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WORKING PAPER

NO. 18.13

July 2018

Universiteit Antwerpen

University of Antwerp
Herman Deleeck Centre for Social Policy
centrumvoorsociaalbeleid.be

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ABSTRACT

Over the past decades, a rich literature developed discussing the remarkably strong role the European Court of Justice (CJEU) played in shaping a deeply integrated single market and European society. Scholars labelled the CJEU's influence on Europe's institutional evolution as the judicialization of the European regime. Some decried this influence as a problem of democratic deficit, others claimed that the CJEU actually adjusts more to state preferences than often assumed. This article empirically contributes to the judicialization debate by assessing the impact of the Vander Elst Case law, which allowed third country nationals (TCNs) to be posted freely across the EU without need to apply for work permits in the countries of posting – and this on the basis of the free movement of services. Making use of unique Belgian data on posting (LIMOSA registration system), we evaluate the degree to which the CJEU's case law designed a mobility regime for TCN posted workers. Our data demonstrate that this mobility regime – exclusively created by case-law starting 25 years back – is a 'grand success' in two ways: 1) data show that this migration regime is successfully used by a growing number of posted TCNs; 2) the same data indicate that the number of TCNs entering based on posting even outnumbers the TCNs entering through the classic national migration route of work permit and visa. This small regime – carved out through the cooperation of the Court and the EU Commission – further lessens the migration sovereignty of Member States. At the same time, the rising use of posting indicates the increasing role of the free movement of services in developing a single European labour market.

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1. Introduction

The free movement of services and the accompanying posting of workers is the subject of heated debate among academics and policy makers. Posting is most often framed in the context of social dumping, deteriorating labour market conditions and fraud (Doellgast and Greer, 2007; Bertola and Mola, 2009; Wagner, 2014; Alsos and Eldring, 2008; Cremers *et al.* 2007). Scholars widely criticized the Court of Justice (hereafter CJEU) case-law for creating a contradiction between 'social Europe' and the free movement of services (Refslund, 2015; Kaupa, 2013) and for partially unravelling the 'grand social bargain' of a European market embedded within national level social policy (Ashiagbor, 2013).

Despite the thorough research cited above, the issue of posted workers across the EU struggles with a lack of reliable data. Notwithstanding the growing evidence of detrimental effects of East-West posting in the EU, we still know very little as to the origins, destinations and nature of the posting flows more generally. One of the reasons is that data on posting are still scarce. The EU mainly relies on A1-certificates, which indicate the social security system that applies to a worker who works in more than one EU country, to map the prevalence of service providers. However, empirical research on the A1-certificates indicates that these do not represent a reliable source for the quantitative study of posted workers (Pacolet and De Wispelaere, 2014).

One exception is the LIMOSA dataset, a compulsory online registration system for service provision created by the Belgian administration.[1] Every posted worker and self-employed person (including third-country nationals) wishing to perform a temporary economic activity in Belgium has to be registered in advance. The online registration of posted workers is intended to improve labour market intelligence and to combat fraud. Belgium is a forerunner in data collection on posted workers. Nevertheless, in 2012 the CJEU ruled that the so-called stringent registration requirements violated the free movement of services.[2] Interestingly, this 2012 verdict of the Court precisely fits into the Court's case-law we discuss below.

This contribution uses the Belgian LIMOSA data to bring out an understudied part of the origins and destinations of posted workers. By doing so, we subscribe to the theory of the judicialization of Europe (Stein, 1981; Weiler, 1991; Stone Sweet, 2013; Grimm, 2015) and contribute by assessing empirically the impact of the Court's case-law on the institutional design and structure of the EU in general and the creation of a service mobility regime for third-country nationals (hereafter TCNs) – more specifically.

[1] https://limosa.be/

[2] C-577/10, European Commission vs Belgium, 19 December 2012 – Belgium adjusted its legislation, reducing the amount of information to be asked from service providers – see The Law of 11 November 2013 amending Chapter 8 of Title IV of the Programme Law (I) of 27 December 2006 and the Social Criminal Code regarding the so-called Limosa declaration (Moniteur Belge 27 November 2013).

