

# Postcare

## Posting of third-country nationals in care services – the current state of play and scenarios for the future

### Country Report Poland<sup>1</sup>

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#### 1. Introduction

Population ageing, a common phenomenon in highly developed countries, is associated with a low birth rate and an increase in life expectancy. The number of elderly citizens has been growing dramatically across the entire world, not only in absolute terms and percentages of population, but also in relation to the working-age population that can potentially provide care<sup>3</sup>.

Ageing of society has naturally been observed also in the European Union countries (EU-27), where the number of people aged ≥80 years has been projected to increase 2.5-fold between 2019 and 2100, from 5.9% to 14.6%<sup>4</sup>. 25 % of Europe's population were aged 60 and above in 2020 – compared to 5.6 % in Africa and 13.3 % in Asia. As projected, by 2050, 34 % of the population in Europe will be over 60 years old<sup>5</sup>. Within the EU, the share of people aged over 80 is set to double over the same period: from 6% in 2020 to 11% in 2050.

When it comes to Poland, the Eurostat reported that it is among the top ten countries in which the percentage of the population aged >65 years grew between 2009 and 2019<sup>6</sup>. Just like other Central and Eastern European countries, Poland is experiencing accelerated demographic ageing, low fertility

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<sup>3</sup> Cf. OECD Health Policy Studies, *Who Cares? Attracting and Retaining Care Workers for the Elderly*, 2020, <https://www.oecd.org/publications/who-cares-attracting-and-retaining-elderly-care-workers-92c0ef68-en.htm>

<sup>4</sup> Eurostat Statistics Explained. *Population structure and ageing*, 2020: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population\\_structure\\_and\\_ageing#The\\_share\\_of\\_elderly\\_people\\_continue\\_to\\_increase](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_structure_and_ageing#The_share_of_elderly_people_continue_to_increase).

<sup>5</sup> Cf. W. He, I. Aboderin, and D. Adjaye-Gbewonyo, “*Africa Aging: 2020 International Population Reports*” (U.S. Department of Commerce” African Population and Health Research Center, U.S. Department of Health and Human Services: 5, 2020), [https://www.census.gov/content/dam/Census/library/publications/2020/demo/p95\\_20-1.pdf](https://www.census.gov/content/dam/Census/library/publications/2020/demo/p95_20-1.pdf).

<sup>6</sup> M. Podhorecka, J. Husejko, A. Pyszora, A. Woźniewicz, K. Kędzióra-Kornatowska, *Attitudes Towards the Elderly in Polish Society: Is Knowledge About Old Age and Personal Experiences a Predictor of Ageism?*, *Psychol Res Behav Manag.* 2022; 15: 95–102, doi: 10.2147/PRBM.S342800

and changes in the age structure. Within the next two or three decades, Poland, along with Italy, Spain, Greece and Japan, will become the oldest OECD countries<sup>7</sup>.

Indeed, as shown in the table below, the ageing of the population is progressing, and with age comes an increased risk of needing assistance with daily living. As Łuczak and Szweda-Lewandowska point out to, the acceleration of the process of double ageing - a significant increase in the number of the oldest old in the population- is a result of the cohort factor, i.e. the reaching old age by persons belonging to the generation of the post-war ‘baby boom’ generation. The post-war ‘baby boomers’ will be the first generation whose experience will be an advanced old age and will probably also be the first to experience such age and will probably be different from the experience of previous generations<sup>8</sup>.

**Table 1: Projected share of population aged 65+ and 80+ in Poland in 2015-2050 (%)**

	2015	2020	2025	2030	2035	2040	2045	2050
65+	15,8	18,9	21,7	23,3	24,5	26,4	29,3	32,7
80+	4,1	4,4	4,5	5,9	7,9	9,5	10,0	10,4

Source: R. Bakalarczyk, *Starość po polsku. Propozycja reformy systemu opieki nad osobami starszymi [Old age in Polish. Proposal for reform of the care system care for the elderly]*, Warszawa 2021, p. 20, citing and based on: Statistics Poland [GUS], *Prognoza ludności na lata 2014-2050 [Population projection for 2014-2050]*, Warszawa 2014

Given the above, no wonder, therefore, that a ‘care crisis’ looms large over both Polish and European welfare politics - particularly in the domain of elderly care<sup>9</sup>. In 2016, 20 % of households in the EU with people in need of care due to long-term health problems used professional home care services<sup>10</sup>. Demographic trends in the EU suggest that demand for elderly care will continue rising well into the 21st century, exerting increasing pressures on public care systems.

At the same time, women—the traditional providers of care within the family— have been entering the paid labour force in larger numbers than before. Thus, they have much less time and drive to care. Due to the combination of the above-mentioned demographic and societal factors, the need for

<sup>7</sup> Cf. K. Matuszczyk, *Forgotten topic or invisible problem? Political discourse in Poland on live-in care migration* [in]: *Towards a scarcity of care? Tensions and contradictions in transnational elderly care systems in central and eastern Europe*, edited by N. Katona and A. Melegh, FES Budapest 2020, p. 49.

<sup>8</sup> Cf. Z. Szweda-Lewandowska, P. Łuczak, *Przesłanki demograficzne, społeczne i ekonomiczne zwiększania zapotrzebowania na świadczenia opieki długoterminowej*, [in]: *Opieka długoterminowa w Polsce. Dzisiaj i jutro*, red. P. Błędowski, Warszawa 2019, p. 9.

<sup>9</sup> Cf. The Global Coalition on Aging (GCOA), “Relationship-Based Home Care: A Sustainable Solution For Europe’s Elder Care Crisis” (2018), [https://globalcoalitiononaging.com/wp-content/uploads/2018/06/RHBC\\_Report\\_DIGITAL.pdf](https://globalcoalitiononaging.com/wp-content/uploads/2018/06/RHBC_Report_DIGITAL.pdf).

<sup>10</sup> Cf. Products Eurostat News - Eurostat, “1 In 5 Households in Need in the EU Use Professional Homecare Services”, 28.02.2018, : <https://ec.europa.eu/eurostat/web/products-eurostatnews/-/ddn-20180228-1>.

additional long-term care<sup>11</sup> is intensifying across the European Union. At the same time, recruiting enough workers in LTC remains a challenge in the developed countries<sup>12</sup>. Interestingly, across the world, the demand for such workers is increasingly fulfilled by employing workers (in various capacities) “with a migratory background”<sup>13</sup>. Care (including especially live-in care) is thus increasingly becoming a “migrantised” occupation, not only in the West, but all across the world, as the process of incorporating non-domestic workers into the live-in care<sup>14</sup> workforces of a country progresses.

**As the populations of European countries grow older the demand for LTC, particularly live-in care work, has increased.** Live-in caregivers are paid professionals, with or without formal training, whose work primarily involves LTC provision while living in a private residence with the care receiver (recipient)<sup>15</sup>. This sector consists in large part of circular workers from newer EU Member States from Central and Eastern Europe<sup>16</sup>. The formal LTC sector of the EU has 6.3 million workers, which forms up to 3.2% of the entire EU workforce. The informal LTC sector is estimated to have up to 40-50 million workers<sup>17</sup>.

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<sup>11</sup> Long-term care (also as ‘LTC’) consists of a range of medical, personal care and assistance services that are provided with the primary goal of alleviating pain and reducing or managing the deterioration in health status for people with a degree of long-term dependency, assisting them with their personal care (through help for activities of daily living, such as eating, washing and dressing) and assisting them to live independently - *OECD. 2020. Who Cares? Attracting and Retaining Care Workers for the Elderly*. Paris: OECD Publishing <https://www.oecd.org/fr/publications/who-cares-attracting-and-retaining-elderly-care-workers-92c0ef68-en.htm>. In turn, care work covers a variety of activities serving the well-being of others, including childcare, caring for people with disabilities and elderly care. Herein, care and care work refer in particular to elderly care, mainly live-in care arrangements provided by caregivers (carers) living in the homes of the elderly care recipients. Caring for others is essential in sustaining social relationships – cf. A. Melegh, N. Katona, *Towards a scarcity of care? Tensions and contradictions in transnational elderly care systems in central and eastern Europe*, edited by N. Katona and A. Melegh, N. Katona, op. cit., p. 14. Following *inter alia* A. Safuta et al. (A. Safuta, K. Noack, K. Gottschall, H. Rothgang, *Migrants to the Rescue? Care Workforce Migrantisation on the Example of Elder Care in Germany* [in:] J. Kuhlmann, F. Nullmeier (eds.), *Causal Mechanisms in the Global Development of Social Policies, Global Dynamics of Social Policy*, [https://doi.org/10.1007/978-3-030-91088-4\\_10](https://doi.org/10.1007/978-3-030-91088-4_10), Bremen 2022, p. 14) I herein understand ‘live-in care’ as (informal) care encompassing care provided not only by relatives and friends, but also by foreign (migrant and posted) workers often residing in the care recipient’s (receiver’s) home (in private households), being at a juncture of international labour mobility, social policies and the issue of ageing, mentioned above.

