.5%	1,262 [1,071+ 191]	6.0%	19,576	93.5%
Human health and social work activities (PKD Q)	81,739 [17,758 +63,981]	936 [612 + 324]	1.15%	821 [547 + 274]	1.0%	80,803	98.85%

Source: own calculations based on data from ZUS

The breakdown in the table above demonstrates that in the above-mentioned sectors of activity, in 2020 most PDs A1 were actually issued to Polish (and EU – encompassing also EEA countries and Switzerland) citizens and the percentage of the attestations issued to third-country nationals that year in Poland was not substantial (apart from the transportation and storage sector). Indeed, the percentage is highest in that very sector - over 20.9% of PDs A1 were issued to third-country nationals and approximately 79.1% to Polish and EU citizens (with the percentage of citizens of countries other than Poland being rather negligible, however no precise records have been available in this regard).

Moreover, in all the above-mentioned sectors, apart from the Temporary Employment Agencies' concerning third-country nationals, the majority (sometimes even the overwhelming one – as it was in particular the case of transportation and storage as well as in construction) of Portable Documents A1 were issued pursuant to Art. 13 of the Basic Regulation, which further corroborates Poland's profile as a major nation posting workers on the basis of that provision of the Regulation

883/2004, a point rightly pointed out to already²²⁵. Indeed, if only Article 13 PDs A1 were to be taken into account, Poland actually issued more of them in 2020, as compared to 2019²²⁶.

Another clearly visible trend in all the above-mentioned sectors is that the highest share of PDs A1 among TCNs - was issued to the citizens of Ukraine. The very percentage proved highest in case of temporary employment agencies (92.6%), followed by transportation sector (83.2%) and the construction sector (76.9%). In the latter two sectors the absolute numbers of the attestations issued were also the highest.

Another inescapable trend in 2020 was obvious in the EU – the impact of the COVID-19 pandemic. There exists no doubt that the 2020 figures were impacted by the COVID-19 pandemic – at the EU level the decreases in PDs A1 issued were crystal-clear – by some 780,000 attestations under Art. 12 and ‘only’ 120,000 under Art. 13 of the Basic Regulation²²⁷. Such was also the case in Poland – however, as mentioned before, it did not concern PDs A1 issued under Art. 13, but absolute numbers of PDs A1 (decrease from 647,989 in 2019 to 617,709 in 2020 [619,127 if the PDs A1 issued to British citizens are added]) and in Article 12 attestations. The most heavily impacted months, when double-digit decreases (in comparison to respective months in 2019) were observed were August and September 2020²²⁸.

However, as mentioned before PDs A1 issued to third-country nationals proved to be ‘immune’ to the general downward trend. Indeed, as shown in the table above – all major nationalities of outgoing third country posted workers experienced increases in both Art. 12 and 13 PDs A1 in 2020. This was also the case in respective sectors of activity that year.

²²⁵ Cf. F. De Wispelaere, L. De Smedt, J. Pacolet, *Posting of workers. Report on A1 Portable Documents issued in 2020*, op. cit., p. 13.

²²⁶ Cf. F. De Wispelaere, L. De Smedt, J. Pacolet, *Coordination of social security systems at a glance. 2021 Statistical Report*, Luxembourg: Publications Office of the European Union, 2022, p. 16 (larger increases occurred in Germany [+28% y/y], Slovenia [+18%] and in Croatian [+7%].

²²⁷ Cf. F. De Wispelaere, L. De Smedt, J. Pacolet, *Posting of workers. Report on A1 Portable Documents issued in 2020*, op. cit., p. 12.

²²⁸ We deal with this topic in greater detail in Chapter 4.

Table 17. Number and share of PDs A1 issued by sectors of activity and nationality, 2021

Sector of activity	Total PDs A1 issued in 2020 under Art. 12 & 13 BR	PDs A1 issued to TCNs		PDs A1 issued to UA nationals		PDs A1 issued to EU nationals (incl. PL citizens)	
		Number	Share in total PDs A1 issued	Number	Share in total PDs A1 issued	Number	Share of total
Transportation and storage (PKD ²²⁹ H)	227,330 [3,004 + 224,326]	80,504 [243+ 80,261]	35.4%	63,254 [191 + 63,063]	27.2%	146,826	64.6%
Construction (PKD F)	203,678 [104,308 + 99,370]	21,605 [8,258 + 13,347]	10.6%	17,238 [6,470 + 10,768]	8.4%	182,073	89.4%
Temporary Employment Agencies (PKD N)	20,706 [12,449 + 8,257]	3,428 [2,732 + 696]	16.6%	2,791 [2,556 + 535]	13.5%	17,278	83.4%
Human health and social work activities (PKD Q)	74,876 [17,953 + 56,833]	2,025 [1,091 + 934]	2.7%	1,836 [1,023 + 813]	90.6%	72,851	97.3%

Source: own calculations based on data from ZUS

As demonstrated in the above table, the upward trend of PDs A1 issued to third-country nationals posted from Poland in 2020 indeed continued in all sectors in 2021, which saw the increases of the number of attestations and share of TCNs in a total number of PDs A1 issued under Art. 12 and 13 of the Basic Regulation. All of this happened despite curious decreases of PDs A1 issued in construction (by almost 63 thousand year on year!) and in human health and social work activities (here of note is especially the reduction in Art. 13 PDs A1 in 2021).

The transportation and storage sector remained the one having by far the largest presence of PDs A1 issued to third-country nationals – constituting, thanks to a huge rise from 44,363 to 80,504 – a sector with the largest share of PDs A1 issued to third-country nationals (that share also increased substantially – from 20.9% to 35.4% in just one year). One should also emphasize that the very growth in numbers of attestations issued to TCNs (by 81.46% from 2020 to 2021) was much higher than the growth in overall PDs A1 issued in the sector (6.8% year on year) – which seems to be a clear indicator of the tendency in international transport entrepreneurs, wanting to make use of

²²⁹ Polish Classification of Activities, equivalent to NACE, as mentioned before.

third-country nationals in the sector (given, *inter alia*, the lack of local workers). Posting of workers in the very sector has been dominated by posting drivers of Ukrainian nationality, whose share in a grand total number of PDs A1 issued has seen a substantive growth in 2021. Paradoxically, the sector's success has since March 2022 been a cause for upset and worry for many entrepreneurs since many of the Ukrainian drivers took their leave and went to Ukraine to fight against Russia²³⁰.

Worthy of note is also the substantive percentage growth in the construction and temporary employment agencies' sectors – demonstrating the increase both in the percentage share of PDs A1 issued to TCNs and in particular to Ukrainian nationals.

Growth (not in absolute numbers, but in the percentage year on year) could also be seen in PDs A1 issued to third-country nationals in the sector of human health and social work activities. However, we fear that when it comes to the most popular direction of third-country national caregivers providing home care – Germany – the domestic so-called Vander Elst visa acts like a major hindrance, directly influencing the number of such TCN caregivers and hindering their access to the German market in contravention with the European law and especially the Court of Justice established line of jurisprudence²³¹. Indeed, the country continues to require third-country national workers posted thereto to obtain such Vander Elst visas from the German embassies, before they are posted to Germany²³².

²³⁰ See A. Woźniak, *Polski transport traci kierowców idących na wojnę / Polish transport loses drivers going to war*, *Rzeczpospolita* 02 March 2022, retrievable at: <https://www.rp.pl/transport/art35793131-polski-transport-traci-kierowcow-idacych-na-wojne>. Before the Russian invasion, about 105,000 Ukrainians were driving trucks with Polish registrations, but according to the Transport and Logistics Employers' Association (TLP) in Poland, 25-30 percent of them have already applied for unpaid leaves to return to the country – see: <https://tlp.org.pl/maciej-wronski-dla-rzeczpospolita-polski-transport-traci-kierowcow-idacych-na-wojne/>. Cf. also: L. Ponikelska, P. Donahue, K. Krasuski, *80,000 Ukrainian emigrants are leaving safety and heading towards war*, *Fortune*, 04 March 2022, retrievable at: <https://fortune.com/2022/03/04/80000-ukraine-emigrants-leaving-jobs-heading-home-war-russia-invasion/>.

²³¹ Cf. *inter alia* *Black Book 2. Barriers on the internal market*, Ministry of Economic Development, Labour and Technology of Poland, retrievable at: <https://www.gov.pl/web/development-technology/ministry-of-economic-development-labour-and-technology-published-the-second-black-book-on-barriers-faced-by-polish-companies-in-eu-countries>; see also in this regard: M. Vah Jevšnik, M. Kiełbasa, S. Danaj, M. Szaraniec, *There and Gone Again? Migration and Posting of Third Country Nationals from the Sending Countries' Perspective*, forthcoming in the European Labour Law Journal, 2022.

²³² Contrarily to the judgments of the Court of Justice of the EU *inter alia* in: C-244/04 Commission v Germany, C-168/04 Commission v Austria and C-219/08 Commission v Belgium.

2.4.2.4. By the receiving Member States

In this subchapter we aim to show the major flows of the outgoing posted workers who are third-country nationals. One important assumption is to be made already at the outset – as mentioned before, given the legal nature of activities under Art. 13 of the Basic Regulation, no information is produced concerning the place of cross-border activities under Art. 13, hence no data is available regarding the receiving Member States²³³. Thus, we examine PDs A1 issued on the basis of Art. 12 only.

What is more, we took into account the latest (and most up to date) data available – commencing with 2020 figures and then analysing 2021 ones.

In 2020, 7,486 PDs A1 were issued by the ZUS under Art. 12 of the Basic Regulation to third-country nationals. Of that number, the majority of the attestations were issued to TCN workers posted to Germany – 3,271 PDs A1 (43.7% of their total number), followed by 1,480 PDs A1 for Belgium (19.8% of the total) and 1,368 PDs A1 for the Netherlands (18.5%).

As one might have expected in the light of the previous parts hereof, the majority of the PDs A1 issued for the above-mentioned respective countries under Art. 12 of the Basic Regulation were PDs A1 issued for Ukrainian citizens. Indeed, in the case of Germany there were 2,521 attestations (77% of all issued to third-country nationals posted to Germany and 33.7% of all PDs A1 issued under Art. 12 of the Basic Regulation). In case of Belgium there were 1,261 attestations (85.2% of all issued to third-country nationals posted to Belgium and 16.8% of all issued under Art. 12), while for the Netherlands there were 1,218 attestations issued (89% and 16.3% respectively).

When it comes to **2021**, the number of PDs A1 issued to third-country nationals by the ZUS under Art. 12 of the Basic Regulation went up – to 14,500 (by 7,014 - approximately +93.69% as compared to 2020) – a clear sign of a rebound after the COVID-19 pandemic, as mentioned before. Of that amount, the majority of the attestations were issued to third country nationals posted to Germany – 6,125 PDs A1 under Art. 12 (42.2% of their total number, +143% as compared to 2020), followed by 3,043 for Belgium (21% of their total number, +141.31% year on year) and 2,765 for the Netherlands (19.1% of their total number, +127.01% compared to 2020)²³⁴.

²³³ As rightly pointed out to by F. De Wispelaere, L. De Smedt, J. Pacolet, *Posting of workers, Portable Documents issued in 2020*, op. cit., p. 39-40.

²³⁴ These countries were also among the biggest recipients of workers posted under Art. 12 Regulation 883/2004 on the whole [including both Art. 12(1) and Art. 12(2) legal bases] from Poland in 2020, with Germany by far the leader (125,380 PDs A1 issued), followed by France (23,591), Belgium (16,687) and the Netherlands (16,644).

That year, too, the majority of the PDs A1 issued for the above-mentioned respective countries under Art. 12 of the Basic Regulation were PDs A1 issued to Ukrainian citizens. In case of Germany there were 4,692 attestations (up by 2,171 PDs A1; 76.6% of all issued to third-country nationals posted to Germany and 32.3% of all PDs A1 issued under Art. 12 of the Basic Regulation). In case of Belgium – 2,622 PDs A1 (86.2% of all issued to TCNs posted there) were issued for Ukrainians, while for the Netherlands – 2,512 attestations (90.8% of all issued to TCNs posted to the Netherlands) were issued for them.

The comparison of the figures between 2020 and 2021 clearly demonstrates the upsurge of the numbers of PDs A1 issued under Art. 12 of the Basic Regulation, which heralds the coming out of the pandemic in case of all major destinations of third-country nationals posted under Art. 12 of Regulation 883/2004 from Poland. Such a conclusion seems to be corroborated by the substantive increase of PDs A1 issued in Poland to third-country nationals under Art. 13 of Regulation 883/2004, which in 2021 reached a whopping amount of 100,740, which constituted the rise by 44,586. It goes without saying that the overwhelming majorities posted to all those receiving Member States were Ukrainian citizens, whose share increased substantially in all the cases.

2.5. The impact of the war in Ukraine on the posting of Ukrainian workers from Poland

2.5.1. Introduction

As already indicated in Chapter 2.1.1.8. – on 24 February 2022 Russian armed forces launched a brutal and unprovoked invasion of Ukraine. The flight from war zones drastically changed the migratory situation in Ukraine itself as well as in many countries of the EU, including Poland, which, as it transpired, has been playing the most important role among the countries receiving displaced persons²³⁵ from our Eastern neighbour with around 3.5 million persons who arrived in Poland between 24 February and mid-May 2022²³⁶.

In the above-remarked Chapter – we presented the facts and figures on migration flows, then the response of the EU. Here we aim rather to focus on the latest available data and possible scenarios

²³⁵ Please note that we make use of the expression '*displaced persons*' – following the nomenclature used in the Council Implementing Decision 2022/382.

²³⁶ Cf. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, *Intereconomics*, 2022, 57(3), p. 164.

that may influence the posting of Ukrainian citizens from Poland (and possibly also impacting legal solutions for other third-country nationals).

2.5.2. Impact of the war in Ukraine on the pool of Ukrainians in Poland and their profiles

The Russian aggression resulted in what the UNHCR described as the largest refugee migration in Europe since World War II, estimated by UNHCR (2022) at 6.3 million persons. In the first two months, almost 3.5 million war refugees crossed the Polish border, of which over 95% were Ukrainian citizens; however, until the second half of May, about 1.39 million people left for Ukraine (among them, about 50,000-60,000 people who had lived in Poland before the outbreak of war and returned to Ukraine to join the army or territorial defence). Therefore, the net flows of the displaced persons crossing the border were about 2.2 million²³⁷. It does not mean, however, that so many people arriving in Poland as a result of war were still in the country at the end of April 2022. Based on available register data from receiving countries, this number can be estimated at 800,000 people. The above, minus arrivals of war refugees to Poland from Ukraine who, after a short stay in other countries (mainly EU countries), decided to move to the country which is relatively close in cultural and linguistic terms (estimated at 70,000- 80,000 persons) – the number of the displaced persons who were staying in Poland at the end of April 2022 can be estimated at around 1.55 million people²³⁸.

Given the above, the scale of Ukrainian presence in Poland in April 2022 (the latest available data) may be estimated at approximately 2.9 million. Importantly, this number is a sum of two sub-populations: those persons who were staying in Poland before the war (around 1.35 million) and those who arrived since then (around 1.55 million). At the same time, due to the very special demographic structure of the newly arrived displaced persons, it can also be estimated that the total population is drastically different from typical labour migration as observed before the war,

²³⁷ At the same time, the latest UNHCR data demonstrate that as of 16 June 2022 – there were 7,703,857 border crossings from Ukraine since 24 February 2022, while such crossings to Ukraine (since 28 February) amounted to 2,558,917 – cf. <https://data.unhcr.org/en/situations/ukraine> (last accessed on 17 June 2022).

²³⁸ Cf. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, *Intereconomics*, 2022, 57(3), p. 166; see also: M. Duszczyk and P. Kaczmarczyk, *War and migration: the recent influx from Ukraine into Poland and possible scenarios for the future*, CMR Spotlight 4(39) 2022; J. Dempsey, *The War in Ukraine Could Change Poland*, Carnegie Europe, 15 March 2022 <https://carnegieeurope.eu/strategiceurope/86636>

i.e., 40% women (aged 18-65), 26% children and 2% elderly²³⁹. It is the above-mentioned figures that constitute the pool of persons who may, when in legal employment, be posted abroad by Polish entrepreneurs.

2.5.3. Insight into the latest developments in European and Polish law – with potential impact on intra-EU labour mobility

As explained in *Chapter 2.1.1.8.* above, the Member States of the Union established that **there was a mass influx of displaced persons** within the meaning of Directive 2001/55/EC, in order to provide temporary protection for them. Their response took the form of the Council Implementing Decision 2022/382²⁴⁰. It ‘awoke’ the Temporary Protection Directive 2001/55 – the final text of the Council Implementing Decision (EU) 2022/382 was published on 4 March 2022²⁴¹.

The adoption of the Council Implementing Decision came with some obligations and rights – for both Member States (and their institutions) and the displaced Ukrainian citizens. Of note is here that the Member States have agreed in a statement that they will not apply Article 11 of Directive 2001/55²⁴², which effectively insured that persons enjoying temporary protection could generally engage in employed or self-employed activities.