The background to this exercise is the following. While analysing the Belgian data on the number and origins of posted workers to Belgium, we noticed a non-negligible and growing number of TCNs registered as posted workers. The public imagination mostly focuses on posting as a phenomenon between new and old Member States, whereby posting is thought of as a European problem, with posted workers being European citizens. Scholars of European integration, however, know that the European Court, as early as the 1990s, enabled TCNs to be posted freely across the EU, as long as they were lawfully residing in one Member State[3]. Even though this case-law has been researched from a legal and policy point of view (Davies 1997; Hatzopoulos, 2010 and 2012), we have not come across any study that checked what the impact of these cases has been on the *actual* mobility of TCNs. How many TCNs are posted across Member States? How do their numbers compare with posted citizens of EU member states? What is the origin of posted TCNs? Are there patterns of mobility and particular Member States from where they are posted? On a more theoretical level, we pose the following research questions: What is the impact of a limited set of case-law that trumped national labour migration rules 25 years down the line? To what extent can we empirically speak of a European mobility regime as a direct consequence of the judicialization of the European structures? Can we find proof that the European inroads in Member States' sovereignty on the immigration of TCNs are significant? To what extent can we make the case that the European mobility regimes surpass national migration regimes? In this contribution, we address these questions and argue that the Court's activism (with the active participation of the European Commission) generated a mobility regime for TCNs based on the free movement of services that successfully and increasingly sidesteps national labour migration regulations.

In the coming paragraphs we proceed as follows. First, we review the debate on the judicialization of Europe and the impact that the European Court has had on Europe's institutions and the Members States' sovereignty. Second, we discuss how the Court's activism developed a legal inroad for TCNs to become posted workers with free mobility based on the free movement of services. Third, we briefly present the unique Belgian case, and Belgium's posting and labour migration situation. Fourth, we present data on the prevalence and origin of TCNs being posted to Belgium and compare these figures with statistics on official labour migration based on work permits. We conclude with a discussion on the significance of the Court's 25 year old case-law in the construction of a mobility regime for posted TCNs.

2. Literature review: The judicialization of Europe

The observation that a mobility regime was created by the European Court of Justice (CJEU) may not surprise scholars of European integration. Over the past many decades, a rich literature developed,

[3] Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803

making sense of the considerable role the CJEU played in shaping the European Union's ever deeper integration.

In the 1980s, the literature qualified the determining influence of the CJEU on the EC's market and political integration as the constitutionalization of the regime (Stein, 1981). In his 1981 piece, Eric Stein demonstrated how the CJEU from the early days of its work onwards, interpreted European Community treaties and legislation 'in a constitutional mode' (Stein, 1981, p. 1). Establishing the direct effect principle and the supremacy of Community law over national law, among others, the Court endowed the treaties with effects typical of constitutional law and at the same time systematically advanced the legal integration of the Community (Weiler, 1991; Alter, 2001; Grimm, 2015). The Court interpreted the Treaties in a way that was more or less detached from the will of Member States (Grimm, 2015). Indeed, the CJEU's rulings over time generated a level of legal integration that in many ways surpassed economic and political integration (Burley and Mattli, 1993) and built a legal framework that is essentially federal in nature. In the process, the authority of the Community and of the Court grew considerably at the expense of national governments (Stone Sweet, 2010). At many instances, national governments – represented at the Court – opposed the stance for further integration, but to no avail. Later literature empirically demonstrated how the CJEU's rulings generated a judicialization of the European regime – 'a process through which Courts accrete influence over the treaty system's institutional evolution' (Stone Sweet, 1999 and 2013). Put differently, Courts are relied upon 'to address major public policy issues and political disputes' (Kelemen, 2013, p. 259). Some literature analysed the far-reaching case-law of the CJEU through delegation theory, whereby Member States – caught between further market integration and political constraints – acting as principals, empowered the CJEU as agent to enforce law against the Member States themselves (Majone, 2001; Pollack, 2003 and 2013; Höreth 2013). In that context, Stone Sweet and Brunell qualified the CJEU as a 'Trustee Court' or 'super-agent', as the CJEU is empowered to enforce the law against states themselves (Stone Sweet and Brunell, 2013). The CJEU is a trustee of the values espoused by the Treaties constituting the organisation. As a trustee the CJEU has the power to work in the service of the Treaties' objectives in a position of structural supremacy over the Member States and can hence dominate the institutional evolution of the EU. Its power is reflected, among others, in the fact that it is virtually impossible for States to reverse the CJEU's rulings on treaty law (Stone Sweet and Brunell, 2013). Hence the CJEU – as a super-agent – makes law in a zone of discretion that most ordinary Courts do not enjoy.