<sup>12</sup> OECD Health Policy Studies, *Who Cares?* 2020, op. cit.

<sup>13</sup> Cf. N. Lightman, 2020. *Comparing Care Regimes: Worker Characteristics and Wage Penalties in the Global Care Chain*. *Social Politics: International Studies in Gender, State & Society* 28 (4): 971–998.

<sup>14</sup> See A. Safuta, K. Noack, K. Gottschall, H. Rothgang, *Migrants to the Rescue?*, op. cit.

<sup>15</sup> Cf. Eurofound. (2020). *Long-term care workforce: Employment and working conditions*. Luxembourg: Publications Office of the European Union.

<sup>16</sup> See B. Aulenbacher, A. Benazha, H. Lutz, V. Prieler, K. Schwiter, J. Steiner, (2021). *Contested Care in Austria, Germany, Switzerland*, *Global Dialogue* 11(3), 20-21.

<sup>17</sup>Cf. M. Barslund, F. De Wispelaere, K. Lenaerts, W. Schepers, E. Fries-Tersch, (2021). *Policies for long-term carers*. Luxembourg: Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament.

Most live-in care workers are women who come from Central and Eastern Europe countries without formal elderly care qualifications<sup>18</sup>.

An increasingly important part of live-in care is played by third-country nationals being posted abroad to provide such care. Some researchers (rightly) claim that households perceive migrants' (and posted workers') services as a replacement for family-provided care<sup>19</sup>. This type of care is mostly provided on a live-in basis: caregiver(s) live with a care recipient. Research on 'migrant<sup>20</sup> in the family care' in Germany (largest receiver of live-in care as it will be shown below) has shown that even when workers do not live within the care receiver's household, 'they are always nearby and able to help quickly if difficulties emerge'<sup>21</sup>. Although some live-in migrant caregivers have experience or training in nursing or care, the large majority does not have ad hoc formal qualifications<sup>22</sup> (despite many having tertiary education in other fields). Such caregivers have also been dubbed the most important 'therapeutic medicine' in the care of older people. They are becoming increasingly relevant in ageing societies, in which those in need of care are increasing, including people with disorders such as dementia<sup>23</sup>.

Posting of workers, which is has increasingly been becoming a source of live-in caregivers, 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<sup>24</sup>. Based on the provisions of Art. 56 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 [persons] (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.<sup>25</sup> Free movement of services, 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',

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<sup>18</sup> Cf. A. Böcker, V. Horn, C. Schweppe, *National Old-Age Care Regimes and the Emergence of Transnational Long-Term Care Arrangements for the Elderly* [in:] Gingrich, L.G. & Königeter, S. (Eds.). *Transnational Social Policy. Social Welfare in a World on the Move*, New York 2017; <https://doi.org/10.4324/9781315665498-11>, p. 230.

<sup>19</sup> Cf. P. Kniejska, *Migrant Care Workers aus Polen in der häuslichen Pflege: Zwischen familiärer Nähe und beruflicher Distanz [Migrant Care Workers from Poland in Home-Based Care: Between Familial Intimacy and Professional Distance]*. Wiesbaden 2016, p. 84 et seq.

<sup>20</sup> Of note is that posted workers are very often confused with migrant workers (whereas these are persons crossing borders on different legal bases – Art. 56 et seq. vs. Art. 45 et seq. of the Treaty on the functioning of the EU, TFEU).

<sup>21</sup> Cf. P. Kniejska, *In between-carer: towards a new type of elder care worker? The example of Polish migrant care workers in Germany'*, *International Journal of Care and Caring* 2018, 2(4): 477-98, DOI: 10.1332/239788218X15321004556767, p. 477.

<sup>22</sup> Cf. A. Böcker, V. Horn, C. Schweppe, *National Old-Age Care Regimes and the Emergence of Transnational Long-Term Care Arrangements for the Elderly*, op. cit., p. 230.

<sup>23</sup> Cf. P. Kniejska, (2018) *In between-carer: towards a new type of elder care worker?*, op. cit., p. 489.

<sup>24</sup> 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 Ruffert: 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, Ruffert e Lussemburgo*, a cura di A. Andreoni e B. Veneziani, Roma 2009, p. 124 et seq.

<sup>25</sup> Cf. C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, Oxford 2013, p. 365.

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). Therefore, the situation of posted workers is ‘split’ – even though they carry out work in the receiving (‘host’) Member State, their residence is (generally speaking) not shifted to the host country, as they, by and large, stay connected with their home country, given that their agreement concerning employment (e.g. contract of employment or a civil law contract in case of Poland) 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 country<sup>26</sup>. Most of them are also fully taxed in the Member State where their employer is established, when their posting missions last less than 183 days per 12-month period<sup>27</sup>.

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 observe also that *‘it is an understatement to say that the topic of ‘posting’ stirs up strong emotions’*<sup>28</sup>.

In turn, a **third-country national (‘TCN’)**, pursuant to Art. 2(6) Regulation 2016/399<sup>29</sup> 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 (...)] 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*].

One needs also to emphasize here the importance of legal employment and legal stay (residence) of third-country nationals in the sending Member State for legal posting. It stems directly from the jurisprudence of the Court of Justice of the European Union (‘CJUE’). In its judgment in C-477/17 Balandin<sup>30</sup>, 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 a sending Member State (in our case – Poland) is a precondition to being able to legally post them abroad**<sup>31</sup>.

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<sup>26</sup> 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.

<sup>27</sup> 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): [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3939196](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939196)), p. 5 et seq.

<sup>28</sup> Y. Jorens, F. De Wispelaere, *Intra-EU posting: looking for solutions: a Herculean or a Sisyphean task?* [in:] p. 113.

<sup>29</sup> 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).

<sup>30</sup> See the judgment of the CJEU in C-477/17 Balandin [ECLI:EU:C:2019:60], para. 47-48.

<sup>31</sup> Please note that given the dimension of our Report, it has been impossible to provide for the full picture of titles of legal stay and work in Poland. In this 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; see also M. Kiełbasa, M. Szaraniec, M.

The aim of the present Report is to take stock of making use of posting of third-country nationals in live-in care services in the Polish context. In particular, it takes into consideration Poland's dual role in that very process<sup>32</sup>. While Polish society is one of the most rapidly ageing in the OECD and TCNs fill in the care gap, Poland is also one of the biggest (if not "the" biggest) provider of TCNs workers posted within the framework of live-in care in the European Union. When it comes to the former dimension – it is actually not the TCN workers posted to Poland who fill in that gap, therefore, the emphasis in this Report will be put on the outgoing postings of third-country nationals in the very sector. The Report will also contain the indication to the most important obstacles in such outgoing postings (especially to Germany). It is also to contribute to the ongoing debate in the matter.

## 2. Live-in care

Within the live-in care sector, several central actors can be identified. Firstly, one should mention live-in care recipients - the end users of live-in care - senior citizens, the elderly, ill (sometimes chronically) or / and dependent person who require care provided to them by live-in caregivers (carers - sometimes also referred to as 'live-ins'). The primary reason for making use of live-in care is mirrored *inter alia* by research - nursing homes are seen not as a 'good alternative' but as a sort of 'final option' to be avoided at cost<sup>33</sup>.

Caregivers provide the services to live-in care recipients on behalf of the posting enterprises (service providers - commonly and wrongly referred to as 'temporary employment agencies'<sup>34</sup> or simply 'agencies') or on the basis of an employment contract (or other type of contract). As mentioned before, the object of interest herein are of course the former arrangements – live-in care provided by workers (TCNs) posted abroad.

One should also mentioned family / relatives of the recipients of care as well as states (and politicians). Poland is regarded (along with Hungary, Romania and Lithuania) as a country with a care system that is not generous to the recipient and poorly developed in terms of organisation. The Polish system is characterised by a low level of public investment in long-term care and an overall underdeveloped formal care service sector, a significant role for the informal sector (mainly the family, or more

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Mędrala, M. Benio, *Posting of Workers from and to Poland. Facts and Figures*, Posting.STAT, Leuven, July 2022, retrievable at: <https://hiva.kuleuven.be/en/news/newsitems/posting-stat-enhancing-collection-and-analysis-national-data-on-intra-eu-posting>

<sup>32</sup> The point very rightly seen the light to by K. Matuszczyk, *Forgotten topics or invisible problem?*, op. cit., p. 54 et seq.