As anticipated above in *Chapter 2.1.1.7.3.* - a question however remains, whether it could be allowed ... under the very Polish law, or more precisely – under certain limitations arising therefrom. We refer here to the original Art. 11(2) of the Special Law on assistance to Ukraine, which reads as follows: ‘(2) *Departure of a Ukrainian citizen from the territory of the Republic of Poland for a period exceeding 1 month shall deprive him/her of the entitlement referred to in Article 2(1)*’. In other words, Art. 11(2) thereof would render posting of Ukrainian displaced persons (being subject to the regime of the Special Law on Ukraine), permissible under the interpretations of the EU and international instruments set out above, to be allowed only for less-than-a-month posting missions, without which would most probably be unsatisfactory for most of

²³⁹ Cf. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, op. cit., 167.

²⁴⁰ It confirmed in its Art. 1 that the existence of a mass influx into the Union of displaced persons who have had to leave Ukraine as a consequence of an armed conflict has been established.

²⁴¹ M. I. Ciger, *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022, EU Immigration and Asylum Law and Policy*, retrievable at: <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>

²⁴² See motive 15 of the Council Implementing Decision 2022/382.

the posting employers. Moreover, the very rule was not to have any exemptions²⁴³. A side effect for some of the displaced Ukrainians (and their spouses – not necessarily of Ukrainian citizenship) could also be that their employability would suffer as a result, as some employers would refrain from employing them as unfit for subsequently being posted.

On the face of it, it would mean that all postings of persons who entered Poland as displaced persons, which exceed 1 month, could result in the loss of the legality of residence in Poland (with serious consequence under both Polish and EU law – in the former, their employment could be considered in violation of law; in the latter, a PD A1 could be considered invalid and become subject to withdrawal – as a displaced person's legal residence in Poland might become illegal²⁴⁴). However, the above-mentioned provision must be seen in the light of the systemic interpretation of law. Using it, one could conclude that a displaced person, who entered Poland holding a biometric passport, may not depart the territory of Poland within the first 30 days (required for investigated their application for residence), yet they are not prohibited from such a departure later. Since this is '*a ad hoc*' interpretation of the very newly law, one would naturally need wait for either the official confirmation from the Border Guard (which seems to be leaning towards the above interpretation) or from the ZUS. The latter, in its Guide of 31 March 2022, such a possibility was not excluded by the Social Insurance Institution itself²⁴⁵.

However, such an interpretation would have been risky at best. Therefore, it is with enormous satisfaction that we welcomed a law amending the Special Law on assistance to Ukraine, adopted by the Polish Parliament in June 2022 and then signed into law by the President (concerning the disputed provision - with the effect from 1 July 2022). The amending law contained an additional provision - Art. 11(3), brokered and authored by the European Labour Mobility Institute, which reads as follows: "*(3) The provision of paragraph (2) shall not apply to persons directed to perform work or services outside the Republic of Poland by entities operating in the territory of the*

²⁴³ As rightly pointed out to by U. Mirowska-Łoskot in: *Potrzebne zmiany w zasadach delegowania Ukraińców* [The need for changes in the rules on posting of Ukrainians], *Dziennik Gazeta Prawna* <https://praca.gazetaprawna.pl/artykuly/8432416,specustawa-ukrainska-zmiany-zasady-delegowania-ukraincow.html>, 2 June 2022, citing also the Ministry of Family and Social Policy's view, confirming the above rule.

²⁴⁴ See Art. 1 Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29.12.2010, p. 1–3.

²⁴⁵ See *Ustalanie miejsca zamieszkania w przypadku obywateli państw trzecich – nowe zasady od 29.03.2022 r.* [Determination of place of residence for third-country nationals - new rules from 29.03.2022], ZUS, 31 March 2022, <https://www.zus.pl/-/ustalanie-miejsca-zamieszkania-w-przypadku-obywateli-panstw-trzecich-zmiana-zasad-od-2-maja-2018-r/?redirect=%2Fbaza-wiedzy%2Fbiezace-wyjasnienia-komorek-merytorycznych>

Republic of Poland.". Its entry into force **effectively allowed for the legal posting of Ukrainian citizens who are subject to the Special Law on assistance to Ukraine**, without them losing the status of legally staying in Poland, should their posting mission last more than a month. This will effectively unblock the possibility of posting such citizens for longer periods of time.

Another tendency, which in turn may adversely influence the number of PDs A1 issued to Ukrainians is the decrease in number of PDs A1 issued in sectors employing largely the male workforce. Given the numbers of Ukrainian citizens, who followed the decree on general mobilization in Ukraine²⁴⁶ (according to the estimates by the Polish Border Guard, 8 to 9 thousand persons, mainly men, would come back daily to Ukraine, to take part in the defence of their homeland against the Russian aggression, in the first six days of war, their estimated number was approximately 54 thousand already in March²⁴⁷), the entrepreneurs potentially posting them abroad could suffer the consequences (it goes without saying that entrepreneurs acting at the Polish market could suffer, too). Sectors which may be affected the most are undoubtedly those, in which the majority of PDs A1 were issued to Ukrainian citizens, as indicated above, that is transportation and storage (where actually up to 30% of persons working in Poland are of Ukrainian nationality) and in the construction sector (more than 27% of all persons working in Poland in the sector are Ukrainian citizens²⁴⁸).

What is more, the Special Law on assistance to Ukraine (and its amendments) will undoubtedly contribute to the easiness of employing not only Ukrainian citizens who enjoy the status of displaced persons, but Ukrainian citizens residing legally in the Polish territory. This is provided by the so-called, already-mentioned 'announcement procedure' of employment, enshrined in the Art. 22 of the Special Law on assistance to Ukraine. As described above in Chapter 2.1.1.2. – the very provision enables the legal and super-flexible employment of every Ukrainian citizen (not necessarily escaping the war!) – provided that the online notification pursuant to Art. 22(2) is carried out on time.

²⁴⁶ Cf. Presidential decree no. 69/2022 – for more see e.g.: *Zelensky signs decree on general mobilization*, Ukrinform 25 February 2022, retrievable at: <https://www.ukrinform.net/rubric-ato/3412264-zelensky-signs-decree-on-general-mobilization.html>

²⁴⁷ Cf. J. Frączyk, *Polscy przedsiębiorcy w strachu przed utratą pracowników. Ukraińcy wracają do kraju, żeby walczyć* [Polish entrepreneurs in fear of losing workers. Ukrainians return to the country to fight], Business Insider, 2 March 2022, retrievable at: <https://businessinsider.com.pl/gospodarka/wojna-rosja-ukraina-polscy-przedsiębiorcy-w-strachu-przed-utrata-pracownikow-ukraincy/c1lvwy9> See also: P. Strzelecki, J. Grawiec, R. Wyszyński, *The contribution of immigration from Ukraine to economic growth in Poland*, Review of World Economics, 2021, op. cit.

In the light of the above - what could then be the outlook for the future, especially concerning the intra-EU labour mobility and the posting of workers? As indicated above, the scale of Ukrainian presence in Poland in April 2022 may be estimated at approximately 2.9 million, divided into two sub-populations: persons who were staying in Poland before the war (1.35 million approximately) and a population of around 1.55 million who arrived following the outbreak of the war²⁴⁹. On the basis of the above and of the recent developments, three hypothetical scenarios have lately been developed in the Polish literature, showing the stock of Ukrainian immigration to Poland until the end of 2023.

Table 18. Post-war immigration from Ukraine to Poland (starting point – April 2022) and three hypothetical scenarios

	Starting point (April 2022)		Scenario I		Scenario II		Scenario III	
	Estimated numbers	Share in the total	Estimated numbers	Share in the total	Estimated numbers	%	Estimated numbers	%
M (18-65)	950 000	33%	1 150 000	37%	850 000	49%	850 000	25%
F (18-65)	1 150 000	40%	1 150 000	37%	650 000	37%	1 350 000	40%
<18	750 000	26%	750 000	24%	200 000	11%	1 100 000	32%
18-65	2 100 000	72%	2 300 000	74%	1 500 000	86%	2 200 000	65%
65>	50 000	2%	70 000	2%	50 000	3%	100 000	3%
TOTAL	2 900 000	-	3 120 000	-	1 750 000	-	3 400 000	-

Source: M. Duszczyk, P. Kaczmarczyk, War and migration: the recent influx from Ukraine into Poland and possible scenarios for the future, CMR Spotlight 4(39) 2022, p. 7

In the first scenario (long continuous war, mostly on a regional level), it is to be expected that the conflict continues (with varying intensity, scope, and scale of activities) for the next several years, i.e., similar to the war over Donbas and Luhansk after the Russian aggression of 2014. Thus, the economic situation in Ukraine will remain adverse, which will stimulate more intensive economic migration than in the past. This means that the structure of the inflow may change, with an increasing share of men and older people (the ban on leaving Ukraine by men aged 18-60 will be significantly liberalised or even totally lifted). In this scenario a grand total of about 3.1 million Ukrainians will reside in Poland in the medium term and the demographic structure will be as follows: 24% children, about 37% women and 37% men (at working age). About 72% of people

²⁴⁹ Cf. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, op. cit., 167.

will be of working age, which means that the age structure would be similar to the one we have now²⁵⁰.

Within the framework of the second scenario (a quick and lasting peace), one should assume a quick (by autumn 2022) conclusion of peace, which will stabilise the situation in the short run and will also bring relatively favourable conditions for Ukraine (territorial, reparations, candidacy to the EU, etc.) in the medium and long term. It would mean a relatively large reduction in the stock of women and children and some outflow of men (including those residing in Poland in the pre-war period). In this scenario, it should be assumed that the number of Ukrainian citizens staying in Poland will stabilize at around 1.75 million, of which 1-1.25 million would be “pre-war” immigrants (mainly males) and 0.5-0.75 million war refugees would transform into “post-war” immigrants (mainly females, children and the elderly, to a large extent family members of those staying in Poland before the war). It should be assumed that mainly people from Eastern Ukraine will stay in Poland, since the destruction of the infrastructure is (and will be until the end of the war) the greatest there, and reconstruction will take the longest. The demographic structure would be as follows: 11% children, about 37% women and about 49% men. The economically active adult population would account for about 86%, which would mean a gradual but rather slow return to the structure of the population residing in Poland before the outbreak of war (share of economically active persons: over 95%)²⁵¹. This is also the best scenario from the point of view of posting in the internal market of the EU.

Finally, the third scenario – which is the grimdest one so far²⁵². It assumes a greater destruction in western Ukraine, whereas a peace agreement will be signed earlier than assumed in scenario one. This means that regardless of the conditions of the peace, an additional influx of children, the elderly and women should be expected, as well as a possible outflow of men (ongoing fighting, reconstruction of the country after signing the peace agreement). In this variant, one should assume an increase in the number of Ukrainians in Poland to around 3.4 million (by the end of 2023). The

²⁵⁰ Cf. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, op. cit., 167-168.

²⁵¹ Cf. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, op. cit., 168.

²⁵² Unfortunately, there may be yet another scenario, whereby Russia would gain a military advantage and eventually occupy much of Ukraine's territory. Ukrainian citizens would flee *en masse* to Poland and other European countries. In such a scenario, the number of refugees could even exceed 10 million, of which about 60% would stay for some time in Poland – see M. Duszczyk, P. Kaczmarczyk, *War and migration: the recent influx from Ukraine into Poland and possible scenarios for the future*, op. cit., p. 9.

demographic structure could then become as follows: 32% children, 40% women and about 25% men. The economically active adult population would account for about 65%, due to the increased proportion of minors compared to the pre-war (or even baseline) period.

In all the above scenarios – it is unlikely that the state of the Ukrainian's economy will quickly return even to pre-war standards (already insufficient, as indicated above). This will contribute to a steady and larger than before 24 February 2022 flow of migration to Poland and to other EU Member States, too. The latter's volume will undoubtedly be linked with whether the period of temporary protection under the Temporary Protection Directive and the Council Implementing Decision 2022/382 will be prolonged (or whether any other mechanism of the EU / international law could be put in place). Such flow of migration will have a higher share of females – which might then be changing both the structure of persons employed in Poland as well as those posted. Finally, for obvious reasons, at the moment one could only speculate about whether the huge influx of displaced persons, coupled with the persons already living and working in Poland prior to the war - will influence the number and directions of posting. *Ex abundanti cautela*, given that the majority of the displaced persons seeking safety abroad are women and children²⁵³ one could state that the pool of persons who can be employed and posted could mainly be in those sectors of activity where women would be most likely to find employment. At the same time, since the majority of persons reaching Poland do know have full command of Polish, one could speculate that their numbers will be rising gradually (yet rather quickly, given sound and proven capabilities of Ukrainian people to master foreign languages), especially in sectors in which traditionally women make up the majority of persons employed (an example could be human health and social work activities sector and the activities of the posted caregivers).

Given that the number of third-country nationals registered in the ZUS is also breaking records as indicated above (indeed as mentioned above – already more than 6% of all the employed persons who are subject to ZUS contributions – are third-country nationals²⁵⁴ - with Ukrainians accounting for 72% of all TCNs registered with the ZUS²⁵⁵) and the fact that since the outbreak of the Russo-

²⁵³ Cf. *Ukraine Situation: UNHCR Supplementary Appeal 2022*, 8 March 2022, retrievable at: <https://reliefweb.int/report/ukraine/ukraine-situation-unhcr-supplementary-appeal-2022>

²⁵⁴ Cf. T. Żołciak, G. Osiecki, Praca szuka cudzoziemca. Rośnie liczba płatników ZUS, 12 May 2022, op. cit.

²⁵⁵ Cf.: *Rośnie liczba płatników składek i ubezpieczonych*, 13 May 2022, <https://www.zus.pl/-/ro%C5%9Bnie-liczba-p%C5%82atnik%C3%9B%C3%B3w-sk%C5%82adek-i-ubezpieczonych>

Ukrainian war, already 358 thousand persons were employed in Poland²⁵⁶, the outlook for entrepreneurs posting TCN workers abroad looks rather bright.

²⁵⁶ As it results from the data of the Polish Ministry of Family and Social Policy published on 27 July 2022; see also A. Błaszcak, *Spada bezrobocie i przybywa Ukraińców w Polsce [Unemployment is falling and there are more Ukrainians in Poland]*, *Rzeczpospolita* 6.06.2022, <https://www.rp.pl/rynek-pracy/art36462701-spada-bezrobocie-i-przybywa-pracujacych-ukraincow-w-polsce#:~:text=Prawie%20o%202026%20tysi%C4%99cy%20zma%C5%82a,Ukrainy%20%E2%80%93%20ju%C5%82BC%20ponad%202000%20tys.>

3. The scale and characteristics of 'irregular' intra-EU posting

3.1. 'Irregular posting'

In this chapter we aim to examine the number of actual controls carried out by the Polish National Labour Inspectorate in relation to workers posted from and to Poland. We then examine the exchange of information between liaison institutions, information on penalties and fines and cross-border execution of fines and penalties – all of which is facilitated by the IMI system and was supposed to intensify after the enforcement directive entered into force. The numbers show that the exchange of information is surprisingly small in relation to the number of postings (especially from Poland). With the exception of Austria, Member States use the IMI system seldom or never. There is no data available on the inspections carried out by the inspections in host Member States if they were conducted without any involvement of the Polish NLI. The chapter is concluded by presenting data from ZUS on the number of PDs A1, which were denied.

Irregularities in the posting of workers may vary in kind. The first part of the analysis does not differentiate between serious crime, fraud, posted workers' rights abuses and minor mistakes. It focuses solely on the statistical data obtained from the Polish National Labour Inspectorate office and from the Polish Social Insurance Institution. This data relates to the number of cases in which questions have been raised by competent liaison institutions and/or by the competent institution of the sending Member State. Subsequently the numbers are presented against total number of postings – based on the number of PDs A1. In conclusion, this chapter gives more information about the statistics of control of compliance, than on the nature of irregularities, which is coherent with the general approach of the POSTING.STAT project. For this reason, data on the number of irregularities must be treated with caution.

The National Labour Inspection is responsible for control over working conditions and labour law compliance for foreign employers who directly employ Polish citizens, foreign employers who post workers to Poland and employers established in Poland who post workers to other Member States. The latter two categories are in the scope of our interest. The tool used to cooperate with other Member States' Inspection is IMI – the Internal Market Information Exchange System, adopted for this purpose by the so-called Enforcement Directive 2014/67/EU. The Inspection is also responsible for execution of fines and penalties imposed by authorities of host Member States on employers posting workers from Poland. The number of these cases is also an indicator of the scale of irregularities.

The Polish Social Insurance Institution on the other hand is responsible for confirming the applicability of the Polish legislation on social security in cross border situations, including posting of workers and carrying out work in two or more Member States. To this end the competent institution verifies the criteria for application of Art. 12 of the Regulation 883/2004, such as prior applicability of the Polish legislation, ‘normal carrying out of its activities’ of an employer, the so-called ‘non replacement’ condition and the maximum period of posting, which should not exceed 24 months. In the case of Art. 13 BR the competent institution verifies if the planned work in two or more Member States has been actually carried out (and not just scheduled), if the work had non-marginal character in all the Member States under consideration. It verifies which is the country of residence and in which country employer has registered office or activity. Irregularities in social security by and large derive from non-compliance with one or more of the above conditions. In such cases a PD A1 is denied or revoked if it had been already issued.