Flipping around the Principal-Agent theory, Davies (2016) takes the interpretation of the CJEU's activism a step further and argues that the degree of control the CJEU has over the EU Legislature is so substantial that the CJEU can be qualified as the Principal while the EU Legislature (Council and Parliament) in fact acts as agent of the Court. As the Member States have written the EU's core normative principles as well as its policy goals into the treaties (Grimm, 2016; Blauberger and Schmidt, 2017), European law merely implements a constitutionalized plan (Davies, 2016) and as the CJEU

interprets the Treaties, the legislature – as agent of the Treaties – is an agent of the Court. Taking the legislation on the internal market as an example, Davies (2016) demonstrates that the regulations and directives on the subject are in fact an exercise in codifying the CJEU's case-law (see also Wasserfallen, 2011).

The CJEU's activism has been challenged over the decades by academics, politicians and the media (Kelemen, 2013). Back in the 1980s, Rasmussen (1986) accused the CJEU of transgressing its mandate and engaging in judicial policy-making beyond its political mandate (Schepal, 2000). Ample literature agrees and sees the extensive power of the CJEU as threatening to undermine democracy in the EU. Grimm (2015), for example, argues that even though the CJEU's far-reaching case-law has made the EU into an unprecedented political entity and has come closer to being a federal state rather than an international organisation, it did so at the cost of democratic legitimacy (see also Scharpf, 2009; Bellamy, 2008; Herzog and Gerken, 2008; Follesdal and Hix, 2006). Not everybody agrees, though, that judicialization undermines democracy. Kelemen (2013), for example, argues to the contrary: judicialization encouraged greater transparency and accountability among Member States and the EU and increased access to justice. Additionally, Grimmel (2014) argues that the concept of judicial activism, with the CJEU being a political and interest-driven actor, is a myth. Going back to the historical context of the CJEU's earlier work, he establishes that rather than judicial activism, it was the lack of legislative activism that was the problem in the early years of integration. Similarly, Höreth (2013) argues that it is rather a lack of countervailing powers in the institutional arrangement of the European multi-level governance system that explains the powerful position of the CJEU (see also Dawson, 2013).

Regardless of the normative implications of judicialization by the CJEU (Kelemen, 2013), scholars challenged the idea of an all-powerful CJEU determining the course of institutional history. Substantial literature empirically refutes the idea that the CJEU works entirely autonomously in furthering European integration. Carrubba and Gabel (2015), for example, argued that the CJEU is actually sensitive to the threat of 'non-compliance' by the Member States, hence it takes into account Member State preferences. Ploughing through thousands of cases, they found a relation between Member States' positions and the CJEU's rulings, when noncompliance can be perceived as a realistic consequence of a ruling (see also Carrubba *et al.*, 2008). Larsson and Naurin (2016) similarly argued that the CJEU's judges face uncertainty whether the CJEU's rulings will face political reactions that could result in 'legislative override' by the Council/Member States. Based on the analysis of years of case-law they found a correlation between the CJEU's rulings and the political signals the CJEU received in the course of the procedures (as reflected in amicus curiae briefs submitted by the Member States). They concluded that judges adjust their rulings to the perceived risk of legislative override, and find a substantive effect of Member States' expressed preferences on the decisions of the CJEU. Nevertheless, Blauberger and Schmidt (2017:915) argued that even if in individual rulings the CJEU aligns itself with Member State preferences, the importance of precedent and subsequent rulings should not be underestimated. The

CJEU's rulings have an expansive effect over time, and constrain Member States to deviate from policy choices made in the past. Moreover, along with Davies (2016) and Schmidt (2018) they argued that existing case-law often forms the basis of the Commission's legislative proposals. Additionally, other authors do not qualify the Court's alignment with Member States' preferences as a sign of judicial restraint, but rather as 'a manifestation of the inter-institutional dialogue and an expression of the institutional balance in action' (Hatzopoulos, 2013, p. 107). Moreover, Höreth (2013) argued that non-compliance by Member States is not really a threat but rather an opportunity for the CJEU to develop further its judicial regime, as non-compliance generates new legal actions, hence new rulings. Martinsen (2015, p. 226), in a thorough study of the power of the CJEU in the development of EU social policy, concluded in a nuanced way that the influence of the CJEU 'varies over time between full and no impact, depending on how the Commission, the Council, and the European Parliament respond to jurisprudence'. There is a continuous interplay between law and politics that can either result in the codification of case-law, but just as well in its modification, non-adoption and override.