<sup>33</sup> Conclusion e.g. from F. Höpflinger, J. Van Wezemael (2014), *Age Report III Wohnen im höheren Lebensalter Grundlagen und Trends*, Zürich / Genf, [https://www.seismoverlag.ch/site/assets/files/6022/oa\\_9783037771433.pdf](https://www.seismoverlag.ch/site/assets/files/6022/oa_9783037771433.pdf)

<sup>34</sup> Cf. e.g.. S. Leiber, K. Matuszczyk & V. Rossow, *Private Labor Market Intermediaries in the Europeanized Live-in Care Market between Germany and Poland: A Typology. Political discourse in Poland on live-in care migration*, 67 *Zeitschrift für Sozialreform* 2019, 65(3), p. 366 + 375) who mention 'informal migratory networks, which are now increasingly superseded by private brokering agencies', estimating of the number of such 'agencies' active in Germany to have skyrocketed to 274 in 2018.

specifically – to women in the family<sup>35</sup>) in meeting the care needs of older people and limited support for the family in this function. Although there is a very wide range of different forms of care support in home, community and inpatient settings<sup>36</sup> in practice many of them have very limited availability. Thus, Poland has one of the of the least recipient-friendly systems among European countries<sup>37</sup>. Indeed, the arrangements for the elderly in Poland are characterized by the lack of a coherent approach, insufficient public financial outlays, undeveloped public care infrastructure and low-quality services<sup>38</sup>. According to estimates, only 2 per cent of the population over 65 receive formal long-term care<sup>39</sup>.

At the same time, increasing economic activity among women and the ongoing redefinition of their role in Polish society (they are not only mothers and caregivers), combined with female emigration, have undermined the basis of the care model for the elderly that has been functioning for many decades. As a result, a care gap has been created, which started to be filled by qualified natives, but above all by immigrant women from Ukraine.

In this way, the chain of care has been consolidated. It had begun to form in the 1990s and Germany soon proved to be the most important destination, mainly due to its geographical and cultural proximity, as well as the possibility of ‘easy’ money that could be earned relatively quickly. The dynamically ageing population in this country and the financial possibilities of households with elderly people also contributed to hiring more and more Polish women as domestic helpers<sup>40</sup>. There was a widespread belief that females from Poland were an appropriate support for dependent people because of their diligence, conscientiousness and their approach to care, captured by the expression »Polish pearls«<sup>41</sup>. Since several years though, more and more frequently that expression could perhaps be altered by precisising that those “pearls” come from Poland (and not necessarily are “Polish” any more).

### 3. Legal and institutional framework of Poland as a Member State sending TCNs

#### 3.1. Legal entry / stay in Poland

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<sup>35</sup> Cf. e.g. M. Duszczek, M. Lesińska, K. Matuszczyk, *Upolitycznienie problemu starzenia się społeczeństwa w Polsce. Teoria i praktyka*. Warszawa: Wydawnictwa UW, Warszawa 2019, <https://doi.org/10.31338/uw.9788323536437>

<sup>36</sup> Cf. measures listed by R. Bakalarczyk, *Starość po polsku [Old age in Polish]*, op. cit., p. 35.

<sup>37</sup> See R. Bakalarczyk, *Starość po polsku [Old age in Polish]*, op. cit., p. 34.

<sup>38</sup> Cf. K. Matuszczyk, *Forgotten topic or invisible problem?*, op. cit., p. 54.

<sup>39</sup> Cf. K. Matuszczyk, *Forgotten topic or invisible problem?*, op. cit., p. 54; see also A. Bartha, O. Fedjuk, V. Zentai, (2014). *Migrant domestic care workers: state and market-based policy mix*. Neujobs Working Paper D. 13.2. 2014.

<sup>40</sup> See also: A. Böcker, V. Horn, C. Schweppe, (2017). *National Old-Age Care Regimes and the Emergence of Transnational Long-Term Care Arrangements for the Elderly* [in:] L.G. Gingrich, S. Königter (eds.). *Transnational Social Policy. Social Welfare in a World on the Move*, New York 2017.

<sup>41</sup>Cf. K. Matuszczyk, *Forgotten topic or invisible problem?*, op. cit., p. 54; see also: E. Palenga-Möllenbeck, (2013), "New maids – new butlers? Polish domestic workers in Germany and commodification of social reproductive work", *Equality, Diversity and Inclusion*, Vol. 32 No. 6, pp. 557-574. <https://doi.org/10.1108/EDI-10-2012-0086>, p. 563 et seq. The media also dubbed them ‘angels from the East’ (Basler Zeitung, 2012), ‘silent heroines’ (Kurier, 2018) or ‘true angels’ (Deutschlandfunk, 2016) – as quoted by J. Steiner, V. Prieler, M. Leibfingler, A. Benazha, *Truly legal!? Legal framing and legality narratives in live-in care in Austria, Germany and Switzerland* [in:] *Towards a Scarcity of Care*, (eds.) N. Katona, A. Meleg, Friedrich-Ebert Stiftung, Budapest, p. 72-73.

Herein I provide the very basic information in this regard<sup>42</sup>, supplemented by indications to further relevant sources<sup>43</sup>. Basically, the legal stay denotes stay of a third-country national during the validity of their residence title, which entitles them to enter and stay in Poland. To list of residence titles there belong for example the following titles: visa, temporary residence permit, permanent residence permit, residence permit for a long-term resident of the EU. Moreover, citizens of certain third countries who are exempt from the visa requirement are allowed to enter and stay in Poland as part of visa-free travel. When it comes to nations of interest herein - this is the case of Moldova (since 28 April 2014); Georgia (since March 2017) and Ukraine (since 11 June 2017).

Furthermore, if one applies for legalisation of stay in Poland during the validity of any of the above-mentioned residence titles, and the application form is free from formal errors, they stay in Poland will be legal until the final decision is issued.

*Last but not least* - the condition of TCNs' legal stay, regardless of their residence title, is to hold a valid travel document.

### 3.2. Legal employment of third-country nationals

To start with, it is worth recalling that 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 was negative, as about 1.2 million Poles (3% of the population) left the country between 2002 and 2013, particularly to the United Kingdom and Ireland in 2004–2008. 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 was altered 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 the years 2016–2018 Poland was the top OECD destination for temporary labour immigrants<sup>44</sup>. The above also translates itself generally into more and more foreigners<sup>45</sup> working in Poland. *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

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<sup>42</sup> Retrievable at the website of the Department for Foreigners of the Office of Wielkopolska Province at: <https://migrant.poznan.uw.gov.pl/en/slownik-pojec/legal-staystay-poland-legally>.

<sup>43</sup> For the comprehensive and updated summary of criteria for entry and stay in Poland see the Polish Border Guard's website: <https://www.strazgraniczna.pl/pl/cudzoziemcy/warunki-wjazdu-pobytu-oraz-pra/4497,Entry-stay-and-working-conditions-in-Poland.html>

<sup>44</sup> P. Strzelecki, J. Growiec, R. Wyszynski, *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.

<sup>45</sup> The divide between free labour mobility by EU citizens on the one hand and nationally controlled labour migration by third-country nationals has been 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>. See also: 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, Jyvaskyla / Warsaw 2020.





regard<sup>46</sup>. The scale of Ukrainian presence in Poland in April 2022 may be estimated at approximately 2.9 million. This number is a sum of two sub-populations: those Ukrainians who were staying in Poland before the war (around 1.35 million) and those who arrived since then (around 1.55 million)<sup>47</sup>.

When it comes to immigration and employment of third-country nationals in Poland – they are governed by a plethora of legal acts, most importantly by the Act of 12 December 2013 on Foreigners<sup>48</sup>, the Act of 20 April 2004 on Employment Promotion and Labour Market Institutions<sup>49</sup>, the Act of 15 June 2012 on consequences of entrusting work to foreigners residing on the territory of the Republic of Poland in violation of the regulations<sup>50</sup>, as well as by a score of implementing provisions.