3.2. Irregularities in the application of the Posting of Workers Directive to workers posted from Poland

From the content of complaints addressed to the National Labour Inspectorate²⁵⁷ on the performance of work abroad in 2020, it follows that **they were dominated by the problem of unpaid wages for work and other work-related receivables in accordance with the regulations of the country of posting**. In 2020, a total of 156 controls were carried out on the posting of workers from the territory of Poland to work in other European countries (in 2019 - 247 controls, in 2018 - 204) ²⁵⁸.

As stated many times above, it is characteristic for Poland **to send citizens of third countries to work abroad**, who have been formally entrusted with work in Polish enterprises²⁵⁹. According to a well-established line of jurisprudence of the Court of Justice of the EU it is possible both on grounds of social security and labour law. A third-country national who is legally residing and legally employed on the territory of one Member State can be posted in the framework of freedom to provide services by his or her employer to another Member State without a separate work

²⁵⁷ Cf. *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020 [Report on the activities of the State Labour Inspection for the year 2020]*, Warsaw 2021, p. 173.

²⁵⁸ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit., p. 173.

²⁵⁹ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit., p. 174.

permit²⁶⁰. The liaison institutions questioned mainly to the fact of residence in Poland of third-country nationals prior to being posted.

Control activities carried out by the National Labour Inspectorate²⁶¹ indicate that posting entities use practices consisting of:

- circumventing the regulations on remuneration **in force in the country of posting** - by paying dues for business trips, which are not recognized by foreign services as a component of the employee's remuneration;
- directing to work abroad persons who were entrusted with work in Poland on the basis of civil law contracts (including foreigners / third-country nationals);
- posting to work outside the territory of the Republic of Poland, in order to perform contracts concluded with foreign contractors such persons **who previously were not connected with Polish entities by an employment relationship or another type of legal bond**;
- posting workers from the territory of the Republic of Poland **by companies using the services of the so-called virtual offices or letterbox companies**;
- **posting third country nationals** to work abroad - mainly citizens of Ukraine and Belarus, including those who **are illegally employed in Poland**. Not infrequently, these are also foreigners not registered for social insurance in Poland, who do not have a PD A1 declaration;
- **'apparent' posting of workers to EU countries, mainly third-country nationals formally employed in companies registered in Poland** (mainly in companies established by Ukrainian citizens), for whom employers obtained documents legalizing work in Poland (mostly declarations on entrusting work) and who never took up work in the territory of the Republic of Poland, because their aim was only to obtain this way a sort of 'a pass' to other EU/EEA countries, which constitutes **an abuse of the institution of posting of workers in the framework of the provision of services**²⁶².

In 2017-2020 the National Labour Inspectorate intensified exchange of information with liaison institutions of other Member States in the area related to posting of workers. The total number of information exchange grew from 466 (2017), to 572 (2018), to 763 (2019)²⁶³ only to settle down

²⁶⁰ See cases C-113/89 Rush Portuguesa and C-43/93 Vander Elst.

²⁶¹ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit., p. 175.

²⁶² *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2019*, Warszawa 2020, p. 175.

²⁶³ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2019*, op. cit., p. 151.

at 726 cases in 2020²⁶⁴. Only a small fraction of information exchange was initiated by the Polish Labour Inspection: 43 (2017), 32 (2018), 46 (2019) – respectively. In the last reporting year out of 723 enquiries 460 needed further investigation in the regional divisions, whereas the remaining ones were answered by simple access to public register of employers or other public data. Liaison institutions were denied access to individual documents only in few cases, due to lack of legislative basis.

Most enquiries came from Austria (248 in 2019, 348 in 2020), Belgium (170 in 2019, 165 in 2020). Taking into consideration that the Member States to which most workers are posted from Poland are Germany, France, Belgium and the Netherlands, the direction from where most questions come is an indicator of intensified activity of liaison institutions from these Member States and not an indicator of where most of irregularities appear. There is no statistical evidence that irregularities are geographically driven, i.e., there are some Member States in which there are more irregularities than in others.

Apart from enquiries the IMI system is used as a tool to forward notification²⁶⁵ about a decision on imposing fines or penalties on a posting employer and eventually as a tool of cross border execution²⁶⁶ of fines and penalties. It is this area where there has been the most dynamic growth of cases. In 2018 there were 26 cases, in 2019 – 82 and in 2020 – 185 cases.

This growth can be attributed not so much to the growing number of irregularities, but rather to enforcement efficiency in the receiving Member States, and specifically in Austria.

In 2020 184 out of 185 IMI notifications about imposing a fine or penalty came from Austria and 1 from Romania. In 2019 79 out of 84 notifications came from Austria, 2 from Finland and 1 from Slovakia. In previous years there has been 10 (2017) and 26 (2018) notifications, respectively.

The number of cross border executions of fines and penalties is growing from 6 in 2017, 8 in 2018, 20 in 2019, to 24 in 2020. Austria is also the Member State with the highest record of IMI applications for cross-border execution of fines and penalties addressed to the National Labour Inspectorate. In 2020, 20 out of 24 applications came from Austria, 3 from Latvia, 1 from Slovakia.

²⁶⁴ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, Warszawa 2021, p. 169.

²⁶⁵ Art. 15(1)(b) Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ L 159, 28.5.2014.

²⁶⁶ Art. 15 (1) (a) *ibidem*.

In 2019, 14 out of 20 came from Austria, 2 from Finland, 2 from Latvia, 1 from Sweden, 1 from Slovakia.

Few conclusions can be drawn from the above data. Poland being mainly sending country receives surprisingly few enquiries from liaison institutions using IMI system. Less than 0.11% of postings are subject to enquiry. Only half of them (0.05%) require further investigation. The number of fines and penalties in 2020, which serves as a good statistical indicator of spotted irregularities shows only 185 notifications on fines imposed in a receiving Member State and 24 cross-border executions of fines and penalties. There is no data on how many of the 185 cases of notification about fines conveyed to employers by Labour Inspection via IMI mechanism was preceded by an enquiry. Similarly, there is no data on how many of the 24 applications for cross border execution of fines and penalties were preceded by an enquiry. As a result, it is not possible to say if all (any) of the 24 execution cases overlap with 185 notifications.

There is no correlation with the number of workers posted to a given Member State and the number of uncovered irregularities. The highest number of workers from Poland are posted to Germany. And yet the IMI enquiries from this particular Member State constituted only 14% of total²⁶⁷ and there were no fines and penalties imposed in Germany on employers from Poland which would be executed on the basis of the Enforcement Directive. At the same time 99% of the fines and penalties notified via IMI have been imposed by Austrian authorities and 80% of all the fines and penalties executed by the NLI had been reported for cross-border execution by Austria, while the share of posting from Poland to that country has remained quite low.

Inspections of the processes of posting employees from Poland abroad are carried out by the National Labour Inspectorate at the request of a foreign inspection institutions, as well as in response to requests submitted to the National Labour Inspectorate by employees of Polish companies²⁶⁸. In 2020, the content of complaints was dominated by the problem of unpaid wages and other work-related receivables in accordance with the regulations of the country of posting. In relation to 151 foreigners (in 2019 - 494), whose correctness of posting to work abroad was verified, it was found that they do not meet the definition of an employee posted from the territory of the Republic of Poland²⁶⁹.

²⁶⁷ Own calculation on the basis of data from *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, Warszawa 2021

²⁶⁸ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit., 2021, p. 173.

²⁶⁹ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit. 2021, p. 174.

The above data confirms the potential role of the National Labour Inspectorate with respect to cooperation with foreign institutions of the European Union, which as a result of the Enforcement Directive has been clearly reinforced. Nonetheless, when the numbers of controls (156), information exchange (726), fines and penalties notification (185) and their cross-border execution (20) are confronted with the number of posting from Poland (619,127 in 2020 – last aggregated data available), the scale of the control and non-control actions to eliminate irregularities is small²⁷⁰. It is however not safe to draw any definite conclusions about the size and impact of irregular postings on the overall picture. Equally we do not know what part of irregularities goes unnoticed.

3.3. Irregularities in the application of the Posting of Workers Directive to workers posted to Poland

In 2020, labour inspectors conducted **70 controls on the posting of workers on the territory of Poland** (132 in 2019, 137 in 2018). The reduced number of inspections remained in connection with the outbreak of coronavirus, which was associated with **a lower number of cases of posting of workers on the territory of Poland**²⁷¹. NLI activities (control and non-control-related ones) in 2020 covered 72 entities posting workers to work in Poland, and the findings were made in relation to 747 foreigners, including primarily those posted from the territory of:

- Ukraine - 432 employees;
- Republic of Korea - 93;
- Germany - 36;
- Belarus - 36;
- Czech Republic - 35.

The basis for selecting the entities to be inspected were primarily declarations of posting entrepreneurs submitted to the National Labour Inspectorate and in the case of foreigners posted from third countries - work permits issued by the relevant voivodes and own findings of the Regional Labour Inspectorates²⁷².

²⁷⁰ The reference year for this conclusion is 2020.

²⁷¹ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit., p. 176.

²⁷² *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit., p. 176.

Violations of the regulations were revealed in 63% of the inspected cases (59% in 2019, 65% in 2018)²⁷³. These figures do not indicate any significant increase in violations as a result of the entry into force of the Directive.

Table 19. Violations of regulations concerning documents submitted to the PIP on posting of workers to the territory of Poland in 2018 - 2020²⁷⁴

Type of violation	2018	2019	2020
Failure to submit a declaration on posting workers to the territory of the Republic of Poland	49	35	10
Failure to notify of change data covered by the declaration	7	11	3

Source: own calculations based on the NLI data

3.4. Irregularities in the application of the coordination of social security systems' rules

There is no data available on frauds or forgery of PDs A1. Individual cases have been investigated in the past and presented during the European Labour Mobility Congress in Krakow in 2016. However, the only statistical data from which irregularities may be inferred are data on the number of negative decisions taken by the competent institution (State Social Insurance Institution – ZUS) after an application for A1 portable document was filled.

In 2019 there were 9,889 negative decisions. In 2,989 cases conditions have not been met. In 3,900 cases there was a different cause for refusal.

In 2020 there were 3,309 negative decisions. In 1,569 cases conditions have not been met. In 1,740 cases there was a different cause for refusal.

In 2021 there were 3,493 negative decisions. In 1,020 cases conditions have not been met. In 2,473 cases there was a different cause for refusal.²⁷⁵

²⁷³ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020*, op. cit., p. 176.

²⁷⁴ Table extracted from *Report on the activities of the National Labour Inspection for the year 2020*, Warsaw 2021, p. 180.

²⁷⁵ Data from the ZUS, 2021.

Table 20. Share of negative decisions in all PDs A1 applications

Reference year	2019	2020	2021
Grand total PDs A1	647,989	619,127	676,775
Negative decisions	9,889	3,309	3,493
Conditions not met	2,989	1,569	1,020
Other reasons	3,900	1,740	2,473
Share of negative decisions in all PDs A1 applications	1,50%	0,53%	0,51%

Source: Own calculations based on data from ZUS

As shown in the table above, the negative decisions constitute a small fraction (from 1.5% – to as low as 0.5%) of all the applications submitted to the ZUS. It must be noted that there are some employers who do not meet the conditions for the application of the Polish legislation during respective posting periods. They intentionally apply for PDs A1 in order to get a formal refusal from the ZUS. Such negative decision guarantees legal compliance when they insure their employees in the receiving Member State. It is hard to call such behaviour “irregularity” in the posting of workers. At the same time there is still a number of posted workers on behalf of whom PD A1 application is never filed. Due to the fact that PD A1 does not in itself create a right, but only confirms the applicable legislation, it is difficult to treat the currently available data from the ZUS as entirely appropriate source in the quest to trace all irregularities, even if every posting without PD A1 would be treated as an irregular one.

4. The impact of the COVID-19 pandemic on intra-EU posting of workers

4.1. Introduction

This chapter is dedicated to the impact of the pandemic on intra-EU posting of workers. The COVID-19²⁷⁶ pandemic is a public health, socioeconomic, political, and human rights crisis that has resulted in millions of cases and the death of millions of people so far and has severely impacted national economies worldwide²⁷⁷. The EU is one of the regions of the world with greatest spread of the virus, yet also the place, where human mobility had played a central role²⁷⁸. Indeed, until March 2020 the mobility of workers was increasing, and the posting of workers was a constantly growing “hot-topic”²⁷⁹.

However, since then, the world has suddenly changed because of the pandemic and the effects it has brought. The posting of workers changed too. Travelling for work purposes that was obvious and the order of the day in many sectors and for many categories of workers, became less evident and started to turn into an exception, only authorized under strict conditions.²⁸⁰ It goes without saying that posted workers in the EU have been facing particular challenges in view of the COVID-19 outbreak and the measures imposed, not only in terms of border restrictions on the free movement of workers and services, but also in terms of emergency measures introduced to mitigate and protect workers and businesses from negative consequences of the crisis²⁸¹.

4.2. COVID-19 countermeasures

4.2.1. COVID-19 countermeasures undertaken by the EU institutions

The overall economic and labour market consequences of the COVID-19 pandemic were predicted to be more serious than those of the 2008–2009 global financial crisis and its economic impact on

²⁷⁶ Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

²⁷⁷ International Organisation of Migration IOM. *Cross-Border Human Mobility Amid and after Covid-19 Policy Paper*, July 2020. Retrievable at: https://www.iom.int/sites/default/files/default/pp_crossborder_human_mobility_amid_and_after_covid-19_policy.pdf

²⁷⁸ S. Marcu, *Towards Sustainable Mobility? The Influence of the COVID-19 Pandemic on Romanian Mobile Citizens in Spain*, Sustainability 2021, 13, 4023. <https://doi.org/10.3390/su13074023>, s. 1.

²⁷⁹ Of note is that a concept of ‘highly mobile workers’ appears in this context as well – for more see Z. Rasnaca, *Essential but unprotected: highly mobile workers in the EU during the Covid-19 pandemic*, ETUI Policy Brief, no. 9/2020, p. 1 et seq.

²⁸⁰ S. Stefanova-Behlert, M. Menghi, *The impact of Covid-19 on posted workers: the new ‘posting framework’*, European Issues no. 591, 13 April 2021, p. 1.

²⁸¹ Cf. ETUC note on Posted Workers and the COVID-19 Outbreak, retrievable at: <https://www.etuc.org/en/document/etuc-note-posted-workers-and-covid-19-outbreak>

the world economy to be the deepest contraction since World War II²⁸². Indeed, there is consensus among the World Bank, the OECD, and other multilateral institutions that the recession it brought could actually rival the recessions experienced after the two World Wars and during the Great Depression of the 1930s²⁸³.

Against such an unfavourable background, the introduction of unprecedented restrictive measures across the Member States took place. The European Union did not stay idle, too - since the outbreak of COVID-19, the mobility restrictions imposed have been unprecedented on a local, regional (as well as global scale)²⁸⁴. Between March and June 2020, EU countries have closed their borders and imposed stringent quarantine measures. Fortunately, the result of those efforts was that the complete elimination of free movement in the EU was averted.

In this regard, one can point out to several guidelines and communications, issued by the European Commission and aimed at alleviating some effects of the measures immediately undertaken by the EU Member States, many of which have been questionable in relation to free movement rules or other aspects of EU law²⁸⁵.

The first of such documents was announced on 16 March 2020²⁸⁶ and dealt with protecting health and keeping goods and essential services available. The most relevant provisions thereof set forth that '*Member States may reintroduce temporary border controls at internal borders if justified for reasons of public policy or internal security*' (para. 18) and that '*Member States should permit and facilitate the crossing of frontier workers, in particular but not only those working in the health care and food sector, and other essential services (e.g., childcare, elderly care, critical staff for utilities) to ensure continued professional activity.*' (para. 23)²⁸⁷.

²⁸² A. Sommaribas, B. Nienaber, *Migration and mobility of third national labour workers to and inside Europe during the Covid-19 pandemic – a legal analysis*, Comparative Migration Studies 2021, p. 8.

²⁸³ Cf. D. G. Papademetriou, K. Hooper, *Commentary: How is COVID-19 Reshaping Labour Migration?*, International Migration 2020, 58(4), p. 259, *World Bank Group 2020 Global Economic Prospects*, June 2020. World Bank Group, Washington D.C. Some unexpected changes due to the pandemic, even included 'dubious renovations' to historic buildings and sites – Cf.: *As the pandemic raged, Europe bulldozed historic buildings*, The Economist, Europe, Jan 29th edition.

²⁸⁴ Cf. also: I. Dmitri, G. Szilvia, *The COVID-19 Crisis as an Opportunity for Escaping the unsustainable global tourism path*, Tour. Geogr. 2020, 22, 624–632.

²⁸⁵ Both guidelines and communications are not legally binding and only provide recommendations.

²⁸⁶ Cf. European Commission (2020a) *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, COM(2020) 1753 final, 16 March 2020, OJ C 86I , 16.3.2020, p. 1–4.

²⁸⁷ For the notion of 'essential' work – see e.g., S. Stevano, R. Ali, M. Jamieson, *Essential Work: Using A Social Reproduction Lens to Investigate the Re-Organisation of Work During the COVID-19 Pandemic*, Working paper No. 241 SOAS University of London, April 2021 p. 7 et seq.

Two further acts concerned the broadly understood transport issues. In the first of them, regarded the so-called ‘green lanes’ to be introduced on the borders²⁸⁸, while the second was the Communication on facilitating air cargo operations²⁸⁹.