Similarly, other historical research mitigates the strong image of an activist CJEU as proliferated by decades of debate on the Court's influence. Mark Pollack's (2013) research overview of the foundational period of the CJEU shows that the Court strategically shaped decisions to what Member States would tolerate. Even though the CJEU did engage in a constitutionalizing process of EU law in a gradual way, they were more cautious in doing so than is generally perceived. The CJEU was 'more acutely aware of the potential for backlash, than a strong 'trusteeship' image might imply' (Pollack, 2013, p. 1310). Research on the Van Gend case establishing the principle of direct effect, revealed not only that the CJEU was greatly influenced by European federalist thinkers of the Legal Service of the European Commission, but also that the CJEU was well aware of its political surroundings and acted cautiously and in a piecemeal fashion (for example, at that point in time the doctrine of supremacy was left aside) (Rasmussen, 2012).

Similarly, while Weiler (1991) did argue that the CJEU's case-law resulted in a constitutionalization of the EU legal system, he denied that the principal actor was the European Court. The constitutionalization of the European Community by the CJEU could only happen in an interaction with the Community political process. Going back to the historical beginnings of the European Communities, at the time that the foundational case-law of the CJEU built a formidable European legal structure (1960s and 1970s to begin with), Member States simultaneously held a firm grip on decision making at the Community level, complete with intergovernmental bodies such as the COREPER (in the early days) and the European Council. These political conditions allowed the Member States to accept the process of constitutionalization (Weiler, 1991).

Additionally, and crucial to our argument, the constitutionalization of the European Community could only be as successful because of the numerous possibilities of judicial review – the ability of the

Commission, the Member States and national Courts as well as private parties to bring a Member State before the European Court for failing to fulfil its obligations under the Treaty (Weiler, 1991). Over the decades, the Commission made use of its competence to ensure Treaty compliance (Stein, 1981). As we will see in the Vander Elst case and the case-law following this, the Commission took active steps to bring an action to a Member State if it believed that free movement was being hindered by national policy (for the Commission's role in driving European integration, see Kostadinova's (2012) overview).

3. The impact of judicialization: the CJEU as designer of an independent mobility regime of third-country posted workers.

Weiler (1991) argued that in the 1970s-1980s the distribution of competences of the Community and Member States 'mutated' without resort to Treaty amendments. Through the CJEU's case-law, the material competences granted to the Community gradually expanded over time giving it a reach over sovereign state powers. An example of how this take-over took place is 'absorption': the CJEU found national measures that were *not* part of Community competence, nevertheless to be in conflict with Community law. The CJEU then overruled such measures as they were impinging on – for example - Community free-movement policy (Weiler, 1991). Hence, Lenaerts (1990, p. 220) concluded: 'there simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community'.

Highly relevant for our case study on the free posting of TCNs across the EU, is the fact that the main beneficiaries of the judicialization of Europe, were the four freedoms (of goods, persons, services and capital – in our case the freedom of services was the driver) (Grimm, 2015). As Grimm (2015, p. 467) put it: 'These freedoms were transformed from objective principles for legislation into subjective rights of the market participants who could claim them against the Member States before national Courts.' That is exactly what happened in the Vander Elst case and the subsequent rulings. In the following paragraphs, we elaborate on a specific expression of the judicialization of Europe. Complementary to most literature that assesses judicialization by examining case-law and its interaction with legislation, we demonstrate that judicialization can also successfully find its expression in the construction of entirely new legal realities or regimes. We see this reflected in the CJEU's construction of an EU mobility regime for TCNs, and this exclusively through its case-law.

The first and crucial case in the development of this autonomous mobility regime for third-country posted workers was the Vander Elst case – a clear case of Weiler's absorption thesis. The Vander Elst case concerned a Belgian employer who employed Moroccan workers in Belgium. The workers had the legally required work and residence permits. Vander Elst planned to provide services in France and planned to take his Moroccan employees along for the job. He had obtained short stay entry visas for the workers from the French Consulate and sent them to France to carry out the work. However, the French authorities objected. They claimed Vander Elst was in breach of French immigration law as no

work permits had been obtained for the Moroccan workers. Vander Elst appealed against the fine he received. The Vander Elst case was a landmark decision, and the first in a line of cases crafting free mobility for posted workers.

In an attempt at codification of this case-law – and confirming the thesis of the judicialization of Europe - the Commission in 1999, attempted to introduce a draft-directive on the posting of TCN workers for the provision of cross-border services (Commission 1999). The draft-directive re-affirmed the case-law of Vander Elst[4] (which was adjudicated in 1994) concerning the free mobility of TCNs. The text stated that Member States would not be allowed anymore to require a work permit or similar obligations from TCNs. Importantly, and in line with the theory of the judicialization of Europe, 'this initiative did not receive the support of Member States and was subsequently dropped from the Commission's agenda' (Hatzopoulos, 2010, p. 46).