By and large, the regulatory framework concerning labour immigration to Poland distinguishes between three categories of persons: EU/EEA and Swiss nationals, special categories of third-country nationals, and the rest of TCNs (plus very recent additions set out in the so-called ‘Special Law on assistance to Ukraine’<sup>51</sup>). Pursuant to 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 various forms) to access it under diverse conditions.

What is more, a special regime concerning employment of TCN workers which includes nationals of six former USSR countries - Ukraine, Belarus, Russia, Armenia, Georgia and Moldova. It comes in the form of the so-called declarations on entrusting work<sup>52</sup> being made even more flexible lately, by amendments to Polish immigration law, which came into force on 29 January 2022<sup>53</sup>.

Finally, as mentioned before, adding to the full picture are the provisions of the ‘Special Law on assistance to Ukraine’<sup>54</sup>, which provided for a new, special procedure of employing Ukrainian citizens (and their spouses). Its Art. 22 enabled 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.

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

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<sup>46</sup> Further cf e.g.: M. Kiełbasa, M. Szaraniec, M. Mędrala, M. Benio, *Posting of Workers from and to Poland*, op. cit., p. 46 et seq.

<sup>47</sup> Cf. M. Duszczyk, P. Kaczmarczyk, *The War in Ukraine and Migration to Poland: Outlook and Challenges*, *Intereconomics*, 2022, 57(3), p. 165 et seq.

<sup>48</sup> Journal of Laws 2021.2354, as amended.

<sup>49</sup> Journal of Laws 2021.1100, as amended.

<sup>50</sup> Journal of Laws 2012.769, as amended.

<sup>51</sup> 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).

<sup>52</sup> Declarations on entrusting work to a foreigner (**‘declarations on entrusting work’ / ‘DoEWs’**) — are to be submitted by an employer to the Poviats Labour Office. 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 work for up to 24 months.

<sup>53</sup> Cf. the Act of 17 December 2021 on amending the Act on foreigners and certain other acts, Journal of Laws 2022, item 91.

<sup>54</sup> 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’**).

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 the above-mentioned declarations on entrusting work. Moreover, the Polish system generally distinguishes between 'traditional' employment contracts on the one hand and civil law contracts<sup>55</sup> on the other - also as bases for employing TCNs. Some of them are also self-employed). 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 rights<sup>56</sup>. When it comes to the latter legal basis - civil law contracts – they are quite common in Poland; sometimes these are actually disguised employment relationships, which in the light of Art. 22 § 1 (1) of the Labour Code means that they formally constitute situations of employment on the basis of an employment contract.

In turn, 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. Recently, the level of protection for civil law contractors has been expanded, e.g. in terms of social security coverage and certain parental-related entitlements<sup>57</sup>.

The Polish Civil Code<sup>58</sup> establishes a legal framework for civil law contracts. The most widespread type of civil law contract are mandate contracts (contracts of mandate – 'umowa zlecenie / 'UZ')<sup>59</sup>. 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. Live-in caregivers (including TCNs) employed via such a contract enjoy a legal position which resembles that of freelancers, in that by and large they are not bound by working time restrictions and generally and formally are free to render services in any way and at times of their choosing.

Therefore, such caregivers may be in subject to social security in Poland (that may be confirmed with a Portable Document A1 – PD A1) and no need to pay social security contributions in Germany arises if such workers are posted there. Given their particular status in Polish labour and civil law (in particular

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<sup>55</sup> For more in this regard see below, as well as: M. Kielbasa, M. Szaraniec, M. Mędrala, M. Benio, *Posting of Workers from and to Poland*, op. cit.; 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 et seq.

<sup>56</sup> See L. Mitrus, *Social security in Poland in times of corona*, op. cit., p. 110-111.

<sup>57</sup> Cf. L. Mitrus, *Social security in Poland in times of corona*, op. cit., p. 112. Cf. also M. Kielbasa, M. Szaraniec, M. Mędrala, M. Benio, *Posting of Workers from and to Poland*, op. cit., p. 68 et seq.

<sup>58</sup> 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.

<sup>59</sup> To be more specific, these are unnamed civil law contracts to which the provisions on mandate shall apply.

– the lack of subordination of the employee<sup>60</sup>), the worktime restrictions that affect to regular employees in Germany are not directly applicable. This makes the constellation of UZ and posting to Germany the most common model of live-in caregivers' employment<sup>61</sup>.

Immigration procedures generally require third-country nationals to obtain an employment title regardless of the type of contract they have been offered. It is generally the job-offeror that must apply for the work permit<sup>62</sup>.

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 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<sup>63</sup>.

Seen in the light of the above, **2021 was actually a record year in terms of the impact of non-Polish citizens on the Polish labour market**. Pursuant 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 Ukrainians), along with 504,172 work permits (of which – 325,213 - to Ukrainians), as well as 113,435 seasonal work permits (111,061 – to Ukrainians) that were issued to TCNs<sup>64</sup>. When it comes to 'individual' ['unique'] persons' behind the declarations on entrusting work, the declarations actually concerned 1,055,226 persons of Ukrainian nationality and on aggregate - 1,303,606 TCNs. According to the available data of the Ministry, 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)<sup>65</sup>. However, there were only 17,716 declarations on

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<sup>60</sup> Provided for in Art. 22 § 1 of the Polish Labour Code (The Law of 26 June 1974 of Labour Code, consolidated text in: Journal of Laws 2020, item 1320, as amended) consists in the employee's undertaking, 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 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.

<sup>61</sup> Cf. T. Ebbing, A. Petermann, *POSTCARE. Posting of third country nationals in care services – the current state of play and scenarios for the future. Country Report Germany* – within the framework of the POSTCARE project.

<sup>62</sup> Except for the so-called 'the single permit' – to be applied for by the third-country national themselves.

<sup>63</sup> 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](https://www.migrant.info.pl/Residence_in_Poland.html)

<sup>64</sup> Please note that given the plethora of limitations (including various and overlapping employment titles as well as residence titles) and the lack of centralized databases, only those three major employment titles of third-country nationals within the total employment in Poland (numbers of the other titles, relatively small, are either unavailable or very much fragmented – e.g. TCNs holding 'the Card of a Pole' and working on its basis).

<sup>65</sup> See the data of the Ministry of Family and Social Policy as well as: A. Błaszczak, *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>

entrusting work registered within the PKD (Polish NACE equivalent) Code Q 'Healthcare and social assistance' [*Opieka zdrowotna i pomoc społeczna*] in 2021 (of which 16,246 were issued to Ukrainians). When it comes to work permits issued in that regard that year, the figures were even smaller – solely 4,509 (of which 4,140 were issued to Ukrainian citizens). Such figures seem to corroborate the estimates of around 20,000 Ukrainians working in the sector yearly, however experts estimate that the actual number of employees may exceed around 100,000 care workers in Poland<sup>66</sup>. It might also be one of the most important consequences of Poland's continuing status as a pool of »good workers« whose one pre-eminent characteristic is 'care drain'<sup>67</sup>. Despite care migration (and posting of caregivers having a temporary, circular character (caregivers usually work for 6–8 weeks at a time), it means the loss of employees' unused potential, mainly limiting the supply of caregivers in their local communities. Estimations range from 300,000 to 500,000 persons involved in this type of labour mobility, especially in Poland, fostered by the dynamically developing industry. Moreover, despite the experience gained abroad, Polish women rarely want to work as caregivers in Poland, mainly because of the low earnings<sup>68</sup>. Indeed of the shortage of domestic workers, the demand for third-country (especially Ukrainian) labour intensified rapidly<sup>69</sup>. The solution was the immigration of third-country nationals, mainly from Ukraine, growing since the beginning of this century.

As the research shows, half of the Ukrainian women who come to Poland initially work in a private household, while only one in three caregivers worked illegally<sup>70</sup>. As in the case of Polish women working in Germany, Ukrainians do not have adequate training to work with the elderly. The vast majority of caregivers have completed only secondary or vocational education, however, their industriousness and willingness to work for relatively lower wages is very much appreciated<sup>71</sup> by employers and colleagues alike.

### 3.3 Social security of third-country nationals in Poland as a sending Member State

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<sup>66</sup> Cf. K. Matuszczyk, *Forgotten topic or invisible problem?*, op. cit., p. 56. See also A. Rogalewski, K. Florek, *The future of live-in care work in Europe*, op. cit.

<sup>67</sup> Which was rightly described as movement of socially insecure groups of people, who face labour market challenges also in the sending countries and who have more and more integrated into care migration toward better off societies in Western Europe – cf. A. Melegh, N. Katona, *Towards a scarcity of care?*, p. 12. See also F. Bettio, A. Simonazzi, P. Villa, *Change in Care Regimes and Female Migration: The 'Care Drain' in the Mediterranean*, *Journal of European Social Policy* 16 (3) 2006: 271–285.