Subsequently, on 30 March 2020, the European Commission published *Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*²⁹⁰. It acknowledged that posted workers (along frontier and seasonal workers) ‘are crucial for their host Member States, for instance for the health care system, the provision of other essential services (...) or ensuring the supply of goods. (...)’. It also provided that the continued free movement of all workers in critical occupations is essential, including both frontier workers and posted workers of whom it provided an inexhaustive list in para. 2. Furthermore, as laid down in para. 7, posted workers should be allowed by Member States to continue crossing their borders to their workplace if work in the sector concerned is still allowed in the host Member State.

The second Communication, issued on the very same day²⁹¹, did not explicitly mention the postings. Nevertheless, by making recommendations on the introduction of temporary travel restrictions to apply to all non-essential travel from third countries, the European Commission has acknowledged the national limitations of assignments coming from a non-EU country²⁹².

A further Communication was issued on 15 May 2020²⁹³, in which the European Commission requested that Member States allow workers, among them posted workers, and seasonal workers, and service providers to cross borders and have unhindered access to their place of work. It also envisaged that travel restrictions and border controls were to be gradually lifted throughout the EU if epidemiological developments across Europe continued their positive trend, in particular when a sufficiently low-level transmission rate is reached.

²⁸⁸ Cf. *Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, 2020/C 96 I/01; C/2020/1897; OJ C 96I, 24.3.2020, p. 1–7.

²⁸⁹ Cf. *Communication from the Commission European Commission Guidelines: Facilitating Air Cargo Operations during COVID-19 outbreak* 2020/C 100 I/01; C/2020/2010, OJ C 100I, 27.3.2020, p. 1–4.

²⁹⁰ Cf. 2020/C 102 I/03 C/2020/2051, OJ C 102I , 30.3.2020, p. 12–14.

²⁹¹ *Communication from the Commission COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy*, 2020/C 102 I/02, C/2020/2050, OJ C 102I, 30.3.2020, p. 3–11.

²⁹² S. Stefanova-Behlert, M. Menghi, *The impact of Covid-19 on posted workers...*, *op. cit.*, p. 3.

²⁹³ Cf. *Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19*, 2020/C 169/03, C/2020/3250, OJ C 169, 15.5.2020, p. 30–37.

Worth mentioning in this regard is also the guidance note that was adopted in June 2020 by the Administrative Commission for the coordination of social security systems. The note contains a non-exhaustive list of identified issues as a result of the COVID-19 pandemic including changes in work patterns and border restrictions. It also sets out possible solutions to issues subject to Regulations 883/2004 and 987/2009 in connection with the measures taken by Member States as a response to the COVID -19 pandemic, both within the framework of the Regulations and other suggested measures to be considered due to the force majeure element. A year later, at the June 2021 meeting of the Administrative Commission, these guidelines have been extended until 31 December 2021²⁹⁴. The note and its subsequent prolongation took stock of that the recommendation to telework, which was issued in most Member States as part of national public health measures included also closing borders or increased border checks to contain the spread of COVID-19 in mid-March 2020, would have adverse effects on the determination of applicable social security legislation for cross-border workers if the rules of Title II of Regulation 883/2004 continued to be applied as intended. The pandemic however constitutes a case of *force majeure* in accordance with the case law of the Court of Justice of the European Union which justified that the intensive use of telework does not change the determination of the applicable social security legislation for cross-border workers. With regard to telework by cross-border workers, the public health measures taken by Member States to contain the spread of COVID-19 therefore justified that the extensive use of telework in the cross-border worker's Member State of residence should not change the social security legislation applicable to them before the pandemic²⁹⁵.

The COVID-19 pandemic has also shown that highly mobile workers (and among them – posted workers) who frequently move either within or in and out of the EU are irreplaceable during a public health crisis. The European Commission had spotted this, too. Indeed, in the above-mentioned Guidelines for border management measures to protect health and ensure the availability of goods and essential services, it intended to set up the principles for an integrated conception of what the Commission herself called “effective border management”: the aim was to protect public health, while preserving the integrity of the internal market, at the same time. To

²⁹⁴ ELA Report — *Cross-border teleworking during the COVID-19 pandemic (2021).pdf* (europa.eu), p. 2. See also the answer given on 13 December 2021 by Commissioner N. Schmit to a question by E-004443/2021 by MEP Sara Matthieu (Verts/ALE), as well as a Deloitte article at: <https://www.taxathand.com/article/18784/Belgium/2021/COVID-19-Tax-and-social-security-reliefs-for-cross-border-workers-further-extended>

²⁹⁵ ELA Report — *Cross-border teleworking during the COVID-19 pandemic*, op. cit., p. 2.

integrate Member States' policies concerning exceptions to the ban on mobility the Commission suggested a **model of free movement**, for the time of the sanitary crisis, **based on a selection of workers whose free movement rights are maintained**.

The mechanism of posting workers in the framework of the provision of services in the EU had been partially used to satisfy some of the identified labour shortages in the EU, including in those sectors of activity which could have now been dubbed 'essential'. The COVID-19 pandemic only exacerbated those needs. Indeed, many posted workers continued to provide essential services, including health care, food service, and transport, when the COVID-19 pandemic had shut down much of the European economy. Also, at least some workers of the construction sector were classified as 'essential'.

4.2.2. United but divided? Measures undertaken by the Member States

The outbreak of COVID-19 triggered a wide range of responses from governments in the European Union. Given that the disease was new and effective medical countermeasures did not exist in early 2020, governments had to adopt non-medical measures aiming at the containment and mitigation of COVID-19. With the aim of "flattening the curve", these policies included bans on public gatherings, closures of academic institutions and public places, national and international mobility restrictions, confinement, and several others.

Italy was the first country in Europe to apply intervention measures from the beginning of March 2020 in response to the severity of the COVID-19 outbreak. Other EU countries soon followed suit, using similar countermeasures around mid-March 2020. The adoption of these policies varied in their scale, stringency, and pace across countries. While most European states implemented confinement measures, the extent of limitations of people's freedoms differed across individual countries²⁹⁶. Lockdowns were usually strictest where the pandemic was deadliest (Italy, Spain, and France), imposing severe limitations on population movements and businesses.

As the pandemic began to abate, governments started designing the lockdown exit strategies and restarting their economies. However, the risk that the new wave of the epidemic may happen did not disappear, especially given that the vaccine development takes a long time, and herd immunity

²⁹⁶ See to that end, S. Robin-Oliver, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis*, op. cit., p. 615.

question remained. In this light, the issue of lifting lockdowns has become a new subject of public debate across and within European countries.

Having observed the measures undertaken by the EU institutions, one could point out to the following features of postings in the times of COVID-19:

a) reintroduction of border controls, closure of the borders and lockdowns have contributed to entrepreneurs posting workers prolonging the latter's stay in the host Member State either due to the impossibility to perform the intended work or due to physical lack of means of transportation to return to their posted workers' home state (e.g., accessible flights or bus / shuttle bus connections)²⁹⁷. This could contribute to an average duration of posting missions. The very restrictions might have contributed to the extension of the concept of remote work (naturally in sectors where this had been possible at all);

b) terms and conditions of posting, especially its duration, may be subject to change at short notice. Some postings have been cancelled, postponed or extended at the very last minute. Such a continuously altering environment caused entrepreneurs to face difficulties to evaluate whether a posting is feasible in a reliable way due to the necessity to conduct a case-by-case legal assessment of whether the posting is permissible. Naturally such assessments inevitably involve additional costs and impose time constraints on the conduct of such postings. Even if an individual posting is permissible, companies may decide not to post workers so as to avoid all these efforts. In addition, the context of legal uncertainty implying continuous and sudden changes of national rules have made it harder for companies to plan postings and provision of cross-border services as they did in the past.

²⁹⁷ S. Stefanova-Behlert, M. Menghi, *The impact of Covid-19 on posted workers...*, op. cit., p. 3.

4.3. COVID-19 measures undertaken by Poland²⁹⁸ and their impact on posting to and from Poland

4.3.1. COVID-19 in Poland – introduction and selected measures

It is quite telling that the Polish ‘patient zero’, confirmed on 4 March 2020, was a person who actually had made use of the freedom of movement at the EU’s internal market²⁹⁹. Indeed, the first 50 officially registered cases of COVID-19 in Poland occurred between 4 and 11 March 2020. Those people were infected with the virus mainly outside Poland, in particular in Italy, Germany, Great Britain, Spain or Norway. Their stay in these countries was *inter alia related* to the performance of work there, on varying legal bases³⁰⁰.

On 9 March 2020, the Polish government implemented health checks at its borders. The day after, the World Health Organization declared the local transmission phase of SARS-CoV-2 in Poland³⁰¹. On 12 March 2020, the first death from COVID-19 in Poland occurred (a victim was a 57-year-old woman), shortly after the government ordered the closure of all schools, cultural institutions, and universities. On that day a so-called “state of epidemic emergency” was declared, effective from 14 March. The government also closed borders on 15 March at midnight and instituted social distancing measures. All Polish citizens and foreign residents working in Poland returning to Poland were subject to a mandatory 14-day quarantine³⁰².

On 20 March 2020, a state of “epidemic” (providing for a stricter regime than the state of epidemic emergency) was declared in Poland, despite the fact that the number of infections as a proportion of the population was lower in Poland than in some Member States of the Union.

At the same time, a plethora of legal acts aimed at tackling the pandemic and in response thereto was enacted in quick succession, following *the Act of 2 March 2020 on extraordinary measures for preventing, counteracting and combating COVID-19, other infectious diseases and*

²⁹⁸ In Poland, from 3 January 2020 to 4:14pm CET, 29 December 2021, there have been 4 080 282 confirmed cases of COVID-19 with 95 707 deaths, reported to WHO. As of 19 December 2021, a total of 45 700 535 vaccine doses have been administered – cf. <https://covid19.who.int/region/euro/country/pl>

²⁹⁹ At the beginning of March 2020 - a 66-year-old had returned to Western Poland from the Westphalia region of Germany, he has subsequently been hospitalized at the University Hospital in Zielona Góra, western Poland and discharged.

³⁰⁰ Cf. *Stanowisko 23: COVID-19 a granice* [Position 23: COVID-19 and the borders], Polska Akademia Nauk [The Polish Academy of Sciences], 26 October 2021, retrievable at: <https://informacje.pan.pl/informacje/materiały-dla-prasy/3466-stanowisko-23-covid-19-a-granice>

³⁰¹ R. Paul, *Europe’s essential workers: Migration and pandemic politics in Central and Eastern Europe during COVID-19*, Eur. Policy Anal. 2020, 6, p. 250. See also:

³⁰² R. Paul, *Europe’s essential workers: Migration and pandemic politics in Central and Eastern Europe*, op. cit.,

*emergencies caused by them*³⁰³. After the introduction of the state of epidemic emergency and in order to mitigate the economic impact of the pandemic crisis in 2020, the Polish government drew up and adopted a an aid package consisting of six so-called “Crisis Shields”, numbered one by one 1.0, 2.0, 3.0, 4.0, 5.0 (so-called “Tourism Shield”), and 6.0 (the so-called “Crisis Shield”), as well as the so-called “Financial Shield 1.0”, with other acts supplementing those ones, too.

The value of assistance as of the end of 2020 amounted to PLN 162.9 billion (EUR 35.6 billion at the average exchange rate of the National Bank of Poland as of 28 January 2022) and it was provided through various institutions. The Polish entrepreneurs were offered, among others, subsidies, credit subsidies, guarantees, loans, exemptions from contributions, wage subsidies, subsidies to salaries. According to the renowned think tank Polish Economic Institute (PIE)’s survey, the solutions available in the Anti-Crisis Shield have been used by 86% of the surveyed entrepreneurs. Overwhelming majority of them (92%) used more than one support instrument, while 52% actually made use of more than 10 support instruments³⁰⁴.

While the available instruments were numerous³⁰⁵, it is worth mentioning those which proved crucial for the uninterrupted functioning of the free movement on the internal marker of the EU. First of all, these were solutions prepared for foreigners, including those who work in Poland. Such solutions included *inter alia*:

- a) Extension of deadlines for applying for residence permits (e.g., temporary and permanent ones, as well as for extension of a visa or visa-free stay) in Poland – deadlines for filing relevant applications, falling within the period of the state of epidemic emergency or the state of epidemic.
- b) Extension of the validity of temporary residence permits and national visas – in such a case there is no need for new permits or visa extensions or the issue or replacing of residence cards or visa stickers.
- c) Opportunity to legally stay in Poland on the basis of the so-called short-term residence titles The solution in question results in recognition of the legal stay of foreigners who on 14 March 2020 stayed in Poland on the basis of short-term residence titles, including the visa-free regime, from the day following the day on which their legal stay under those titles ended until the 30th day

³⁰³ Cf. the Polish Journal of Laws 2020, item 374, as amended).

³⁰⁴ Cf. PIE study.

³⁰⁵ For the summary of the instruments in English see: Poland. Government and institution measures in response to COVID-19, KPMG insights, retrievable at: <https://home.kpmg/xx/en/home/insights/2020/04/poland-government-and-institution-measures-in-response-to-covid.html>; in Polish,

following the day of cancellation of the state of epidemic emergency or the state of epidemic (whichever is cancelled later).

- d) Extension of the period for voluntary return.
- e) Extension of the deadline for leaving the territory of the Republic of Poland.
- f) Extension of the validity of work permits and statements
- g) Extension of the validity periods of Foreigner's Temporary Identity Certificates (TZTC)³⁰⁶

Worthy of note here is also the provision of the Polish so-called **regulation on limitations**³⁰⁷, whose § 3(2)(15) in its original version³⁰⁸ provided for the quarantine to a person (irrespective of their nationality) crossing the Polish border (irrespective of whether this border is external – with third countries) or internal – for Poland the latter meant land borders with Germany, Czechia, Slovakia and Lithuania and a sea border with Sweden. Therefore, a person crossing one of the former (external) borders would generally have been subject to quarantine, whereas a person crossing one of the latter (internal) borders would not have been subject to such obligation. The very provision was amended several times (which naturally created a lot of chaos).

However, the wording of the original regulation on limitations had covered all borders, therefore any person arriving to Poland from abroad was subject to quarantine – which of course was one of the factors sometimes putting the entrepreneurs off their plans to carry out a given posting mission. Interestingly, the original regulation of 13 March 2020 of the Minister of Health on the announcement of the state of epidemic emergency³⁰⁹ provided for the exemption from the quarantine for persons crossing the Polish border (when making return to Poland) **within the scope of their crossing the border of the Republic of Poland in the course of professional activities**, e.g., in a neighbouring state by a person performing professional activities in that state, including being a driver operating a motor vehicle in road transport. Some entrepreneurs posting workers from Poland rightly concluded that the very provision did not concern drivers only, but any person

³⁰⁶ Cf. a dedicated government website at: <https://www.gov.pl/web/tarczaantykryzysowa/dodatkowe-wsparcie-cudzoziemcy>

³⁰⁷ Cf. its latest consolidated text (amended numerous times since): ROZPORZĄDZENIE RADY MINISTRÓW z dnia 6 maja 2021 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii [*REGULATION OF THE COUNCIL of MINISTERS of 6 May 2021 on establishing certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic situation*], Journal of Laws 2021, item 861, as amended [Its first version was dated 31 March 2020, Journal of Laws 2020, item 566, as amended].

³⁰⁸ Analogous provision is contained in the currently binding regulation.

³⁰⁹ Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego, Dz.U. 2020, poz. 433 [*Regulation of the Minister of Health of 13 March 2020 on the declaration of an epidemic emergency in the territory of the Republic of Poland*, Journal of Laws 2020, item 433].

who carried out their professional activities and was then making return to Poland. In practice it concerned mostly workers posted to Germany (highest volume of workers posted from Poland) and helped a great deal to avert the panic which was spreading after the decision to impose the quarantine (some media even dubbed the mass return of Poles to Poland in March – April 2020 as “Dunkirk in reverse”³¹⁰).

The above-mentioned provisions also made clear the reasons for less posted workers from third countries, confirmed by the closer look at the numbers of postings to Poland from respective countries. We have already shown it in greater detail below, but it is worth recalling it here that all countries (apart from Ukraine) suffered the decline in numbers, but the case of the USA is particularly telling. The number for 2020 (159 postings from the USA) means not only the decrease by a staggering percentage when compared to 2019, but also a substantial decrease as compared to the figures of 2018 (by 61%!)³¹¹. The reason for such a slump has undoubtedly been the restrictions on travelling from the USA to Poland, introduced (and lifted) several times in the course of the pandemic.

Generally speaking, the COVID-19 pandemic has had important impact on the labour market in Poland. According to a generalized study, based on the Statistics Poland [GUS]’s data³¹² in 2020 around 94,000 jobs were lost in Poland due to the epidemic, mainly in the private sector. Moreover, the Statistics Poland’s data indicate an increase in the number of the registered unemployed - at the end of December 2020 their number amounted to 1,046.4 thousand and was higher by 180.1 thousand (i.e., by 20.8%) than at the end of December 2019. At the same time, the registered unemployment rate at the end of 2020 was 6.2% and it was higher by 1.0 percentage point in relation to the corresponding period of 2019.