The CJEU, in dialogue with the Commission, however, steadily ruled in subsequent case-law on the same issue and hence methodically constructed a mobility regime for TCN posted workers. In the 2000s, the Commission engaged the European Court of Justice at several instances to ensure Member States did not impose barriers for posted TCNs and the Court systematically slashed barriers that any member state attempted to impose. For example, in 2004, in *Commission v. Luxembourg, posted workers I*[5] the CJEU held that Luxembourg unduly restricted the service providers' free movement by imposing a work permit on their personnel (Hatzopoulos, 2010, p. 46). Similarly, the CJEU condemned Germany for requiring TCN posted workers to be at least one year employed with the service provider before they would be granted an entry and work visa. In 2006, the Court ruled that this was in violation of article 56 TFEU (on the free movement of services).[6] It also condemned Austria which required posted workers to obtain both an entry visa and an 'EU posting confirmation'.[7]

In 2006, Luxembourg was again condemned for violating the free movement of services for imposing a notification obligation to TCNs which needed to be fulfilled by the first working day (Hatzopoulos, 2010, p. 52).[8] The CJEU systematically and persistently enabled the free mobility of TCN posted workers and hence carved a legal space in the overall governance of EU mobility for TCN posted workers. But any data on how relevant this mobility is, are lacking. What is the impact of a limited set of case-law that trumped national labour migration rules, 25 years down the line? How many TCNs are posted across Member States? What is their origin? Are there patterns of mobility and particular Member States from where they are posted?

[4] Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803
[5] Case C-445/03 *Commission v Luxembourg, posted workers I* [2004] ECR I-10191.
[6] Case C-244/04, *Commission v Germany*, [2006] ECR I-00885 .
[7] Case C-168/04, *Commission v Austria, posted workers* [2006] ECR I-9041.
[8] Case C-319/06 *Commission* v Luxembourg, posted workers II [2008] ECR I-4323.

4. The TCN service mobility regime – the Belgian case

We aim to answer these questions by using the unique Belgian case. As mentioned in the introduction, Belgium is a one-in-its-kind case to study the impact of TCN free mobility, first, because it managed to develop a registration system for posted workers, called LIMOSA, in 2007. Every posted worker (including TCNs) and self-employed persons wishing to perform a temporary economic activity in Belgium must register in advance. The online registration of posted workers is intended to improve labour market intelligence and to combat fraud. The registering foreign employer must specify the posted worker's identity, the employer, the Belgian service user, the period and location of employment in Belgium and the timetable. The foreign employer or self-employed worker receives a 'LIMOSA-form' which posted workers must keep with them for the entire duration of their posting (Maes, 2014).

The LIMOSA system allows Belgium to gather much more accurate data then any current EUROSTAT effort would be able to collect. As mentioned, the database came under attack by the Commission for obstructing the free movement of services. This was followed by a condemnation by the CJEU for the same – much in line with the case-law we are investigating here. Despite the CJEU's condemnation, and a temporary suspension of the LIMOSA database, the database was largely preserved. The Belgian government reduced the amount of information that needed to be registered in LIMOSA.

Second, Belgium is an interesting case, as it is one of the highest receiving countries of posted workers (Wagner, 2015). Third, Belgium is a small country with a very open economy and high unemployment levels. Despite high unemployment levels, many labour shortages persist, in particular in Flanders. Officially, Belgium imposes a brake on labour migration by TCNs, but in fact has one of the cheapest and fastest systems of work permits for certain categories of workers, primarily the highly skilled (Mussche *et al*., 2013). For lower-skilled workers, the procedure is less flexible and based on a labour market test. The actual inflow of low-skilled TCNs through work permits is very limited. The statistics on this classical national labour migration route – entirely controlled by (the regions of) the Member State – are an interesting point of comparison to measure the impact of TCN posted workers.

4.1. TCNs' mobility in the posting regime

The LIMOSA data generally indicate a rising influx of posted workers in Belgium. Whereas in 2008, about 117,000 posted workers were registered, this figure gradually rose to about 228,000 posted workers and self-employed service-providers in 2017. These 228,000 workers performed about 810,000 service jobs in 2017. This figure indicates the highly circular mobility of posted workers. Of these 228,000 workers, 118,000 (52%) are citizens of EU15 Member States, with most of them coming from the Netherlands, Portugal, France and Germany. About 57,000 (25%) are citizens of EU10 Member States (the large majority from Poland) and 31,000 (13%) come from EU3 Member States (mainly from Romania and Bulgaria) (see table 1).