<sup>68</sup> Cf. K. Matuszczyk, *Forgotten topic or invisible problem?*, op. cit., p. 56.

<sup>69</sup> Cf. e.g. M. Kindler, A. Kordasiewicz, M. Szulecka, *Care needs and migration for domestic work: Ukraine-Poland*, Geneva: International Labour Office, 2016, p. 5 et seq. See also: Vollmer B. & Malynovska O. (2016). *Ukrainian Migration Research Before and Since 1991* [in:] O. Fedyuk, M. Kindler (eds.), *Ukrainian Migration to the European Union*. (pp. 17-33). IMISCOE Research Series. Springer.

<sup>70</sup> A. Górny, E. Jaźwińska, *Ukraińskie migrantki i migranci w aglomeracji warszawskiej: cechy społeczno-demograficzne i relacje społeczne. Raport z badan.* CMR Working Papers 115/173, p. 32; see also: A. Górny, P. Kaczmarczyk, M. Szulecka, M. Bitner, M. Okólski, U. Siedlecka, A. Stefańczyk, *Imigranci w Polsce w kontekście uproszczonej procedury zatrudniania cudzoziemców. Raport z badań.* WISE Europa i Ośrodek Badań nad Migracjami UW Warszawa 2018, <http://www.migracje.uw.edu.pl/wp-content/uploads/2016/11/raport-power.pdf>

<sup>71</sup> Cf. K. Matuszczyk, *Forgotten topic or invisible problem?*, op. cit., p. 56.

Pursuant to the Law of 4 September 1997 on governmental administration sections<sup>72</sup>, the “social security” section in Poland covers a vast range of areas: social insurance and social security; old-age pension funds; social assistance; government programmes for social assistance; social benefits, employment, social and vocational rehabilitation of people with disabilities; support combatants and persecuted persons; the coordination of the social security systems and public benefit activity. As of 2016, the social protection in Poland comprised 20.3% of the GDP, which was below the European Union (EU) average (28.2%). The financing of the Polish social protection system relies on social contributions, which finance more than two thirds of social benefits and transfers. This, together with the high degree of decommodification, places Poland among the countries characterised as a conservative-corporatist model of welfare state regime, but with gradual shift towards a liberal regime after the reforms introduced in the past<sup>73</sup>.

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 at 30 June 2022, including 729,002 Ukrainian citizens<sup>74</sup>. This is almost one-third more than at the end of 2020<sup>75</sup>. 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 thousand<sup>76</sup> and as at 31 January 2022 there were 871,559 such persons (including 620,771 Ukrainian citizens).

When it comes to legal bases of the subjection to social security, nearly 59% were persons who were workers (employed on the basis of an employment contract pursuant to the Polish Labour Code<sup>77</sup>), 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 contracts<sup>78</sup>.

When it comes to numbers of third-country nationals posted to Poland – these figures are meagre – compare the table below including the latest available figures for 2020 (please note that it includes also the number of foreigners (non-Polish EU / EEA / Swiss nationals) posted to Poland. Unfortunately, the statistics concerning live-in care are unavailable with regards to incoming TCN postings.

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<sup>72</sup> Cf. Journal of Laws 2015, item 812, as amended.

<sup>73</sup> Cf. A. Chłoń-Domińczak, *Migrants’ Access to Social Protection in Poland*, [in:] J.-M. Lafleur, D. Vintilla (Eds.), *Migration and Social Protection in Europe and Beyond (Volume 1). Comparing Access to Welfare Entitlements*, Springer, Liege, 2020, p. 327 et seq.

<sup>74</sup> The number of non-Polish citizens, who are subject to retirement and disability pension insurance as at that date, cf.: <https://psz.zus.pl/kategorie/ubezpieczeni/ubezpieczenia-emerytalne-i-rentowe>

<sup>75</sup> A. Błaszczak, *A record number of economic immigrants in Poland*, op. cit.

<sup>76</sup> Cf. <https://www.zus.pl/o-zus/aktualnosci/-/publisher/aktualnosc/0/niemal-15-7-mln-osob-ubezpieczonych-w-zus/4240661>

<sup>77</sup> For more – see below in this Report.

<sup>78</sup> 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 solely on its basis is not entitled to pension, disability, sickness, accident or health insurance.

**Table 2. Number of foreigners (including third country nationals) posted to Poland, 2018 - 2020**

Country posting workers	2018	2019	2020 (+ % share of the grand total)	% share of the change 2019 vs. 2020 (+/-)
Ukraine	3788	8745	9389 (38.5 %)	+ 7,36%
Germany	3048	8405	6170 (25.3%)	- 26,59%
South Korea	313	3812	2785 (11.4 %)	- 26,94%
Belarus	1223	2232	1730 (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	1267	159	- 87,45 %
India	382	556	139	- 75 %
Great Britain	145	225	101	- 55,11 %
Japan	133	212	41	- 80,66 %
Other countries combined	1923	3134	1707	- 45,53%
<b>Grand total:</b>	<b>13,731</b>	<b>31,217</b>	<b>24,373</b>	<b>- 21,92 %</b>

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

When it comes to the outgoing postings – these are numbers of Portable Documents A1 (PDs A1) issued in Poland to all – Polish and non-Polish (including third-country) citizens in respective years:

**Table 3. Total number of PDs A1 (E101s) issued in Poland 2011 - 2021**

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: Polish Social Insurance Institution (ZUS)

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 - the number of PDs A1<sup>79</sup> increased substantially in 2021 year on year.

**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 Art. 13 of the Basic Regulation were 667,244<sup>80</sup>, **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 4. 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 <sup>81</sup> 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%

<sup>79</sup> Please note that in this section we provide data mostly based on numbers of PDs A1.

<sup>80</sup> 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).

<sup>81</sup> Polish Classification of Activities, equivalent to NACE, as mentioned before.

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 %
<b>Human health and social work activities (PKD Q)</b>	<b>74,876</b> <b>[17,953</b> <b>+</b> <b>56,833]</b>	<b>2,025</b> <b>1,091</b> <b>+ 934</b>	<b>2.7%</b>	<b>1,836</b> <b>[1,023 +</b> <b>813]</b>	<b>90.6 %</b>	<b>72,851</b>	<b>97.3%</b>

Source: own calculations based on data from the 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,.

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** – area which is crucial for the present Report. However, we fear that when it comes to the most popular direction of third-country national caregivers providing home care – Germany – their 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 jurisprudence<sup>82</sup>. 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 Germany<sup>83</sup>.

#### 4. Legal and institutional framework of the receiving Member State

As indicated above, I focus herein predominantly on postings of third-country nationals from Poland. In the light of the latest research, there can be no doubt that **the majority of postings from Poland actually take place to Germany**<sup>84</sup>. That Member State will therefore be of primary interest in this subchapter.

<sup>82</sup> 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.

<sup>83</sup> 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*.

<sup>84</sup> 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) for workers posted from Poland in 2021 included Germany (125,380 PDs A1 issued under Art. 12 of the BR - up from 113,138 in 2020), France, Belgium, the Netherlands and Sweden. This is also confirmed by the latest research carried out in Germany, demonstrating it as the main receiving country of posted workers



In Germany, about 2.86 million people relied on the assistance and care of another person in 2015<sup>85</sup> and it is estimated that the number is set to rise. This is a challenge not only for German families, the welfare state and for care and social politics, but also for the organisation and management of care<sup>86</sup>. Indeed, in Germany, demographic ageing, together with structural changes in family patterns, has been causing the market for institutional elder care services to expand. With a volume of about 49 billion euros in 2016, the market for inpatient and outpatient care services ranked third in the domestic health-care sector. Notwithstanding these developments, 52 per cent of the 3.4 million people in need of long-term care still rely on informal care<sup>87</sup> at home<sup>88</sup>. In this private realm, largely unregulated cash-for-care allowance - Pflegegeld<sup>89</sup> - has been increasingly shifting the boundaries between paid and unpaid care work. Even though the benefit amount cannot cover a live-in care in full, it is estimated that in roughly every twelfth household with a registered care recipient, this work is carried out by – mostly female – central and eastern European live-ins<sup>90</sup>. Because the vast majority of them work on two- or three-month rotation, this could correspond to about 414,000 care workers (or 450,000 if the Austrian statistics are applied to the German context)<sup>91</sup>.