To grasp the major tendencies at the Polish labour market, it is worth to look into the Statistics Poland’s data more closely, especially to those regarding the number of liquidated jobs and the number of vacancies. When it comes to the number of employees (people in employment / occupied posts of work) in Poland, it was subject to a decrease in the second quarter of 2020 (by

³¹⁰ Cf. R. Paul, *COVID-19: Policy responses across Europe*, op. cit., p. 241-242.

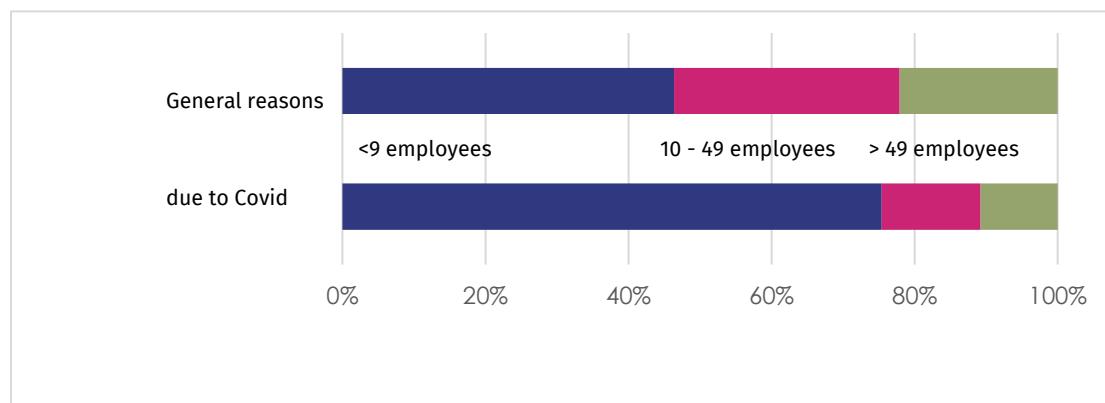
³¹¹ Cf. *Sprawozdanie z działalności Państwowej Inspekcji Pracy w 2020 roku* [Report on the activities of the State Labour Inspectorate in 2020], p. 179.

³¹² *Synteza wyników badań ewaluacyjnych dotyczących skutków epidemii COVID-19 oraz mitygacji skutków tego zjawiska*, Analizy- Ministerstwo Funduszy i Polityki Regionalnej [Synthesis of the results of evaluation studies on the impact of the COVID-19 epidemic and the mitigation of its effects, Analyses] -Ministry of Funds and Regional Policy, p. 4.

2.7% compared to the end of the first quarter of 2020³¹³), in the fourth quarter of 2020 (by 3.4% as compared to the end of the third quarter of 2020³¹⁴); also the number of posts of work occupied at the end of the first quarter of 2021 was lower by 2.9% than at the end of the first quarter of 2020³¹⁵; whereas at the end of the second and third quarter of 2021, the number of posts of work was almost the same as in the preceding quarters³¹⁶.

In Q4 2020, which seems to be the best fit for comparison purposes given data availability, 53.9 thousand jobs were lost. This was almost 14% less than in Q3 2020. The loss of jobs took place across all size classes of units. A higher-than-average share of jobs eliminated due to the epidemic situation occurred in units with up to 9 employees.

Figure 24. Jobs lost in Poland in Q4 2020



Source: Statistics Poland, 2020

Job losses due to the spread of COVID-19 had taken place mainly in the private sector. Taking into account the type of activity according to the Polish Classification of Activities (PKD), it can be concluded that jobs eliminated due to the epidemic situation in some sections were correlated with jobs eliminated in general. For example, jobs lost in manufacturing accounted for about 24% of jobs lost in the whole economy, while jobs lost in this section due to the pandemic epidemic

³¹³ Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w II kwartale 2020, Statistics Poland, p. 1.

³¹⁴ Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w czwartym kwartale 2021 r., Statistics Poland, p. 1, respectively.

³¹⁵ Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w pierwszym kwartale 2021 r., op. cit., p. 1.

³¹⁶ See Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w drugim kwartale 2021 r., Statistics Poland, p. 1 and Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w trzecim kwartale 2021 r., Statistics Poland, p. 1, respectively.

situation accounted for 40.0% of the total jobs eliminated for that reason. The larger difference was greater in the section accommodation and food service activities. In this section the share of jobs lost due to the pandemic was more than 4 times higher than the share of jobs lost overall.

In Q4 2020, relatively the fewest jobs were lost (as compared to previous quarters) due to the pandemic situation in the country. In Q4 2020, the number of workers depicting jobs which had been filled, after a period of significant decline in Q3 2020, returned to the Q2 2020 levels. However, when comparing the scale of the loss between Q3 and Q4 2019 and Q3 to Q4 2020, it was nearly 9 times greater in the latter, which testifies on the impact the pandemic had on that segment of labour market in Poland.

The largest changes in economic activity of population resulting from the circumstances accompanying the fight against the COVID-19 pandemic took place in the second quarter of 2020. During this period, the population of employed persons comprising 16,274 thousand, decreased in relation to the second quarter of 2019 by 210 thousand, i.e. by 1.3%, while compared to the first quarter of 2020 – by 151 thousand, i.e. by 0.9%³¹⁷ (for instance: the number of employed persons in the second quarter of 2019 compared to the second quarter of 2018 also decreased, albeit a drop was lower, by 81 thousand, i.e. by 0.5%); whereas between the first and the second quarter in the years preceding the pandemic, the direction of changes was different than in 2020 (in 2018, a growth by 221 thousand persons was recorded, while in 2019 - by 210 thousand).

Despite a decrease in the total number of the employed in the second quarter of 2020, at the same time the sizes of the subpopulations described above when characterising the first quarter (*inter alia* persons temporarily not performing work and persons working shorter than usually for establishment related reasons) increased significantly. The number of persons working at home also increased - it was connected with performing remote work, which was allowed by the provision introduced within the framework of one of the so-called anti-crisis shields³¹⁸.

The third quarter of 2020 – viewed from the contemporary perspective – seemed to be raising the hope for the end of the pandemic, hence loosening of the restrictions. It was also observed in statistical data. The number of employed persons increased slightly compared to the second quarter

³¹⁷ Statistics Poland, *Wybrane aspekty rynku pracy w Polsce. Aktywność ekonomiczna ludności przed i w czasie pandemii COVID-19 [Selected aspects of the labour market in Poland. Economic activity of the population before and during the COVID-19 pandemic period]*, J Warszawa, Oct. 2021, p. 20.

³¹⁸ Statistics Poland, *Wybrane aspekty rynku pracy w Polsce... [Selected aspects of the labour market in Poland...]*, op. cit., p. 20.

of 2020, while, at the same time, there was observed a decrease in percentages of persons not performing work due to economic stoppages, as well as due to employees' illnesses and the so-called "other reasons" which included childcare. However, it should be indicated that, despite an evident decrease in comparison to the second quarter of 2020, the discussed percentage shares were still at least twice as high as in the corresponding period of 2019 (with the exception of holiday periods).

In the fourth quarter of 2020, the restrictions connected with prevention of the increase in the number of the COVID-19 cases were sharpened, including, *inter alia* re-closure of schools, extended limitations of activities in the area of catering, collective accommodation, and commercial facilities such as the shopping centres. Nevertheless, the number of persons who had a job amounted to 16,555 thousand and compared to the previous quarter, as well as the corresponding period a year ago, its growth was recorded (respectively: by 43 thousand, i.e., by 0.3% and by 88 thousand, i.e., by 0.5%).

The kind of activity conducted by a company was really significant in respect to sustaining the level of employment in 2020, including the circumstances caused by the COVID-19 pandemic. In 2020, compared to the pre pandemic period, two phenomena were observed: a decrease as well as an increase in the population of persons who had a job.

The strongest dynamics of year-on-year changes, presenting decreases in the population of the employed, were observed in section accommodation and catering, while in each successive quarter of 2020, these y/y differences were increasingly larger. The situation in this section was clearly connected with the continued restrictions connected with the COVID-19 pandemic and severe limitations involving possibility to conduct economic activity within the scope of this section (in the first quarter of 2020, the number of employed persons was on average lower by 2.8% y/y, while in successive ones, y/y drops respectively accounted for: 12.2%, 16.3%, and 18.2%).

Moreover, a y/y decrease in the number of the employed took also place in sections: manufacturing, trade, repair of motor vehicles, administrative and support service activities, mining and quarrying, arts, entertainment and recreation, real estate activities. The scale of changes compared to 2019 varied depending on a quarter³¹⁹.

³¹⁹ Statistics Poland, *Wybrane aspekty rynku pracy w Polsce... [Selected aspects of the labour market in Poland...]*, op. cit., p. 21.

The size of the population of employed persons (who had a job) during the entire period of the binding force of the above-mentioned ‘Shields’ was probably influenced by the clauses included in the contracts for obtaining standstill benefits, determining the necessity of maintaining employment, albeit also the determination of the entrepreneurs themselves regarding the necessity to withstand this difficult period and as far as possible not dismissing the staff, which would be difficult to rebuild after the end of the crisis (hence, appearing in the public space notion of ‘hoarding of employees’).

Particularly worth pointing out to is also a new form of performing work which appeared in Poland in 2020, namely: remote work, which was closely related to the state of the COVID-19 epidemic announced in March 2020 and successive special acts passed at a fast pace.

In the second quarter of 2020, work at home due to the COVID-19 in a form of remote work was regularly performed by 1,493 thousand persons, which accounted for 9.2% of the total number of employed persons. In the third quarter, i.e., after lifting some COVID-related 520 thousand persons, i.e., 3.3% of the employed worked regularly in a form of “home office”. In the fourth quarter, after a repeated increase in the number of COVID-19 cases and following its restrictions in the economy, the population of persons regularly performing remote work again exceeded a million (1009 thousand persons), while the percentage of persons performing that form of work accounted for 6.1%. In addition, also a significant share of the employed performed remote work occasionally. In the second quarter of 2020, work from home due to the COVID-19 in a form of remote work performed “from time to time” 746 thousand persons, accounting for 4.6% of the total number of the employed. During the successive two quarters, this population comprised 507 thousand and 802 thousand persons, i.e., respectively 3.1% and 4.8% of the total number of the employed in these quarters.

4.3.2. COVID-19 and posting of workers to Poland

As mentioned before³²⁰, among the duties foreign employers posting their workers to Poland must comply with is to file with the National Labour Inspectorate (NLI), no later than the date of commencement of the posting of a worker, a declaration with certain information concerning the details of the foreign employer posting the worker, the host entity, the posted workers, and the

³²⁰ A reference in this regard has been provided in a chapter on posting to Poland in this report.

conditions of their posting. The Inspectorate must also be notified of any subsequent change in certain information provided in the declaration.

Careful examination of the data provided by the NLI demonstrates the extent of the impact of the pandemic on posting of workers to Poland, setting out the decrease in majority of categories and numbers, as shown in figures and tables below. Such the impact has also been acknowledged by the NLI itself, which justified it by the pandemic³²¹. One needs to emphasize here, that another reason contributing to the decrease could have been the coming into force and application of Directive 2018/957³²², however, its extent is unknown.

As the Table 21 demonstrates below, in 2020³²³, the number of postings to Poland registered a substantial decrease (by almost 7 thousand – that is by almost 22%). Such a turn of events is obviously contrary to the previous tendency of a substantive rise registered from 2016.

Table 21. Evolution of the number of persons reported to the National Labour Inspectorate, posted to Poland during a reference year, 2018 - 2020

Reference year	Number of postings	% Change y/y
2020	24,373	- 22%
2019	31,217	+ 127%
2018	13,731	+ 86%
2017	7,372	+ 78%
2016	4,148	+ 4%
2015	~4,000	

Source: own study & calculations, based on NLI data.

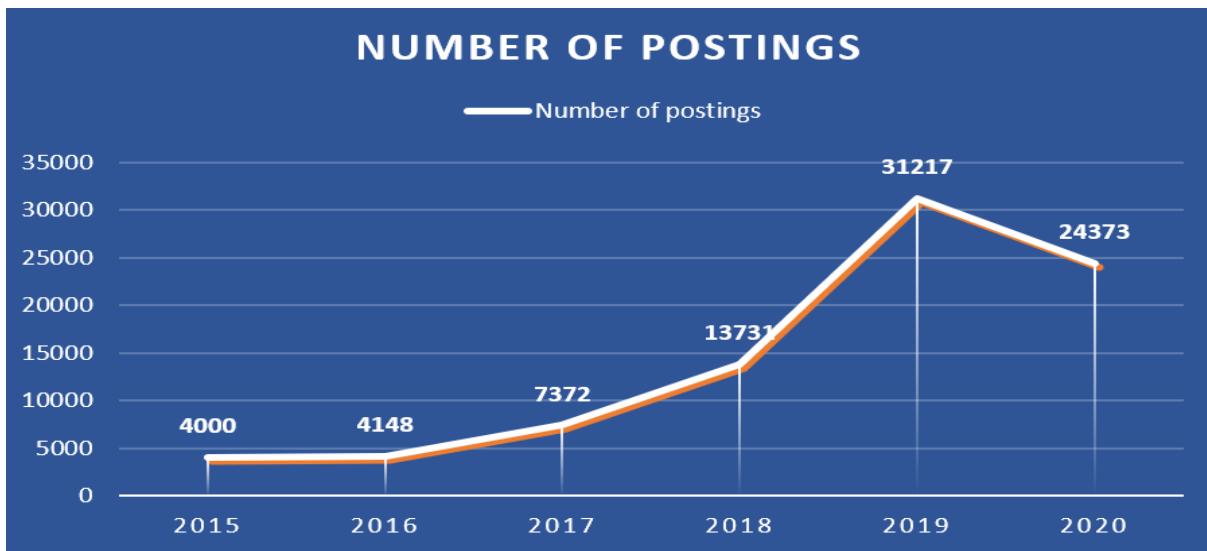
One could say on the basis of data from 2018 to 2020 that the decrease in incoming postings from EU/EEA/ Switzerland was higher than the one concerning postings from other countries, as shown in the table below.

³²¹ Cf. *Sprawozdanie z działalności Państwowej Inspekcji Pracy w 2020 roku [Report on the activities of the State Labour Inspectorate in 2020]*, p. 179.

³²² We further explore this topic in Ch. 5 hereof.

³²³ Unfortunately, to date, figures for 2021 have not been made available – 2020 data are the most recent ones.

Figure 25. Number of postings reported to the NLI from EU / EOG / Switzerland, 2018-2020



Source: own study & calculations, based on the NLI data.

Table 22. Number of postings reported to the NLI, 2018-2020

Year	Reference year 2018	Reference year 2019	Reference year 2020			
Category	Sum	Including from EU/EEZ/ Switzerland	Sum	Including from EU/EEZ/ Switzerland	Sum	Including from EU/EEZ/ Switzerland
Number of postings to Poland	13,731	6,765	31,217	18,046	24,373	14,821
Number of countries posting workers to Poland	61	26	65	39	49	23
Number of foreign entities posting workers to Poland	1,110	833	1,591	413	1,525	345

	2016		2017		2018		2019		2020	
	Sum	EU/E EA/ SUI	Sum	EU/E EA/ SUI	Sum	EU /EEA /SUI	Sum	EU /EEA /SUI	Sum	EU /EEA/ SUI
Number of foreign entities posting workers to Poland	1,030	760	1,878	1,413	1,110	833	1,591	413	1,525	345

Source: own study, based on the NLI data

The likely reason for the above might be that Poland was easier to access for citizens of the EU/EEA Member States / Switzerland than for third country nationals³²⁴. A good example in this regard is provided by the currently applicable Polish so-called Regulation on limitations³²⁵, whose § 2(2)(2) provided for the quarantine in case of persons crossing the national border which is external border as provided for in Art. 2(2) of the Schengen Borders Code³²⁶ - in this case such a border means for Poland its borders with Russia, Belarus and Ukraine, but not with the EU Member States (Germany, Czechia, Slovakia, and Lithuania). Therefore, a person crossing one of the former borders will generally be subject to quarantine, whether a person crossing one of the latter borders will not be subject to such obligation.

Such a supposition concerning the reasons for less posted workers from third countries seems to be exacerbated by the closer look at the numbers of postings from respective countries. Indeed, all countries (apart from Ukraine) suffered the decline in numbers, but the case of the USA is particularly telling – as mentioned before³²⁷.

³²⁴ Cf. <https://www.gov.pl/web/usa/covid-19-podroze-do-polski>

³²⁵ Rozporządzenie Rady Ministrów z dnia 6 maja 2021 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii [REGULATION OF THE COUNCIL of MINISTERS of 6 May 2021 on establishing certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic situation], Journal of Laws 2021, item 861, as amended.

³²⁶ Cf. REGULATION (EU) 2016/399 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77/1 of 23 March 2016.

³²⁷ Cf. Business Insider of 18 June 2021: <https://businessinsider.com.pl/wiadomosci/zmiana-zasad-wjazdu-do-polski-przylot-obywateli-usa/3z13szv>

At the other extreme is Ukraine, which as **a sole country registered an increase of postings to Poland in 2020**, as shown in the table above. However, the very increase was meagre, especially given the previous year-on-year increases.