In 2008, LIMOSA registered 10,000 TCNs accounting for 9% of the total number of posted workers. Over time, the share of TCNs remained stable but the absolute number of registered TCNs increased to 21,000 in 2017. These general figures include both TCNs being posted from third countries with a work permit as well as TCNs being posted based on the Vander Elst case-law. We will zoom in on the 'Vander Elst TCNs' in the coming paragraphs. We conclude from table 1 that the continuous and substantial increase in the number of postings not only reflects a continuous deepening of market integration in Europe, but also indicates the ever increasing role posting plays in the formation of a hybrid EU single labour market that relies less on the free movement of workers, but increasingly on the free movement of services (Mussche *et al.*, 2017).

Table 1. Number of unique posted workers and self-employed service providers

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
EU15	78,419	66,864	70,829	79,216	86,713	98,883	103,736	113,721	120,855	118,669
EU10[9]	24,016	20,519	23,282	32,514	37,104	43,928	53,917	60,542	53,892	57,323
EU3[10]	4,557	4,099	4,886	7,967	10,520	13,845	18,745	22,704	25,328	30,697
TCN	10,459	7,614	8,423	9,472	10,037	11,774	15,788	19,809	16,647	21,262
Total	117,451	99,096	107,420	129,169	144,374	168,430	192,186	216,776	216,722	227,951

Source: Belgian National Social Security Office, LIMOSA data, own calculations.

As discussed above, the Vander Elst and following case-law allowed TCNs to be posted freely across the EU – provided they have a residence and work permit in the Member State from which they are posted. We do see the Vander Elst free posting of TCNs reflected in the Belgian LIMOSA data. Of the 21,000 TCNs that were registered in 2017, 14,000 (68%) were posted from an EU28 country.[11] Even though the data reveal that a posting regime was already established a decade (or more) ago, there is a continuous rise in the number of TCNs posted from EU28 countries (see table 2). These figures clearly show that the mobility of TCNs across EU Member States as enabled by the CJEU is a substantial and growing phenomenon. Moreover, the highly circular mobility of posted workers generally also applies to TCN workers. Our data show that the 14,000 TCNs posted from EU28 countries in 2017 performed 58,000 service jobs in that year. The average duration of their service jobs amounts to about 100 days.

[9] Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Malta and Cyprus.
[10] Romania, Bulgaria and Croatia.
[11] TCNs posted from third countries, entering on a regular work permit and visa, also need to be registered in LIMOSA. Hence the total number of posted TCNs is higher than the number of TCNs posted from a EU Member State.

Table 2. Number of TCN posted workers posted from EU28 countries

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
EU15	4,587	3,593	3,853	4,473	4,730	5,585	6,322	7,653	7,217	8,181
EU10	158	214	265	603	1,246	1,526	3,908	6,079	2,836	5,760
EU3	9	32	51	29	31	48	278	383	241	423
Total	4,754	3,839	4,169	5,105	6,007	7,159	10,508	14,115	10,294	14,364

Source: Belgian National Social Security Office, LIMOSA data, own calculations

Moreover, the TCN intra-EU mobility regime is used by posted workers with a very large variety of citizenships. About 200 third-country citizenships are represented in the database. To obtain a better picture of who makes predominantly use of the TCN mobility regime, we zoom in on the top 6 citizenships that are posted to Belgium from EU28 countries in 2017. As is shown in Table three, these are: Ukraine, Bosnia-Herzegovina, Brazil, Turkey, Serbia and Morocco. Poland is the main sending country of Ukrainian posted workers. Bosnian and Serbian workers are mainly sent from Slovenia. Turkish posted workers are predominantly posted from Germany and the Netherlands, while Brazilians are mostly posted from Portugal. The majority of Moroccans are posted from Italy, France, Spain and the Netherlands.

Notice that Ukraine, Bosnia and Serbia (to a lesser extent) are the main countries of origin that drive the trend we observed in table 2: a sharp increase in the number of TCNs posted from EU10 countries in 2014-2015, a sharp decline in 2016, and a recovery in 2017 to the level of 2015 or even above. We can explain these trends at least partly through the following observations made by the national LIMOSA administration. First, Ukrainians are posted to a large degree from Poland. Contacts between the Polish and Belgian administrations indicate that as Polish companies face a shortage of Polish workers – as a result of their already high levels of posting mobility – these companies started recruiting from the neighbouring third-countries, especially from Ukraine. Ukrainians can be posted easily as a consequence of the discussed Vander Elst mobility regime designed by the CJEU. So the success of intra-EU posting leads to a widening circle of posting recruitments outside of the EU borders, facilitated by the CJEU. A similar evolution can be discerned for Slovenia whose employers recruit heavily from Bosnia and Serbia (see table 3). The fluctuations in the data are most probably attributable to the temporary nature of the service contracts of the sending companies. For Slovenia, the Belgian administration noticed that most posting registrations were made by three very large Slovenian companies for a specific period of time. This most probably indicates large contracts obtained by these service providers.