Despite the lack of official data and the vague estimates, it is obvious that migrant live-in care has become an integral part of the care regime in Germany. According to the census, almost half of the live-ins come from Poland. Other important countries of origin are Slovakia (11 per cent) and Romania (10 per cent). In a few cases, they come from non-EU members, such as Ukraine (2 per cent), Moldova

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in the European Union. In 2020, 16.9 percent of all postings from EU countries had Germany as a destination country – see C. Albrecht, Y. Giesing, B. Rude, *Posted Workers in Germany – Developments and New Legislations*, CESifo Forum, 3/2022, May 2022, Vol. 23, p. 8.

<sup>85</sup> Cf. Statista research, 2017.

<sup>86</sup> Cf. P. Kniejska, *In between-carer: towards a new type of elder care worker?*, op. cit., p. 477.

<sup>87</sup> Cf. J. Steiner, V. Prieler, M. Leiblfinger, A. Benazha, *Truly legal!?*, op. cit. p. 72-73.

<sup>88</sup> Please note that these figures correspond to those who receive only long-term care allowance under Section 37 of the German SGB XI. Thus, the statistic disguises whether this work is really provided by the relatives or outsourced to a third party, such as migrant live-ins – see J. Steiner, V. Prieler, M. Leiblfinger, A. Benazha, *Truly legal!?*, op. cit. p. 73.

<sup>89</sup> Pflegegeld – the (nursing) care allowance paid thanks to the Pflegeversicherung (nursing care insurance) contributions paid, introduced on 1 January 1995 under Helmut Kohl. The prerequisite for receiving the allowance is that home care is provided to care recipient, for example by relatives or other caregivers, and that at least care grade 2 is available. The allowance is transferred to the person in need of care by the care insurance fund. The latter can freely dispose of the use of the care allowance and usually passes the care allowance on to the persons caring for them. The care allowance can also be combined with outpatient care benefits in kind. Care levels ranging from 2 (tantamount to 316 EUR per month) to 5 (901 EUR per month) are available – see <https://www.bundesgesundheitsministerium.de/pflegegeld.html> .

<sup>90</sup> J. Steiner, V. Prieler, M. Leiblfinger, A. Benazha, *Truly legal!?*, op. cit. p. 73. See also V. Hielscher, S. Kirchen-Petres, L. Nock, (2017). *Pflege in den eigenen vier Wänden. Zeitaufwand und Kosten. Pflegebedürftige und ihre Angehörigen geben Auskunft*, 2017, [https://www.boeckler.de/pdf/p\\_study\\_hbs\\_363.pdf](https://www.boeckler.de/pdf/p_study_hbs_363.pdf) .

<sup>91</sup> Cf. J. Steiner, V. Prieler, M. Leiblfinger, A. Benazha, *Truly legal!?*, op. cit. p. 73.

(0.3 per cent) or Serbia (0.3 per cent)<sup>92</sup>. When it comes to their age – estimations concerning the majority of them vary from ‘45 years or over’<sup>93</sup> to ‘about 50 years of age’<sup>94</sup> or ‘over fifty’ years of age<sup>95</sup>. When it comes to the numbers of migrant live-in care workers employed within private households, estimates range between 60,000<sup>96</sup> and 300,000 – 400,000<sup>97</sup> and the latest research assesses that even around 500,000 “live-ins” (live-in caregivers) are active in Germany<sup>98</sup>.

Live-in migrant (including TCN posted workers’) care work has become a cornerstone in the German care industry. Some of the researchers went even that far to conclude that the German care regime would collapse without live-in carers from abroad<sup>99</sup>.

At the same time, precise estimation of the actual numbers of live-ins is difficult because of the mostly irregular character of this type of employment. VHBP, a German association, VHBP, estimates that even 90% of all migrant (therefore including posting TCN workers) care workers in German households work irregularly<sup>100</sup>.

As stated in the previous chapter, TCN holders of a long-term work permit in Poland technically have the option to be posted for up to 90 days (out of 12 months). However, the German Embassy in Poland, contrarily to the EU law requires them to make an appointment for ‘a Visa according to Vander Elst’ to ensure that the posting of labour to Germany is legal.

## 5. Comparative analysis of employment conditions of EU-citizens and TCNs in live-in care

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<sup>92</sup> Cf. J. Steiner, V. Prieler, M. Leiblfinger, A. Benazha, *Truly legal!?*, op. cit. p. 73.

<sup>93</sup> Cf. K. Matuszczyk, *Forgotten topic or invisible problem?*, op. cit., p. 55 and A. Rogalewski, K. Florek, *The future of live-in care work in Europe*, op. cit.

<sup>94</sup> Cf. J. Steiner, V. Prieler, M. Leiblfinger, A. Benazha, *Truly legal!?*, op. cit. p. 73.

<sup>95</sup> J. Karakayali, *Transnational Haushalten. Biografische Interviews mit care workers aus Osteuropa [Transnational Households. Biographical Interviews with Care Workers from Eastern Europe]*. Wiesbaden 2010.

<sup>96</sup> See T. Rostgaard, C. Glendinning, C. Gori, T. Kroger, A. Österle, M. Szebehely, . . . M. Vabo (2011), *Living at home: Living independently at home: Reforms in home care in 9 European countries*: SFI - Danish National Centre for Social Research 2011, p. 154 et seq.

<sup>97</sup> Cf. M. Fahimi, S. Rosoli, K. Schalek, *Improving Conditions for Health Professionals and Live-in Care Workers*, Policy Brief 4/2020, AK Europa, Wien 2020.

<sup>98</sup> Cf. A. V. Benazha, H. Lutz, *Intersektionale Perspektiven auf die Pflege: Geschlechterverhältnisse und Migrationsprozesse, [in:] Interessenvertretung und Care: Voraussetzungen, Akteure und Handlungsebenen*, C. Rudolph, K. Schmidt (ed.), Münster 2019, pp. 146–160; A. Safuta, K. Noack, K. Gottschall, H. Rothgang, *Migrants to the Rescue?*, op. cit., p. 311.

<sup>99</sup> Cf. H. Lutz, E. Palenga-Möllenbeck, *Care, Gender and Migration: Towards a Theory of Transnational Domestic Work Migration in Europe*, *Journal of Contemporary European Studies* 19(3) 2011, p. 349; A. Safuta, K. Noack, K. Gottschall, H. Rothgang, *Migrants to the Rescue?*, op. cit., p. 311.

<sup>100</sup> Cf. Petermann, T. Ebbing, P. Michael, 2017. *Das Tätigkeitsprofil von Betreuungspersonen in häuslicher Gemeinschaft [The Job Profile of Care Workers in Home-Based Care]*. *Berufsakademie für Gesundheits- und Sozialwesen Saarland (BAGSS)*, 2017, p. 4. A. Safuta, K. Noack, K. Gottschall, H. Rothgang, *Migrants to the Rescue?*, op. cit., p. 311.

As demonstrated above – our research has shown that Poland is mostly posting out workers rather than taking them in and that the major country receiving live-in caregivers is Germany. Therefore, the comparative analysis herein shall focus on some chosen particulars concerning posting from Poland to Germany.

To start with, in Germany 52 per cent of the 3.4 million people in need of long-term care still rely on informal care at home<sup>101</sup>. Almost half of the live-in caregivers come from Poland<sup>102</sup>. Care recipients and their family members expect high quality service provided preferably round the clock, yet high standards of the ordinary labour contract in Germany would require three caregivers to meet this need. Meeting this demand would be impossible German family budget could stand<sup>103</sup>.

Against such backdrop one could indicate three major legal models of hiring a live-in caregiver to work in Germany. Firstly - direct employment of a live-in caregiver by a German recipient of care / family. Secondly – taking on a self-employed live-in caregiver. Thirdly - making use of a foreign posting company (as indicated above – predominantly with its registered office in Poland) that would employ caregivers there and send them to temporarily carry out services in work in Germany<sup>104</sup>.