Table 23. Number of postings reported to the NLI from Ukraine, 2017³²⁸-2020

	2017	2018	2019	2020
Ukraine	1,134	3,788	8,745	9,389

Source: own calculations on the basis of the data from the NLI

4.3.3. COVID-19 and posting of workers from Poland

The similar, downward tendency, most likely caused by the emergence of COVID-19 can also be inferred from sheer numbers of PDs A1 issued in Poland. When comparing the grand total number of PDs A1 issued in the last five years, we can clearly observe, firstly, the upward tendency in the number of PDs A1 issued prior to 2020 and, secondly, a substantive drop between 2019 (a total of 649,969 PDs A1 issued) and 2020 (a total of 619,127 only)³²⁹. Interestingly and crucially, as mentioned before - data for 2021 show that their number (generally) bounced back again.

Table 24. PDs A1 issued in Poland under Art. 12 and 13 BR, 2017-21

	2017	2018	2019	2020	2021
Grand total number of PDs A1 issued	573,293	605,710	649,969	617,709/ 619,127	676,775
Art. 12 (12(1), (2))	236,177	238,525	246,849	207,964	223,293
Art. 13 (13(1), (2), (3), (4))	324,593	351,364	387,342	399,675	443,951

Source: own study & calculations, based on ZUS data

A detailed look on PDs A1 issued in 2019 and 2020 demonstrates how the pandemic unfolded and how it affected the data in various stages thereof and especially during its focal points when the number of the infected was highest and the limitations (including quarantine to persons crossing

³²⁸ The detailed data concerning Ukraine are available from that year on.

³²⁹ See also in this report – part 5.

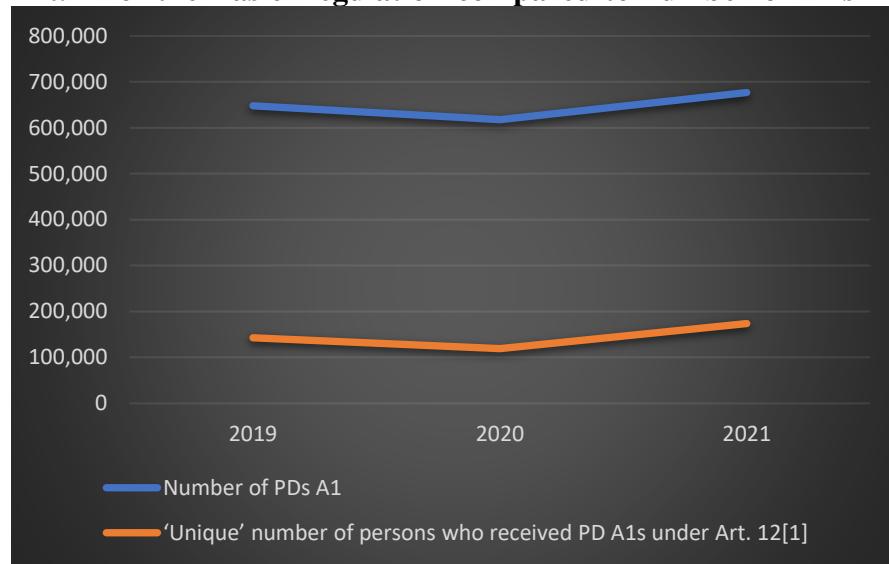
back the border when coming back to Poland) were the strictest and also when it was impossible to return to Poland (when the borders were being closed to persons arriving from certain countries). Using the very same data for respective months, we generally ruled out any major incidence of the adoption, implementation, and transposition of the Directive 2018/957 on the figures (perhaps apart from the month of August 2020).

Table 25. Evolution of persons with a PD A1 issued by Poland, 2019-2021

	2019	2020	% Change 2020 vs 2019	2021
Grand total PDs A1				
<i>January</i>	55,241	68,477	+ 24%	56,046
<i>February</i>	48,398	58,719	+ 21.3%	51,275
<i>March</i>	53,372	59,420	+ 11.3%	60,056
<i>April</i>	50,623	41,643	- 17.7%	50,882
<i>May</i>	52,250	47,132	- 11.5%	52,479
<i>June</i>	44,956	39,582	- 11.5%	55,072
<i>July</i>	52,178	51,164	- 1.9%	55,910
<i>August</i>	55,418	43,564	- 21.4%	56,320
<i>September</i>	58,607	55,469	- 22.4%	60,902
<i>October</i>	65,658	58,251	- 11.3%	60,415
<i>November</i>	54,756	44,686	- 9.4%	57,961
<i>December</i>	56,532	49,602	- 12.3%	59,457

Source: Own calculations based on data from ZUS

Figure 26. Number of ‘unique’ (‘individual’) persons who received PDA1 on the basis of Art. 12 of the Basic Regulation compared to number of PDsA1 issued under Art. 12 BR.



It is also worth mentioning and comparing individual categories (e.g., PDs A1 issued on the basis of Art. 12 / Art. 13 Regulation 883/2004) as well as in individual sectors. We chose to compare such sectors that according to report were most affected by the pandemic, especially given that work within their scope could not have been performed remotely.

Table 26. Industry (including the construction sector)

Sector & legal basis in Reg. 883/2004	Year	2019	2020	2021	% Change y/y 2019 - 2020
Industry – NACE Codes B to F (including the construction sector - F) – Art. 12		165,142 (112,553)	136,975 (93,492)	147,170 (104,308)	- 17.1% (-16.9%)
Industry – NACE Codes B to F (including the construction sector - F) – Art. 13		101,088 (79,658)	102,497 (79,710)	121,705 (99,370)	+ 1.4% (+ 0.07%)

Source: Own calculations on the basis of data from ZUS

As shown above, the industry sector (equivalent of the NACE codes B to F, including “F” – construction) suffered a substantive plunge in 2020, as compared to 2019 – yet that concerned only PDs A1 issued on the basis of Art. 12 Regulation 883/2004 and not the ones issued on the basis of

Art. 13 thereof. At the same time, it is worth noting that both the former (both in general industry – by almost 7% on the plus side as well as in construction – by more than 10% year on year) and the latter (both in general industry – by a tiny percentage on the plus side as well as in construction – by the slightest of margin) rebounded in 2021 as compared to 2020.

Undoubtedly, what must have affected those numbers (especially in 2020) were lockdowns and restrictions of entry introduced by the major receiving countries (for Poland, according to research, those were in 2020: Germany, Italy, Belgium) and the consequential inability of posting entrepreneurs to carry out their services abroad in some periods, as well as restrictions of entry into Poland, which made some workers reconsider their postings abroad, especially in the light of envisaged problems on the border on return (a particularly relevant issue in spring (from March till May 2020 and in the autumn of 2020).

The rebound of 2021 is indeed the testimonial that PDs A1 issued on the basis of Art. 12 Regulation 883/2004 had been losing ground to Art. 13 PDs A1, as evidenced indeed also by numbers in recent studies.

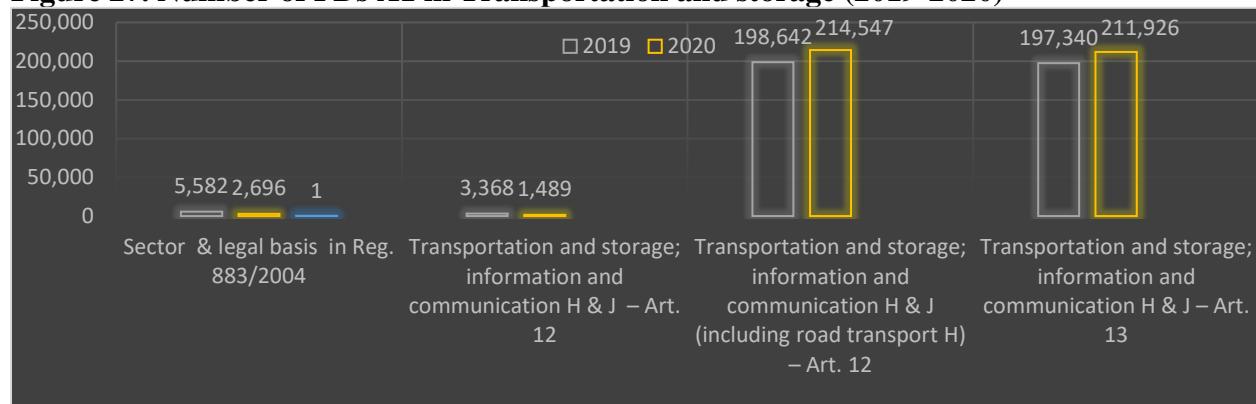
Interestingly, the data for 2021, show the number of PDs A1 issued in those months were on the rise again, as compared to 2020, yet it did not concern all sectors of activity.

Table 27. Number of PDs A1 in Transportation and storage

Sector & legal basis in Reg. 883/2004	Year	2019	2020	2021	% Change y/y 2019 – 2020
Transportation and storage; information and communication H & J (including road transport H) – Art. 12		5,582 (3,368)	2,696 (1,489)	2,636 (3,004)	-51.7% (-55.8%)
Transportation and storage; information and communication H & J (including road transport H) – Art. 13		198,642 (197,340)	214,547 (211,926)	225,285 (224,326)	+ 8% (+ 13.1%)

Source: Own calculations on the basis of data from ZUS

Figure 27. Number of PDs A1 in Transportation and storage (2019-2020)



Source: Own calculations on the basis of data from ZUS, 2021

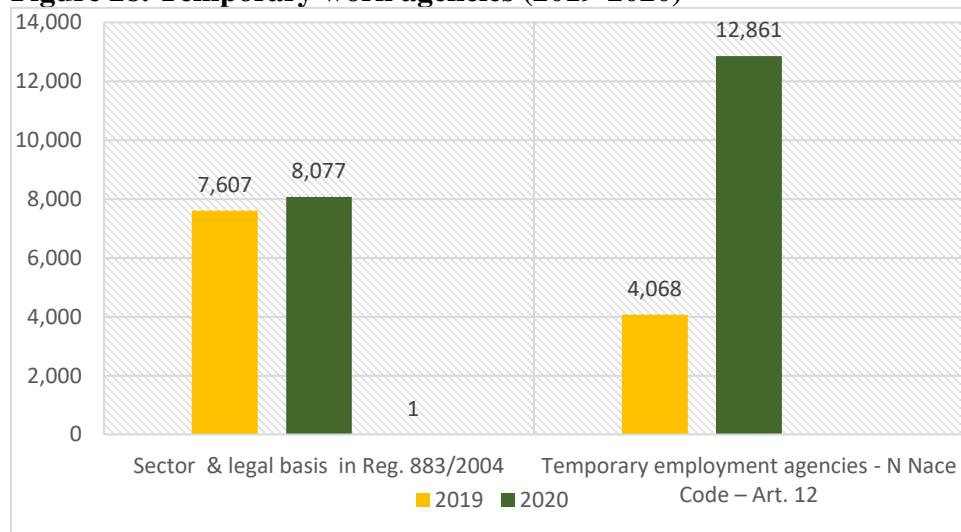
When it comes to **NACE-equivalent PKD sectors H & J transportation and storage; information and communication sector (including H - road transport)**, **2020 brought about a slump in numbers of PDs A1 issued on the basis of Art. 12 Regulation 883/2004** (as shown in the table above, those numbers were however a fraction of attestations issued for persons normally pursuing their activity in two or more Member States of the EU). **This was not the case for Art. 13 PDs A1, where actually an 8% increase was recorded** and 13% increase in transport sector only. Further increase was recorded in 2021. One could come to a conclusion that the pressure exerted by the EU institutions somehow enabled the movement of workers in this sector ('kept this sector going').

Table 28. Temporary Employment Agencies

Sector & legal basis in Reg. 883/2004	Year	2019	2020	2021	% Change y/y 2019 - 2020
Temporary employment agencies - N NACE Code – Art. 12		7,607	8,077	12,449	+ 6.2%
Temporary employment agencies - N NACE Code – Art. 13		4,068	12,861	8,257	+ 216.1%

Source: Own calculations on the basis of data from ZUS

Figure 28. Temporary work agencies (2019-2020)



Source: Own calculations on the basis of data from ZUS

As the above table clearly shows, PDs A1 issued for temporary workers posted abroad from Poland were on the rise in 2020, despite the pandemic. Particularly telling was indeed the rise in the attestations issued under Art. 13 Regulation 883/2004, amounting to a staggering 216.1% year on year, in the course of pandemic to top that (!). It could perhaps be attributable the movement possibilities of seasonal workers.

Table 29. Human health and social work activities' sector

Sector & legal basis in Reg. 883/2004	Year	2019	2020	2021	% Change y/y 2019 - 2020
Education, healthcare -NACE Codes P, Q, R, S – including healthcare and social assistance - Q NACE Code – Art. 12		51,674 (17,831)	45,565 (17,758)	45,672 (17,953)	- 11.8% (- 0.4%)
Education, healthcare -NACE Codes P, Q, R, S – including healthcare and social assistance - Q NACE Code – Art. 13		68,777 (46,096)	110,856 (63,981)	75,624 (56,833)	+ 61.2% (+ 37.8%)

Source: Own calculations on the basis of data from ZUS

4.3.3.1. COVID-19 and posting of workers from Poland – case of foreigners (including especially third-country nationals)

As rightly remarked by A. Sommaribas and B. Nienaber, the COVID-19 pandemic and its negative effects on economies, borders and mobilities, which are still ongoing, can be seen as having an

especially high impact on the restricted intra-EU mobility of third country nationals as well as on their status in the EU Member States. The closure of borders, together with the economic crisis and the mobility restrictions with which third-country nationals are confronted, puts them in a precarious situation as there is a fear for their employments or independent activities making uncertain their reason for staying and residing in the host country, which may oblige them to leave it. However, this possibility becomes even more complex as the internal and external borders are closed, obstructing the possibility of making secondary moves to find employment or preventing a return to their country of origin. This situation can result in these third-country nationals falling into an irregular and thus precarious residency situation. The pandemic is primarily a health crisis but in the migration context it also becomes a humanitarian and an economic crisis, one which demonstrates the difficulties Member States have in responding to the situation through ad-hoc legal and policy interventions³³⁰.

The very issue was indeed no stranger also in case of third-country nationals staying in Poland, with a possible intention of being posted to another Member States of the Union. To carry out this part of our analysis properly, it was worth looking into numbers of third-country nationals present just before and after the outbreak of the pandemic on the territory of the Republic of Poland (the pandemic triggered a closer scrutiny thereof than before). On the basis of nine public registers (unfortunately – some of them – fragmented), one may conclude that as of 31 December 2019, the number of foreigners (including third-country nationals) had been estimated at 2,106,101 of whom 1,351,418 persons (64.2%) were citizens of Ukraine. They were followed by citizens of Belarus (105,404) and Germany (77,073). In the population of foreigners (including TCNs) 1,208,545 persons (57.4%) had a Polish PESEL Personal Identification Number, and 897,556 (42.6%) did not have such a number³³¹.

Moreover, it is estimated that at the end of February 2020 there were 2,213,594 foreigners residing in Poland, of which 1,390,978 were citizens of Ukraine. On the basis of information from the Polish Border Guard, in March and April 2020, 938,014 foreigners departed Poland and 714,834

³³⁰ A. Sommaribas, B. Nienaber, *Migration and mobility of third-country national labour workers...*, op. cit., p. 3-4.

³³¹ *Populacja cudzoziemców w Polsce w czasie COVID-19* [Population of foreigners in Poland during COVID-19], GUS [Statistics Poland], 04 June 2020, p. 2.

foreigners arrived, which indicates a decrease of over 223,000 persons³³². Some details are provided in the Table below.

Table 30. Arrivals and departures of foreigners to/from Poland from 1 March to 30 April 2020 – selected countries of citizenship

Country of citizenship	Arrivals	Departures	Comparison
Ukraine	407,786	567,828	-160,042
Belarus	162,719	196,706	-33,987
Russia	41,791	51,308	-9,517
Great Britain	38,031	46,180	-8,149
Moldova	2,633	5,152	-2,519
Israel	1,787	3,327	-1,540
Ireland	5,702	6,997	-1,295
Turkey	1,390	2,527	-1,137
Serbia	657	1,745	-1,088
USA	4,228	5,246	-1,018

Source: Polish Border Guard data, quoted after: *Populacja cudzoziemców w Polsce w czasie COVID-19 [Population of foreigners in Poland during COVID-19]*, GUS [Statistics Poland], 04 June 2020.

The above means that the population of non-Polish citizens in Poland at the end of April 2020, compared to the end of February 2020, **decreased by 223,000 persons, that is by 10.1%**. Among them, the population of Ukrainian nationals decreased by 11.5%; according to the estimates, during March and April 2020 the population of Ukrainian citizens in Poland decreased by almost 160 000 persons. The greatest percentual decrease was recorded among the citizens of Belarus (32.2%) and Russia (25.7%)³³³.

When it comes to the number of foreigners notified to the Polish social security system, at the end of April 2020 their number dropped by about 47,900 in comparison with February 2020; among them approximately 43,800 were Ukrainian citizens (91.4%).

³³² Cf. *Populacja cudzoziemców w Polsce w czasie COVID-19 [Population of foreigners in Poland during COVID-19]*, op. cit., p. 2.