Table 3. Top 6 TCNs posted from EU28 countries – citizenship and country from which they are posted

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Ukraine (total)	100	72	116	191	498	464	1,422	2,040	988	2,958
Poland	2	2	14	53	243	158	586	910	412	2,041
Other	98	70	102	138	255	306	836	1 130	576	917
Bosnia-Herz. (total)	206	244	222	394	646	834	1,658	3,028	1,468	1,780
Slovenia	47	86	105	247	539	673	1,516	2,853	1,263	1,486
Other	159	158	117	147	107	161	142	175	205	294
Brazil (total)	141	200	179	258	564	835	767	927	1,245	1,748
Portugal	116	176	150	213	452	699	660	800	1,134	1,612
Other	25	24	29	45	112	136	107	127	111	136
Turkey (total)	1,550	1,216	1,161	1,387	1,250	1,307	1,195	1,202	1,263	1,209
Germany	1,209	895	731	881	755	792	617	588	664	627
Netherlands	257	217	355	419	398	415	501	487	474	449
Other	84	104	75	87	97	100	77	127	125	133
Serbia (total)	179	190	205	212	184	231	443	479	426	676
Slovenia	15	18	25	52	52	86	169	185	138	323
Germany	126	92	107	109	66	78	125	116	121	150
Other	38	80	73	51	66	67	149	178	167	203
Morocco (total)	281	188	229	263	314	372	394	486	564	599
Italy	40	13	53	13	44	33	57	83	140	161
France	144	86	96	124	99	112	83	116	135	142
Spain	3	3	8	46	56	99	96	111	137	117
Netherlands	61	33	42	53	95	97	106	122	106	115
Other	33	53	30	27	20	31	52	54	46	64

Source: Belgian National Social Security Office, LIMOSA data, own calculations

The LIMOSA database also enables us to say something about the type of posting. More than 90% of TCNs posted from EU28 countries enter Belgium as employees rather than as self-employed workers. For the year 2018,[12] our data show that almost 60% of TCN posted workers work in the construction sector. Another 10% works in the transport sector, and 5% in the metal industry. The others are spread over various other sectors. Finally, only 2% of the TCNs posted workers are female.

[12] Due to CJEU case-law against the Belgian LIMOSA system, LIMOSA only recently restarted registering the sector in which posted workers are active. Hence these data are limited to January till April 2018.

4.2. TCN postings surpassing the traditional labour migration flows

The above data demonstrate that the CJEU's case-law effectively installed a mobility regime for TCN posted workers based on the free movement of services. This regime is a clear example of the above mentioned judicialization of Europe. In any EU Member State TCNs usually need a work permit to work in that particular Member State. Applying for a work/residence permit of a particular Member State is costly in some countries and takes time. Once the TCN successfully obtains the permit, (s)he is free to reside and work in that Member State for the duration of the permit. The conditional entry still belongs to the domain of the national sovereignty of Member States. Only very gradually have Member States transferred sovereignty in the area of migration to the European level (Koslowski, 1998; Strumia, 2016; Trauner and Servent, 2016). Moreover, Koslowski (1998) argued that when migration became part of the initial Justice and Home Affairs area, some Member States were quite reluctant to extend CJEU jurisdiction to that area, fearing that they might lose more sovereignty to the EU. As concerns labour migration, the EU adopted a range of directives addressing specific categories of workers, such as the highly skilled (blue card), students and researchers, seasonal workers, etc., leaving the core part of admission of TCN labour migrants to the Member States' sovereignty (Strumia, 2016). Member States have long viewed (or view) the entry of posted TCNs as a form of labour migration to which work permit rules apply and as the series of case-law on posted TCNs indicates, Member States were not eager to join the CJEU's enthusiasm for the free movement of services applied to TCNs (Bertola and Mola, 2009). Member States repeatedly put conditions and restrictions on TCN posted workers. Time and again the CJEU condemned any migration requirements for posted workers, and hence 'absorbed' Member States' sovereignty concerning the entry of TCN posted workers. In this paragraph we empirically assess the quantitative impact of this absorption. How do the numbers of free entries of posted TCNs compare with the number of 'unfree' entries of TCNs based on work permits and other administrative requirements?