The German Country Report drawn up within the framework of the present Grant project<sup>105</sup> details the risks for the care recipients, caregivers and posting companies, associated with the two first models. Given the scope of the present Report, we shall focus solely on the third of the above-mentioned model, indicating briefly major issues therein. To start with, the very model is said to present the least disadvantages, as compared to other models. Apart from the provisions applying in the sending Member State, some German provisions will apply. Most certainly it will be Arbeitnehmer-Entsendegesetz (AEntG)<sup>106</sup>, transposing the Basic Directive on Posting EU 96/71/EC<sup>107</sup>. The AEntG was amended in 2020 by way of the Law implementing Directive 2018/957<sup>108</sup> to transpose the provisions

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<sup>101</sup> Cf. J. Steiner, V. Prieler, M. Leiblfinger, A. Benazha, *Truly legal!? Legal framing and legality narratives in live-in care in Austria, Germany and Switzerland* (in:) *Towards a Scarcity of Care*, eds. N. Katona, A. Melegh, Friedrich-Ebert Stiftung, Budapest, p. 72-73; See also: Albrecht, C., Duran, S., Giesing, Y., Niederhoefer, B., Rude, B., & Steigmeier, J. (2022). *Posted workers from and to Germany. Facts and figures*, Leuven: POSTING.STAT project VS/2020/0499.p. 28.

<sup>102</sup> J. Steiner, V. Prieler, M. Leiblfinger, A. Benazha, *Truly legal!? op. cit.*, p. 73.

<sup>103</sup> A. Rogalewski, K. Florek, *The future of live-in care work in Europe, Report on the EESC country visits to the United Kingdom, Germany, Italy and Poland following up on the EESC opinion on “The rights of live-in care workers”*, 2020, p. 5 et seq.

<sup>104</sup> Cf. Ch. Haberstumpf-Münchow, *Die Beschäftigung von polnischen Haushaltshilfen in deutschen Pflegehaushalten aus rechtlicher Perspektive* [in:] B. Städtler-Mach, H. Ignatzi (eds.): *Grauer Markt Pflege. 24Stunden-Unterstützung durch osteuropäische Betreuungskräfte*, Göttingen: Vandenhoeck & Ruprecht 2020, p. 11–22; A. Rogalewski, K. Florek, *The future of live-in care work in Europe*, op. cit., p. 8.

<sup>105</sup> Cf. T. Ebbing, A. Petermann, *POSTCARE. Posting of third country nationals in care services – the current state of play and scenarios for the future. Country Report Germany* – within the framework of the POSTCARE project.

<sup>106</sup> Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen, [https://www.gesetze-im-internet.de/aentg\\_2009/](https://www.gesetze-im-internet.de/aentg_2009/).

<sup>107</sup> Cf. 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.

<sup>108</sup> See Gesetz zur Umsetzung der Richtlinie (EU) 2018/957 des Europäischen Parlaments und des Rates vom 28. Juni 2018 zur Änderung der Richtlinie 96/71/EG über die Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen: Bundesgesetzblatt Teil 1 (BGB 1); N.: 35; p.: 01657-01663.

of the Revision Directive 2018/957<sup>109</sup>. Adopted by the federal government, it was passed by Parliament on 18 June 2020. It then came into force on 30 July 2020. The new rules apply to all postings, even if they started prior to 30 July 2020<sup>110</sup>.

The amended AEntG requires the posting company to adhere to the minimum requirements of the local German labour law. The relevant criteria in this regard are the total remuneration and not only minimum wages. The total remuneration consists of the following components: basic salary, any remuneration components, which are granted depending on the performance of work duties, qualification, and/or the professional expertise of the employees as well as any other allowances such as overtime allowance and benefits-in-kind<sup>111</sup>. The application of the amended AEntG also entails the application of provisions of *inter alia* the Hours of Work Act (ArbZG)<sup>112</sup>, the German provisions on minimum wage (including Minimum Wage Law - MiLoG<sup>113</sup>)<sup>114</sup>, as well as the Act to Combat Clandestine Employment<sup>115</sup>.

When it comes to the social security of posted caregivers, including naturally the third-country nationals posted in such capacity, they may retain their status of the persons subject to the social security system of the sending Member State (e.g. Poland). In order to ensure that, an application should be made in the latter Member State for a PD A1 – in Poland the competent institution in this regard is the Polish Social Security Institution (ZUS). No social security contributions are therefore due provided a PD A1 is produced by a TCN. It is worth noting that such a document issued by the ZUS of declaratory nature; it does not in itself create any entitlement to a caregiver. Despite such nature, it is advisable to apply for it, since it is also used to combat illegal employment and failing to apply is a misdemeanor punishable by a fine<sup>116</sup>.

Moreover, it is of note that the Court of Justice (CJEU) has quite recently ruled that PDs A1 issued to document an individual's affiliation to a social security regime in a European Economic Area (EEA) country or Switzerland have binding effect solely in the area of social security.<sup>117</sup> Conversely, they cannot have a binding effect in the area of labour law. If no A1 certificate is provided, the employee per practice becomes subject to social security in Germany and the employer is obliged to fund employer's contributions irrespective of whether it is a German domestic or foreign employer.

Naturally, third-country nationals are also posted using this very model. To be able to avail themselves of it, for a third-country national to obtain an A1 certificate, they must reside legally in a Member State

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<sup>109</sup> Cf. 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, PE/18/2018/REV/1, OJ L 173, 9.7.2018, p. 16–24.

<sup>110</sup> Cf. *KPMG Guide to the Posting of Workers 2022*, p. 67.

<sup>111</sup> Cf. *KPMG Guide to the Posting of Workers 2022*, p. 67-68.

<sup>112</sup> See *Arbeitszeitgesetz – ArbZG*, Bundesgesetzblatt, 1994-06-10, Part I, No. 33, pp. 1170-1183.

<sup>113</sup> See the Act Regulating a General Minimum Wage 2014, *Mindestlohngesetz (MiLoG)*, BGBl. I S. 1348.

<sup>114</sup> Cf. T. Ebbing, A. Petermann, *POSTCARE. (...) Country Report Germany*, op. cit., p. 10.

<sup>115</sup> See the above-mentioned *Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung – SchwarzArbG*, Bundesgesetzblatt, 2004-07-28, vol. 39, pp. 1842-1856.

<sup>116</sup> As rightly noted by T. Ebbing, A. Petermann, *POSTCARE. (...) Country Report Germany*, op. cit.

<sup>117</sup> Cf. the judgment of the CJEU in C-17/19 in *Bouygues travaux publics and others*, para. para. 44 et seq.

and move between Member States. If such a person is not legally resident in a Member State, EU rules on the coordination of social security systems will not apply to him/her. Consequently, such a person will not receive an A1 certificate<sup>118</sup>.

Therefore, if a third-country national holds a residence title in Poland as well as an employment title there, they are, by and large, entitled to be posted to Germany, following the same rules as EU citizens. However, as rightly indicated by T. Ebbing & A. Petermann, this procedure is subject to a variety of restrictions in Germany. The permit from the sending country must be a long-term work and residence permit (> six months). Such a visa also must be granted for the purpose of working in the sending country.

If the previous conditions do not apply, the receiving EU country must grant a visa, not the posting one. If the conditions are fulfilled, the TCN with a visa from the sending country can be posted to another EU country.

The relevant Visa for having a clear statement on the legality of posting a TCN within two European countries is ‘*Vander Elst Visa*’ – or more specifically – ‘*Visa according to Vander Elst*’. It takes its name from a well-known judgment issued on 9 August 1994 in case C-43/93 Raymont Vander Elst.

The rationale provided for by the German authorities in this regard is very bizarre. On the one hand, Germany acknowledges that according to the EU provision concerning the free movement of services, companies based in a Member State of the EU (e.g. Poland) may send (‘post’) workers into other EU-member states (e.g. Germany) in order to provide services without having to acquire a working permit<sup>119</sup>. On the other - there is still the necessity of a visa application beforehand in case the citizen to be sent has a nationality which is required to apply for a visa in case of entering the territory of the Federal Republic of Germany.

Visa-free entry for the purpose of carrying out activities under Vander Elst is currently possible only under the conditions set out in section 19c (1) of the Ordinance governing Residence in conjunction with section 30(3) of the Ordinance on the Employment of Foreigners (refers to employees who are third-country nationals and who hold a long-term resident status in another member state of the European Union and applies for no longer than 90 days within a period of 12 months).

An information from the German Embassy in Warsaw<sup>120</sup> furthermore also requires that the definition of the term “sending” requires a working stay in the country of application before entering the country in which the services are to be provided. A specific project is required and the workers being sent must receive their commission/contract from the sending country. Failing to provide information to make the required circumstances credible will result in a denial of the application.

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<sup>118</sup> Cf. 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.

<sup>119</sup> This is also confirmed by a well-established line of case-law of the Court of Justice of the EU (CJEU) – most recently in C-17/18 *Danieli Officine Meccaniche*.