³³³ Cf. *Populacja cudzoziemców w Polsce w czasie COVID-19*, op. cit., p. 2. See also: [https://www.newsweek.pl/polaska/spoleczenstwo/ilu-ukraincow-jest-w-polsce-ilu-ukraincow-wyjechalo-z-polski-w-pandemii/9b0gcx6](https://www.newsweek.pl/polска/spoleczenstwo/ilu-ukraincow-jest-w-polsce-ilu-ukraincow-wyjechalo-z-polski-w-pandemii/9b0gcx6)

When it comes to foreigners at the Polish labour market, which could have direct repercussions for the volume of workers posted abroad, the largest change between the end of December 2019 and February, March and April 2020 was recorded in case of Ukrainian citizens – the decrease in their numbers of persons notified to the social security system in Poland – of almost 30,000 notifications. Undoubtedly, the reason for such the decrease must have been the introduction of health checks at the Polish border (on 9 March) as well as the closure of the border at midnight 15 March 2020³³⁴.

4.4. (Potential) impact of the COVID-19 pandemic on the use of intra-EU posting

A. Short-time postings might become less likely (and less frequent)

According to many observations, the COVID-19 pandemic and its accompanying crisis was liable for the decrease of mobility in the EU in 2020. The numbers provided herein corroborate those assertions³³⁵; indeed, as rightly put by S. Devetzi - COVID-19 has put a magnifying glass on certain pre-existing issues in that regard³³⁶; some even found that persons with a migratory background have so far suffered higher income losses than others³³⁷.

However, assumptions had also been put forward, that postings and in particular, short-term postings, were to be unlikely – at least in the near future – to return to the high numbers they reached before the pandemic crisis. The following reasons were proposed for this trend:

- Sanitary measures would remain in place for some time and they would be likely to be reinstated when numbers of infections would rise after ‘getting back to normal’;
- When it comes to certain sectors, other forms of work and service, such as remote business management (e.g., via virtual meetings), have proved to be sustainable and cost-effective alternatives.

³³⁴ Cf. *Stanowisko 23: COVID-19 a granice* [Position 23: COVID-19 and the borders], Polska Akademia Nauk

³³⁵ Indeed, the overall number of PDs A1 issued decreased by almost 900,000 or by almost one-fifth as compared to 2019 – cf. F. De Wispelaere, L. De Smedt, J. Pacolet, *Posting of workers. Report on A1 Portable Documents issued in 2020*, op. cit., p. 11. The Authors however point out soberly to the fact that despite a rather sharp fall, the overall numbers are still higher than in 2018 and earlier – see p. 12.

³³⁶ Cf. S. Devetzi, E. Stergiou [Eds.], *Social security in times of corona. A legal comparison of selected European countries*, op. cit., p. 195. See also: F. Fasani, I. Mazza, *Immigrant key workers: Their contribution to Europe’s Covid-19 response*, IZA Discussion Paper, 2020

³³⁷ Cf. S. Devetzi, E. Stergiou [Eds.], *Social security in times of corona. A legal comparison of selected European countries*, op. cit., p. 195; A. Walter, *Social protection for migrant workers in Germany in times of corona* [in:] S. Devetzi, E. Stergiou [Eds.], *Social security in times of corona. A legal comparison of selected European countries*, op. cit., p. 23.

When it comes to the first of the above considerations, it indeed has proven to be an issue and is likely to remain so for unspecified time³³⁸. As to the second issue, it must be pointed out that the posting of workers takes place largely in sectors where the workers activities, because of their specific nature, cannot be performed remotely, since they require the worker to be physically present at the workplace. This is the case, for instance, in the construction and transportation sector. For these types of work, the pandemic has had immediate impact: first, some posting companies were, notably at the beginning of the crisis, forced to postpone or cancel some scheduled postings and reviewed some of their assignment plans. Many construction sites, for instance, were closed in response to the lockdowns³³⁹. This has made posted workers particularly vulnerable to the negative impacts of the crisis, both in terms of health and socio-economic consequences.

The pandemic times have, *inter alia*, revealed the specific importance of certain workers for the survival of the economy and social life; this is particularly evident for posted workers in sensitive areas, such as transport workers as well as in the health and food industry workers, medical workers, including caregivers etc.³⁴⁰. In our opinion, especially the latter's figures are bound to rise, even though the increase might be hampered by external factors – such as the infamous ‘Vander Elst’ visa still required for incoming postings by Germany.

However, in case of data concerning Poland the rise of PDs' A1 total number by in 2021 as compared to 2020 (and much higher when third-country nationals were concerned – a huge % year on year) has shown that Poland seems to be brushing off the COVID-19 effects within the posting of workers (labour mobility in general) quite efficiently, also in the sectors where carrying out work in person (e.g., in transport sector) is indispensable.

³³⁸ S. Stefanova-Behlert, M. Menghi, *The impact of Covid-19 on posted workers*, op. cit., p. 5 et seq. See also F. De Wispelaere, *Intra-EU labour mobility as adjustment mechanism for the economic shock caused by the COVID-19 pandemic: wishful thinking or a serious option?*, retrievable at: <https://hiva.kuleuven.be/nl/nieuws/nieuwsitems/Intra-EU-labour-mobility-as-adjustment-mechanism-for-the-economic-shock-caused-by-COVID-19-pandemic> - who was right to assert that despite several communication and guidelines from the European Commission, problems still remain for accessing certain Member States.

³³⁹ Cf. S. Stefanova-Behlert, M. Menghi, *The impact of Covid-19 on posted workers*, op. cit., p. 5. See also: C. Alcidi, F. Corti, *The EU response to Covid-19: breaking old taboos?* [in:] *Social policy in the European Union: State of play 2021*.

³⁴⁰ Cf. *inter alia*: S. Robin-Oliver, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis*, op. cit., p. 614. The Author rightly emphasises that this selection of the types of work mobility to be preserved, in the crisis, can be regarded as an indication of what future looks like: a dramatic regression.

B. National inspections might become more frequent and less random

However, the economic consequences should not be underestimated. Some of the companies that used to post employees abroad systematically, have faced severe financial difficulties which has forced them to reduce their business activities, including posting workers to other Member States. In this critical context, national authorities' inspections and controls have been increasing and therefore employers have become increasingly aware of the necessity to comply with all posting rules including registration of posted employees with local authorities of the host Member States. In fact, if posted employees are more likely to be controlled on the borders and asked to justify their purpose of travel, proof of posting registration is likely to become an important instrument in order to be able to pass the border. In this sense, the crisis may have increased awareness among stakeholders regarding the registration obligations³⁴¹.

Indeed, one can sense this when it comes to the posting to Poland. The latest *Action Programme of the National Labour Inspectorate for 2022-2024*³⁴² among the tasks for that period provided *inter alia* unlimited number of inspections potentially to be carried out in control of legality of employment, the carrying out of work by the foreigners, as well as posting from the territory of Poland (posting to Poland is to be controlled within the framework of 80 inspections).

C. Increased use of remote work³⁴³? Questions concerning conflicts of law?

In a number of situations, the pandemic had forced the creation of remote working situations, in others it has revealed remote working as a normal form of working. Indeed, the remote work may turn out to be an alternative to some of the forms of work. At the same time, it needs to be taken into consideration that in majority of occasions, there is no foreign service recipient of a remote work, therefore it may transpire that some remote workers risk not being formally regarded as posted workers (with all the potential adverse consequences)³⁴⁴.

Moreover, some interesting questions arise in the present regard in terms of the Basic Regulation. Its Art. 11 basically states, a person who works in a given Member State is covered by that state's

³⁴¹ *Ibidem*, p. 5 et seq.

³⁴² Cf. *Program działania Państwowej Inspekcji Pracy na lata 2022-2024 [Action Programme of the National Labour Inspectorate for 2022-2024]*, Warszawa 2021.

³⁴³ See in this regard: M. Mędrala (red. naukowa [scientific editor]), *Praca zdalna w polskim systemie prawnym [Remote work in the Polish legal system]*, Warsaw 2021.

³⁴⁴ For more see e.g., F. De Wispelaere, L. De Smedt, J. Pacolet, *Posting of workers. Report on A1 Portable Documents issued in 2020*, op. cit., p. 11.

social security system. However, a person that works in two or more EU Member States shall be covered by the social security system of the Member State in which they officially reside if they carry out a substantial part of their work in that particular Member State (Article 13 (1) BR). During COVID-19 period, many employers instructed their workers to work from home. This meant that frontier workers between EU Member States were in many cases required to perform their work from their country of residence. The question thus arose whether this would lead to a change in the applicable social security legislation, with the law of the country of residence “suddenly” becoming applicable to such workers instead of the law of the country of employment³⁴⁵. So far, the response from authorities had been rather swift - the administrative authorities e.g., in Belgium, the Netherlands as well as in Germany, agreed that working from home during the lockdown would not affect the applicable legislation³⁴⁶. In the similar vein, the Swedish and Danish governments agreed that social security laws covering cross-border Öresund commuters would not be affected by the restrictions imposed due to the pandemic. A question that might need to be addressed for the future is whether working from home several days a week will become a permanent phenomenon, and whether and how social security legislation will need to be adjusted accordingly³⁴⁷.

³⁴⁵ Cf. S. Devetzi, E. Stergiou [Eds.], *Social security in times of corona. A legal comparison of selected European countries*, op. cit., p. 196.

³⁴⁶ Cf. e.g., <https://pers.svb.nl/coronavirus-en-wonen-of-werken-over-de-grens-de-sociale-verzekeringverandert-niet/>.

³⁴⁷ See S. Devetzi, E. Stergiou [Eds.], *Social security in times of corona. A legal comparison of selected European countries*, op. cit., p. 196-197.

5. The impact of Directive 2018/957/EU amending Directive 96/71/EC

5.1. Introduction

In this Chapter we aim to analyse the impact (including the economic one) of the adoption and first several months of operation of the Revised Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services³⁴⁸ - which led to a great deal of debate³⁴⁹ and proved to be very important to a single market for services – a sector accounting for about 70% of the EU’s GDP and employment³⁵⁰. We deal first with the implementation of the Directive in Poland, then describe Polish and Hungarian actions for annulment brought to the Court of Justice of the EU under Art. 263 TFEU against the Directive (worth-noting since those were the only nations filing such actions) and then with the impact of the Directive – especially with regards to potential risks arising therefrom.

The major tool for analyses is data obtained from the NLI and the ZUS. When it comes to the further, we are fully aware of the division between the labour law and social security³⁵¹, yet the information on PDs A1 issued in respective years / months are the best indicator of

5.1.2. Implementation of the Directive into the Polish legislation

On 8 March 2016 the European Commission proposed a revision of the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Two years later, the co-legislators have adopted the Revision Directive³⁵².

As announced by Jean-Claude Juncker in July 2014, the Commission’s proposal was presented as a “targeted” revision of the PoW Directive in view of “ensuring fair working conditions for all

³⁴⁸ OJ L 173/16, 9.7.2018.

³⁴⁹ See e.g., B. Furåker, B. Larsson, *Revision of the EU Posting of Workers Directive, Social Dumping and Trade Unions’ Position* [in:] B. Furåker, B. Larsson, *Trade Union Cooperation in Europe. Patterns, Conditions, Issues*, p. 109.

³⁵⁰ G. Davies, Dion Kramer, *The Posting of Workers* [Forthcoming in: Robert Schütze & Takis Tridimas (eds.) *Oxford Principles of European Union Law Vol 2: The Internal Market*, OUP], Author’s Original Unedited Draft, p. 4.

³⁵¹ As stated *inter alia* by the Court of Justice of the EU in its judgment in C-17/19 Bouygues.

³⁵² For more on the history of the revision see *inter alia*: P. Van Nuffel, and S. Afanasjeva, *The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-Border Provision of Service*, European Papers 2018 3 (3): 1401–1427 (and the literature cited therein); M. Bottero, *Posting of Workers in EU Law: Challenges of Equality, Solidarity and Fair Competition*, op. cit.

workers”. The essence of the proposal has been to replace the host Member State’s obligation to impose minimum rates of pay by the requirement to have all legislation and collective agreements on remuneration applicable to posted workers, that is to say to have posted workers receiving wages determined in accordance with the same rules as local workers. For that purpose, relevant provisions of collective agreements declared universally applicable should be applied also outside the construction sector³⁵³.

The Revised Directive was implemented by the Polish legislator through the Act of 24 July 2020 amending the Act on the posting of workers in the framework of the provision of services and certain other acts³⁵⁴, which entered into force on 4 September 2020.

The changes introduced to the Polish legislation by the discussed act boil down to several key issues:

1) The definition of the employer posting workers has been changed.

An employer who posts a worker to the territory of the Republic of Poland is an employer who has its registered office and conducts substantial business activity in another Member State³⁵⁵:

a) from the territory of which it temporarily directs the employee to work on the territory of the Republic of Poland:

- in connection with the performance of a contract concluded by this employer with an entity conducting activity in the territory of the Republic of Poland,

- in a branch or in an enterprise belonging to the group of enterprises to which this employer belongs, which operates in the territory of the Republic of Poland,

- as an entity which is a temporary work agency or staff leasing agency, which has referred to the user undertaking a person who has remained a worker of that entity throughout the period of referral,

b) being an entity which as a temporary work agency or staff leasing agency has referred to the user undertaking a person remaining a worker of that entity throughout the period of referral, in

³⁵³ P. Van Nuffel, S. Afanasjeva, *The Revised Posting of Workers Directive: Curbing or Ensuring Free Movement?* [in:] *European Citizenship under Stress Social Justice, Brexit and Other Challenges*, red. N. Cambien, D. Kochenov, E. Muir, Leiden– Boston 2020, p. 285-286.

³⁵⁴ Cf. Polish Journal of Laws of 2020, item 1423, as amended (hereinafter also as ‘the Act’ or ‘the Amending Act’ where appropriate).

³⁵⁵ Art. 3 point 4 Act of 10 June 2016 on the posting of workers in the framework of the provision of services (Dz.U. z 2018 r. poz. 2206).

the case where the user undertaking in the territory of the same or another Member State then temporarily refers that worker to work in the territory of the Republic of Poland.

Temporary employment agencies (TEAs) are also to be regarded as the employer who posts the worker in question if the user undertaking sends out temporary workers in the context of successive posting (so-called "chain posting"³⁵⁶). In such a case it is the TEA's responsibility to complete all the formalities connected with the posting of a given worker³⁵⁷.

An employer who posts a worker from the territory of the Republic of Poland is an employer having its registered office, and in case of a natural person carrying out business activity - a permanent place of conducting such activity, in the territory of the Republic of Poland:

a) which temporarily directs a worker, within the meaning of the provisions of the Member State to which the worker is posted, to work on the territory of that State:

- in relation to the performance of a contract concluded by that employer with an entity established in the territory of another Member State,

- in a branch or company belonging to the group of undertakings to which that employer belongs, and which operates in the territory of that Member State,

- as a temporary work agency,

b) being a temporary work agency, where such agency directs the worker to the user undertaking in the territory of the Republic of Poland or another Member State, which then temporarily directs that worker to work in the territory of another Member State.

2) The Revision Directive substantially changed the requirement to ensure minimum working conditions in the host Member State. According to the previous regulations the posted worker was guaranteed remuneration at the place of posting that was not lower than the local minimum rates of pay. According to the newly introduced regulations, remuneration for work in Poland should include all obligatory remuneration components under the Labour Code and other regulations

³⁵⁶ For more on "chain posting" see e.g., *Practical Guide on Posting, Luxembourg: Publications Office of the European Union*, 2019, retrievable at: <https://op.europa.eu/en/publication-detail/-/publication/8ac7320a-170f-11ea-8c1f-01aa75ed71a1/language-en>; p. 14 et seq..

³⁵⁷ M. Kiełbasa, *Delegowanie (głównie do Polski) po nowemu – Polska transponuje Dyrektywę 2018/957/UE [Posting (mainly to Poland) in a new way - Poland transposes Directive 2018/957/EU]*, <https://inicjatywa.eu/15561/polska-transponuje-dyrektyle-2018-957-ue/> (access: 14.11.2021).

governing the rights and obligations of employees³⁵⁸. The remuneration for work includes the allowance for posting in the part that does not constitute reimbursement of expenses actually incurred in connection with the posting, such as travel costs, board and accommodation. In the event that the law applicable to the employment relationship of the employee posted within the territory of the Republic of Poland does not specify the part of the posting allowance which constitutes the reimbursement of expenses actually incurred in connection with the posting, the entire allowance shall be deemed to be the reimbursement of such expenses.

3) The Act expanded the catalogue of terms and conditions of employment covered by the coordination mechanism the terms and conditions of accommodation for employees where it is provided by the employer to employees far from their normal place of work and the rates of allowances or reimbursement of expenses for travel, food and accommodation for employees who are far from home for professional reasons³⁵⁹. The part of the posting allowance which does not constitute reimbursement of expenses actually incurred in connection with the posting, such as travel, board and lodging expenses, shall also be included in remuneration. In the event that the law applicable to the employment relationship of the worker posted within the territory of the Republic of Poland does not specify the part of the posting allowance that constitutes reimbursement of the expenses actually incurred in connection with the posting, the entire allowance shall be deemed to constitute reimbursement of such expenses (Article 4(5) of the Act³⁶⁰).