To assess how significant the entry of posted TCNs from EU28 countries is as compared to TCNs entering on a classical work permit, we compare the number of posted workers with Belgian work permit data for our top 6 citizenships. We focus exclusively on posted employees, not on the self-employed. Doing this, we see some interesting patterns, confirming the significance of the CJEU's mobility system for TCN posted workers. For the top 5 posting origins (Ukraine, Bosnia, Brazil, Turkey and Serbia) the number of posted workers outnumbers the number of work permits for these origin countries to a large extent. In other words, for the top 5 posting origins (representing most of the postings), posting significantly surpasses the Belgian labour migration system as an entry point to perform work in Belgium. For Ukrainian workers (the top posting TCN origin) posting mobility is almost ten times more substantial than work permit based migration. For Bosnians (second highest), work permit migration is

less important (81 work permits) as compared to the substantial number of Bosnian workers entering based on posting (about 3000 in 2017). For Brazilians (third), posting gradually became more important than work permits. For Turks (fourth) and Serbians (fifth), the number of posted workers is about three to four times larger than the number of workers entering on a classical work permit. Only for Moroccans (sixth) work permits are still more important than the number of postings. Of course, work permits do provide a continuous right of residence for one year, which is usually taken up. This is not the case with posting: workers enter (often more than once) for shorter service jobs. However, this type of circular work mobility for TCNs, facilitated by the CJEU, clearly fits into the needs of an ever more integrated single market. The CJEU created an well-used system of mobility for TCN posted workers which surpasses the national labour migration system in Belgium.

Table 4. Comparison of TCNs entering on a working permit B and TCNs entering through posting

		2008	2009	2010	2011	2012	2013	2014	2015
Ukrainians	Work Permit B	116	140	147	227	251	215	239	285
	Posted (from EU27)	100	72	116	191	498	464	1,422	2,040
Bosnians	Work Permit B	58	45	41	43	63	42	66	81
	Posted (from EU27)	206	244	222	394	646	834	1,658	3,028
Brazilians	Work Permit B	300	287	283	425	346	340	310	284
	Posted (from EU27)	141	200	179	258	564	835	767	927
Turkish	Work Permit B	698	584	648	668	595	563	471	454
	Posted (from EU27)	1,550	1,216	1,161	1,387	1,250	1,307	1,195	1,202
Serbians	Work Permit B	48	54	75	105	99	105	92	132
	Posted (from EU27)	179	190	205	212	184	231	443	479
Moroccans	Work Permit B	328	465	877	1,403	1,520	1,166	984	554
	Posted (from EU27)	281	188	229	263	314	372	394	486

Source: Belgian Federal Public Service Employment, Labour and Social Dialogue – Belgian National Social Security Office, LIMOSA data, own calculations

5. Conclusion

The CJEU has been subject of study and intense debate for decades. This contribution did not approach the debate of the judicialization of Europe through the tested method of studying case-law in detail or through studying the complex relationship between law and politics. We addressed the CJEU's activism through the lens of the economic realities it is potentially able to shape. We focused on one relatively limited line of case-law in which the CJEU slashed barriers to the free movement of posted TCN workers. The first case was adjudicated more than 25 years ago. We aimed to see what the impact was of this on the ground. What we found was evidence for the theory of the judicialization of Europe. The

CJEU systematically carved out a space for TCN posted workers – out of the Member States' remaining national sovereignty regarding labour migration – and this against the explicit will of Member States. Based on unique Belgian data on posting, we were able to distinguish between EU posted workers and TCN posted workers – both categories freely entering Belgium for the delivery of services. Whereas of course EU citizens represent the vast majority of posted workers, an increasing number of TCN workers – 14,000 in 2017 – worked in Belgium on service jobs. That number surpasses the number of TCNs who enter based on the classical national labour migration route for the top 6 TCN posted worker nationalities. This rising number runs parallel with the general increase of posted workers to Belgium. However, the extension of the free movement of services to TCNs is entirely a product of the CJEU, despite the Member States' resistance. In a different context than the mobility of posted workers, Thym (2016, p. 301) nevertheless comes to a similar conclusion: 'In the EU, legal rules often have a transformative character. Instead of stabilising pre-existing social realities, they are instruments for change, which aspire to foster the process of European integration. This transformation function implies that the degree of legal integration will not necessarily reflect political and social realities.'

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