4) The Act adopts the principle that exceeding the 12-month period of posting (or 18 months in the case of submitting a motivated notification to the National Labour Inspectorate) results in applying to the posted worker, on the basis of the principle of equal treatment, all the terms and

³⁵⁸ Art. 4 ust. 3-5 Act of 10 June 2016 on the posting of workers in the framework of the provision of services (Dz.U. z 2018 r. poz. 2206). For more on that principle see also: H. Verschueren, *The CJEU endorses the revision of the Posting of Workers Directive*, Era Forum 2021, Published online on 3 August 2021, p. 3, as well as P. Van Nuffel, S. Afanasjeva, *The Revised Posting of Workers Directive: Curbing or Ensuring Free Movement?*, op. cit. 285 et seq.

³⁵⁹ A. Zwolińska, *Delegowanie pracowników w ramach swobody świadczenia usług — TSUE ocenia ważność dyrektywy 2018/957 z 28 czerwca 2018 r. — część I* [Posting of workers under the freedom to provide services - The CJEU assesses the validity of Directive 2018/957 of 28 June 2018-part 1], PiZS 1/2021, p. 46.

³⁶⁰ See also in this regard: M. Bottero, *Posting of Workers in EU Law: Challenges of Equality, Solidarity and Fair Competition*, Wolters Kluwer 2020 – Chapter 3.3.2. Substantive Scope.

conditions of employment that apply in the host Member State³⁶¹, with the exception of: a) procedures, formalities and conditions of concluding and terminating employment contracts, including non-competition clauses; b) supplementary occupational pension schemes (Article 4b of the Act)³⁶².

5) The Act has also expanded the tasks of the National Labour Inspectorate (NLI). These include the obligation to provide motivated notification of the extension of the period of posting up to a maximum of 18 months, as well as information obligations in relation to the European Commission or providing, at the request of the interested party, information on the conditions of employment in Poland and the scope of their application to the worker posted to the territory of Poland.

The tasks of the National Labour Inspectorate in 2020 were related, among others, to the exchange of information with foreign authorities competent in matters related to posting, primarily through the use of the Electronic Information Exchange System for the Internal Market (IMI)³⁶³. The National Labour Inspectorate was established as a liaison office in matters concerning the posting of workers, empowered to communicate directly with its counterparts in the countries of the European Union (EU), the European Economic Area (EEA) and the Swiss Confederation³⁶⁴.

5.2. Actions by Poland and Hungary for annulment of the Directive

As anticipated before, in the context in question, it should be noted that Poland and Hungary have brought actions before the CJEU seeking annulment of the Directive 2018/957 pursuant to Art. 263 TFEU. These actions were based on similar pleas. They were resolved adversely to both countries in the CJEU judgment of 8 December 2020 in Case C-620/18 Hungary v European Parliament and Council of the European Union and Poland v European Parliament and Council of the European Union.

³⁶¹ Cf. also, J. Ryszka, 2021. *The new situation of posted workers in the framework of provision of services in the internal market of the European Union. Gloss to the Judgment of the Court of Justice of 8 December 2020 in Case C-620/18 Republic of Poland v Parliament and the Council of the European Union*. Opolskie Studia Administracyjno-Prawne, 19(2): 131–142. DOI: 10.25167/osap.4278., p. 138 et seq.

³⁶² A. Zwolińska, *Delegowanie pracowników w ramach swobody świadczenia usług — TSUE ocenia ważność dyrektywy 2018/957 z 28 czerwca 2018 r. — część 1/Posting of workers under the freedom to provide services - The CJEU assesses the validity of Directive 2018/957 of 28 June 2018-part 1*, PiZS 1/2021, p. 46.

³⁶³ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020 [Report on the activities of the State Labour Inspection for the year 2020]*, Warszawa 2021, p. 169.

³⁶⁴ *Sprawozdanie z działalności Państwowej Inspekcji Pracy za rok 2020 [Report on the activities of the State Labour Inspection for the year 2020]*, op. cit., p. 169.

Poland contested the use of Articles 53(1) and 62 TFEU as legal basis for the contested Directive, arguing that, unlike Directive 96/71, the contested directive introduces restrictions on the freedom to provide services for undertakings that post workers. The main objective of the contested directive is the protection of posted workers and, consequently, it should have been based on the provisions of the TFEU which are relevant in the social policy field. Moreover, Article 1(2)(a) and (b) of the contested directive is not intended to facilitate self-employed activity but, on the contrary, undermines that objective. The replacement of the concept of 'minimum rates of pay' by the concept of 'remuneration' and the new regime applicable to workers posted for more than 12 months introduces unjustified and disproportionate restrictions on the freedom to provide services³⁶⁵. In the Poland's view, the substitution of the concept of 'minimum rates of pay' for the concept of 'remuneration' in point (c) of the first subparagraph of Article 3(1) of Directive 96/71, as amended, constitutes a discriminatory restriction on the freedom to provide services, in so far as it places an additional economic and administrative burden on the service provider employing posted workers. Moreover, the freedom to provide services guaranteed by Article 56 TFEU is based not on the principle of equal treatment but on the prohibition of discrimination and, moreover, foreign service providers are in a different and more difficult situation than service providers established in the host Member State, mainly because they have to comply with the provisions of the Member State of origin and those of the host Member State. The complaint draws attention to the difference in the situation of a worker temporarily posted to a Member State and a permanent worker. It was also pointed out that the need to ensure all working conditions at the place of work constitutes an additional economic and administrative constraint.

From the Poland's point of view, the greatest doubts and concerns were raised about the application of the Directive **in the transport and forwarding sector**, where international drivers often spend a significant part of their working time outside Poland. This means that Polish employers are obliged to ensure that their remuneration and/or terms and conditions of employment are identical to those of the country in which they work. The adopted solution may cause unfair competition of richer countries towards poorer ones, which post their workers to them.

However, the Court found the complaints of Poland and Hungary groundless, and in its justification adopted the opposite argumentation. According to the Court, the contested directive

³⁶⁵ Judgment of the Court (Grand Chamber) of 8 December 2020, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=235183&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=1108206>

balances the factors in the light of which undertakings established in different Member States may compete without eliminating possible competitive advantages which service providers from certain Member States might enjoy, since the directive does not in any way have the effect of eliminating all competition based on costs. Moreover, according to the Court, the contested directive does not have the effect of placing service providers established in Member States other than the host Member State in a situation comparable to that of service providers established in the latter State, since the former must ensure that the workers they employ in that State are subject only to certain terms and conditions of employment applicable to the latter. Article 3(3) of the contested directive is not intended to govern the freedom to provide services in the field of transport and therefore, according to the Court, cannot be contrary to Article 58 TFEU. Moreover, according to the Court (paragraph 118 of the grounds of the judgment), the remuneration received by posted workers must be that which is determined by the mandatory provisions of the host Member State in order to enable them to cover their subsistence costs in that Member State and not that which would enable them to cover their subsistence costs in their State of habitual residence.

The legal doctrine rightly points out that the interpretation adopted by the Court of Justice may lead to differences in situation between posted workers and temporarily mobile workers who take up employment with an employer established in the country of posting. For example, a posting allowance paid as reimbursement for expenses such as travel, board and lodging will not constitute part of the remuneration. In the case of workers going to another Member State to work there and employed by an employer established there, such costs may be considered as part of the remuneration³⁶⁶. There are also doubts about the exclusion of the subsistence allowance from the remuneration, which may result in double compensation for subsistence costs at the place of posting³⁶⁷.

³⁶⁶ A. Zwolińska, *Delegowanie pracowników w ramach swobody świadczenia usług — TSUE ocenia ważność dyrektywy 2018/957 z 28 czerwca 2018 r. — część 2* [Posting of workers under the freedom to provide services - The CJEU assesses the validity of Directive 2018/957 of 28 June 2018-part 2], PiZS 1/2021, p. 62.

³⁶⁷ A. Zwolińska, *Delegowanie pracowników w ramach swobody świadczenia usług*, op. cit., p. 63. See also C. Barnard, *Delegowanie pracowników – kwestia płacy* [Posting of workers – the question of pay], Europejski Przegląd Sądowy 2018 no. 6, p. 33.

The directive may affect the transport sector in particular. Despite Poland's efforts, this sector was not excluded from the directive's scope³⁶⁸. This means, in particular, that per diems and flat-rate travel allowances cannot be included in the remuneration of posted workers, which was fairly common practice on the market before the Directive came into force.

At this point it should be noted that in order to address the situation on the transport market and the entities employing drivers, the Polish legislator amended the regulations in this respect³⁶⁹. The amending act eliminated business travel as a form of performing business tasks of drivers performing international road transport. *Per diems* and lump sums paid after the effective date of the act will be treated as elements of remuneration subject to taxation and social insurance contributions. As a specific compensation for the increase in labour costs, it is provided for the application to the remuneration of international road transport drivers of the provisions of the Income Tax Act and the provisions of the Ministry of Labour and Social Policy on the calculation of the basis for calculating the amount of social security contributions applicable to date to employees employed by Polish entrepreneurs abroad³⁷⁰.

The above legal changes raise questions about their impact on posting of workers from and to Poland. At the outset it should be noted that the data for this period may be significantly distorted due to the COVID-19 pandemic, which also had a significant impact on the level of posting of workers. However, the precise extent to that impact is unknown and shall require much further study.

A closer look at the data in for respective months³⁷¹ demonstrates when exactly the number of PDs A1 began to decline (April 2020) and in which months the decreases were most substantial. One could clearly observe that save for April 2020 (marked with fears of COVID-19 and overwhelming uncertainty throughout Europe), the largest decreases happened in August and in September 2020. The decline in August could have been attributed partially to the commencement of application of the Revision Directive and entrepreneurs' wait-and-see attitude, as they were not sure, how its

³⁶⁸ For more, see e.g.: *Nowa, unijna dyrektywa o pracownikach delegowanych za granicę. Jak wpłynie na polski transport międzynarodowy?/New EU Directive on Posted Workers. How It Will Affect Polish International Transport?/*, OCKR, <https://menadzerfloty.pl/prawo-i-podatki/nova-unijna-dyrektywa-o-pracownikach-delegowanych-granice-wplynie-polski-transport-miedzynarodowy/> (access on: 18.12.2021).

³⁶⁹ See the Act on amending the road transport act, the act on drivers' working time, and certain other acts, passed at the Journal of Laws 2021, item. 44, on 15 December 2021, print no. 1835.

³⁷⁰ M. Wroński, *Rząd przyjął projekt ustawy wdrażającej Pakiet Mobilności* [The government adopted a draft law implementing the Mobility Package, the 7th of December 2021, <https://tlp.org.pl/rzad-przyjal-projekt-ustawy-wdrazajacej-pakiet-mobilnosci/> (access: 27.12.2021).

³⁷¹ The very data were also subject to our scrutiny in the Chapter concerning COVID-19.

provisions would be interpreted; it is however difficult to reckon that the same reason could be behind the decline in September. We do not consider the implementations of the Revision Directive to the Polish legislation (occurring in September – therefore in delay of the Directive-mandated time limit) to be a factor playing any major role in further decreases, as the figures in question concern outgoing postings and therefore it is the transpositions in host Member States – and not in Poland – that could be instrumental in this regard.

It is however worth emphasising that both months of November – December 2020 as well as January – February 2021 were actually periods with the number of COVID-19 cases going up substantially. It is therefore difficult to rule out the link between such phenomenon and the decrease in PDs A1 issued in those months. It is all the more probable as in the spring months of 2021 (starting with March 2021) – the number of attestations went up, as compared to 2020 (and in some cases also – to 2019). Therefore, the above-mentioned declines in numbers are rather attributable to COVID-19 than to the uncertainty surrounding the Revision Directive and its implementation throughout the EU Member States.

Table 31. Evolution of persons with a PD A1 issued by Poland, 2019-2021

	2019	2020	% Change 2020 vs 2019	2021
Number of PDs A1 issued in respective years / months	647,989	617,709/ 619,127	~ - 4%	676,775
<i>January</i>	55,241	68,477	+ 24%	56,046
<i>February</i>	48,398	58,719	+ 21.3%	51,275
<i>March</i>	53,372	59,420	+ 11.3%	60,056
<i>April</i>	50,623	41,643	- 17.7%	50,882
<i>May</i>	52,250	47,132	- 11.5%	52,479
<i>June</i>	44,956	39,582	- 11.5%	55,072
<i>July</i>	52,178	51,164	- 1.9%	55,910
<i>August</i>	55,418	43,564	- 21.4%	56,320
<i>September</i>	58,607	55,469	- 22.4%	60,902
<i>October</i>	65,658	58,251	- 11.3%	60,415
<i>November</i>	54,756	44,686	- 9.4%	57,961
<i>December</i>	56,532	49,602	- 12.3%	59,457

Source: own study & calculations, based on ZUS data

The present analysis of the impact of the Revision Directive would not be complete without another interesting set of data.

As demonstrated in the table below - a rather sharp decline of ‘unique’ number of persons who received PDs A1 under Art. 12 of the Basic Regulation can be attributed to the adverse effect of the pandemic. However, it is fairly puzzling how the very number rebounded in 2021 – not only did it regain all the loss sustained in 2020, but the increase was even larger than expected on the basis of previous years’ data. Clearly, this proves that neither the pandemic nor the Revision Directive did not have any adverse effect to that number in 2021.

An interesting phenomenon may also be observed with regards to the average duration of PDs A1. The clear trend emerging from the data is that statistically they are issued for longer periods year on year and that it was somewhat ‘immune’ to both the pandemic and the adoption, application, and transposition of the 2018/957 Directive.

Table 32. Evolution of persons with a PD A1 issued by Poland, 2019-2021 – ‘unique’ persons and average duration of PDs A1

	2019	2020	% Change 2020 vs 2019	2021
Number of PDs A1	647,989	617,709/ 619,127	~ - 4.7%	676,775
‘Unique’ number of persons who received PDs A1 under Art. 12³⁷²	142,658	119,214	- 16.4%	173,832
Average duration of all PDs A1 issued under Art. 12 (in days)	124	147	+ 18.5%	175

5.3. Directive 2018/957 and the impact on access to information

5.3.1. Single national official website and its role in providing access to information

The Revision Directive reiterated the requirement contained in Art. 5(2) of the Enforcement Directive 2014/67 to indicate clearly, in a detailed and user-friendly manner and in an accessible format on a single official national website and by other suitable means, which terms and

³⁷² ‘Unique’ number of PDs A1 under Art. 13 Regulation 883/2004 for 2020 are unavailable.

conditions of employment and/or which parts of their national and/or regional law are to be applied to workers posted to their territory. The relevant Art. 1(2) of Directive 2018/957 provided the obligation of the Member State to publish the information on the terms and conditions of employment, in accordance with national law and/or practice, without undue delay and in a transparent manner, on the single official national website referred to in that Article, including the constituent elements of remuneration as referred to in the third subparagraph of this paragraph and all the terms and conditions of employment in accordance with paragraph 1a of this Article. Member States shall ensure that the information provided on the single official national website is accurate and up to date (also confirmed by the recital 21 thereof). Failure to point out which terms and conditions of employment are to be applied in compliance with Art. 5 of Directive 2014/67 would result in that such circumstance should be taken into account in determination of a penalty therefor³⁷³.

Poland complied with the above-mentioned duties by adopting Art. 13 of the Act of 2016³⁷⁴, providing for such a website³⁷⁵, which is to be kept and updated in Polish and in at least one other official language of the European Union (Art. 13(3)).

Despite this obvious facilitation, the Polish website in question is not exactly intuitive, as we were able to find out when examining it in detail for the purposes of this Report. For example, it lacks any link to the ZUS website containing the necessary information for the purposes of applying for a PDs A1. Moreover, there is no clear exposition of the terms and conditions for workers posted to Poland: one needs to find out by themselves how to access them. What is more, the choice of topics, allowing access to further content, albeit relatively extensive, seems to be rather random – and so is the order in which they are provided (e.g., ‘declaration on the posting of a worker to the territory of Poland’ as a third-from-the-bottom active link, preceded *inter alia* by less universal topic of ‘Rules for the posting of workers by temporary employment agencies and placement agencies’).

Given that the single official national websites serve as a gateway to posting to a given country, the Polish website seems to be in need of some restructuring, taking into account both the above-

³⁷³ During the drafting of amendments prior to trialogues, one of the solutions on the table was even the total exemption from penalties in such circumstances.

³⁷⁴ Further complemented by Art. 1 (10) of the Act of 24 July 2020, transposing the Revision Directive into Polish law.

³⁷⁵ Its English version is retrievable at: <https://www.biznes.gov.pl/en/firma/doing-business-in-poland/posting-of-workers-to-poland>

mentioned principles introduced by Directives 2014/67 and 2018/957 as well as the convenience and easiness of obtaining information.

We mention the above not without a reason. Indeed, in order to analyse the impact of the Revision Directive on the intra-EU posting we have carried out a survey among the interested parties – entrepreneurs and managers of enterprises posting workers abroad (all being Members of the European Labour Mobility Institute). One of the most unambiguous observations, shared by more than 70% of the respondents was that they had problems with obtaining information concerning terms and conditions of employment in the host Member States (solely less than 20% of them indicated that they encountered no problem in that regard).

The above result – despite a relatively small cohort of respondents – clearly demonstrates the importance of easily accessible information, as a lack of knowledge of host Member State's provisions and practice can actually lead to non-compliance and hefty fines. It is also yet another reason to reckon that the majority of posting entrepreneurs seem to be willing to comply with the host Member States' provisions, however they find it difficult to find accurate and clear sources thereof.