<sup>120</sup> Cf. the website of the German Embassy in Warsaw: *Visa for third-country nationals for temporarily rendering services in Germany (‘Vander Elst’-Visa)*, January 2021, <https://polen.diplo.de/blob/488744/3badc8ebe31039cb43f2a9d0ebd27788/vanderelst-eng-data.pdf>



Moreover, only the visa section of the German Embassy in Warsaw is in charge of all visa applications. The German Missions in Krakow, Wrocław, Gdańsk and Opole do not issue visas and do not provide any information on this subject.

What is more, the application must be made in person and will be accepted only if all required documents are submitted according to our regulations. To apply for a visa it is necessary to book an appointment via our appointment management system online of the Embassy, using the link available on its website. The Embassy states that it takes up to seven working days to examine the application, however the major and practical problem is the difficulty in making the appointments<sup>121</sup>.

There is no doubt that the keeping of the procedure by the German authorities is in glaring violation of the EU law. Germany itself has already lost a case at the Court of Justice in Luxembourg against the Commission<sup>122</sup>. The Court clearly held that *the check in advance practiced by the German authorities in respect of the posting of workers who are nationals of a non Member State (Visa according to Vander Elst – MK) cannot be justified by the necessity of ensuring that the posting is effected lawfully and, therefore, it is a disproportionate means having regard to the objectives pursued by the Federal Republic of Germany*<sup>123</sup>.

What it more, *the rationale* behind the keeping of the above-mentioned Vander Elst Visa procedure has been reiterated by German Courts, including the judgment of Bundesverwaltungsgericht of 20 June 2019<sup>124</sup> and most recently also in judgments of lower instances.

When it comes to working conditions and remuneration of TCNs posted in live-in care to Germany, it must first be noted that the statutory minimum wage also applies to foreign employers if they send workers to Germany. The reason for such the conclusion is that the statutory regulation whereas employees working in Germany are entitled to a certain statutory minimum wage qualifies as a so called “*overriding mandatory provision(s)*” pursuant to the Rome I Regulation<sup>125</sup>.

The German Country Report within the present Grant Project sheds appropriate light to working conditions, average remunerations differences and. When it comes to the former, the report quotes majority of the TCNs surveyed claiming to have had clear work and recreational times scheduled; 5 replied not to have such a regulated work schedule, while 4 of them did not give a clear answer. Ten of the TCNs were allowed to leave their workplace / the home of the elderly when they had free time. Eleven reported that this was not allowed for them<sup>126</sup>.

When it comes to remuneration, the TCN surveyed within the above-mentioned Report claimed to have earned 1267,20 Euro net per month in average during their last work placement.

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<sup>121</sup> Cf. the website of the German Embassy in Warsaw: Visa for third-country nationals for temporarily rendering services in Germany, op. cit.

<sup>122</sup> The CJEU judgment in C-244/04 the Federal Republic of Germany v Commission.

<sup>123</sup> *Ibidem*, para. 51.

<sup>124</sup> Cf. BVerwG 1 B 12.19, ECLI:DE:BVerwG:2019:200619B1B12.19.0.

<sup>125</sup> Cf. 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.

<sup>126</sup> T. Ebbing, A. Petermann, *POSTCARE. (...) Country Report Germany*, op. cit., p. 17.

In contrast, all (4) Polish respondents quoted in the above-mentioned Report to have fixed work and recreational times. However, just two of them were allowed to leave the home of the elderly person in their free time. At the same time one of the elderly persons they cared for needed night-time attention. Two of the families of a care recipient had an additional mobile nursing service employed (visiting once a day for 5 – 7 days a week). The average monthly net income generated from the job as reported by the Polish citizens was 1687,50 Euro<sup>127</sup>.

Very telling were also some expectations towards the job, gathered in the above-mentioned survey. The TCNs aspired their monthly net income to add up to 1537 Euro. For this, they wanted to work about 10 hours per day on 6 days of the week. In average, they would like to work for 6,9 months per year as a live-in caregiver in Germany. Fourteen of the TCNs were willing to take care of two persons in the same household. Three of these would do so for no additional payment. Six required the salary to be twice as high for taking care of two persons. Five would want an additional payment for taking care of the second person.

The Polish respondents on the other hand aspired their monthly net payment to be as high as 1837,50 Euro in mean. For this, they want to work an average of 7,75 hours on 5,75 days of the week. This amounts to a net salary of about 9,16 Euro / hour. They want to work as a live-in caregiver for six to eight months of the year.

Three of the Polish caregivers would be willing to take care of two persons at the same time if they would be paid double the salary. Another live-in caregiver would charge 300 Euro more for taking care of another person and the fourth Polish respondent had no interest in taking care of more than one person at the same time<sup>128</sup>.

## **6. Conclusions from the research phase, including nuances of undeclared work or unregistered stay**

Providing complete information in this regard presents difficulties, because the entire sector is unregulated, and work often performed by undeclared female workers. Moreover, coherent minimum quality standards are absent, and care companies have been reported to take advantage of the poor information and insufficient language skills of incoming workers to place them in non-transparent, exploitative contracts. Despite the 2004 Law against Illegal and Irregular Employment<sup>129</sup>, there have been few investigations in the private household sector, due to a lack of political will<sup>130</sup>. Indeed, by turning a blind eye to the issue while (in)directly benefiting from it, the German state is abetting this

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<sup>127</sup> T. Ebbing, A. Petermann, *POSTCARE. (...) Country Report Germany*, op. cit., p. 17.

<sup>128</sup> T. Ebbing, A. Petermann, *POSTCARE. (...) Country Report Germany*, op. cit., p. 17-18.

<sup>129</sup> Cf. the above-mentioned Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung – SchwarzArbG, Bundesgesetzblatt, 2004-07-28, vol. 39, pp. 1842-1856.

<sup>130</sup> Albrecht, C., Duran, S., Giesing, Y., Niederhoefer, B., Rude, B., & Steigmeier, J. (2022). *Posted workers from and to Germany. Facts and figures*; op. cit., p. 28; V. Horn, C. Schweppe, A Böcker, M. Bruquetas-Callejo, (2019). *Live-in migrant care worker arrangements in Germany and the Netherlands: motivations and justifications in family decision-making*, International Journal of Ageing and Later Life, 13(2), 83-113.

development complicitly<sup>131</sup> One response on the part of providers has been to try to institutionalise the sector from below. This resulted in the founding of two special interest groups in 2007 and in 2014, with the principal aim of being officially accepted as a new pillar in the German long-term care sector, that is, by being included in the social insurance scheme<sup>132</sup>. However, in spite of what has been described as ‘intensive lobbying’, the legal situation still remains unresolved and ambiguous. Moreover, it is doubtful whether a regularisation of the sector would change the informal character of working arrangements in day-to-day practice<sup>133</sup>.

According to the latest German research, the model of posting TCN live-in caregivers (especially Ukrainians employed in Poland) was used by some 70% of formal live-in care posting enterprises, while others use models such as self-employment. However, as mentioned above, undeclared live-in care work dominates the sector, as the costs of hiring irregularly employed workers (€ 500 to € 1,800 a month) are much lower than through a placement agency (€ 3,400 a month)<sup>134</sup>.

Interestingly, though foreign (both EU citizens as well as third-country nationals) workers play a crucial role in the German live-in care sector, this is, for several reasons, not reflected in the available data from the Minimum Wage Registration Portal. In 2020, only 1.112 posted workers were registered in the portal, accounting for only 0.05% of all registered incoming postings to Germany<sup>135</sup>. With only 313 posted workers for a share of 0.01% in 2021, the number decreased drastically in 2021, which most probably can be explained by the pandemic-induced cross-border travel restrictions. Additionally, it must be noted that the care service comprises not only the live-in care sector, but also other care-related jobs. Thus, the live-in care sector plays a marginal role in the context of posted workers to Germany based on official figures. It must be considered, however, that there is a large undeclared care sector consisting of migrant workers, and that a given worker may work in multiple households in shifts<sup>136</sup>. Moreover, some of the categories of live-in care workers are under no obligation to notify within that very registration Portal.

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<sup>131</sup> H. Lutz, *Care. Eine intersektionelle Analyse transnationaler Care-Arbeit und transnationaler Familien* [in:] H. Lutz, A. Amelina (Eds.), *Gender, Migration, Transnationalisierung. Eine intersektionelle Einführung*, Bielefeld 2017: transcript Verlag, p. 117.

<sup>132</sup> Cf. VHBP, Ziele, 2020, <https://www.vhbp.de/ziele/>.

<sup>133</sup> Cf. J. Steiner, V. Prieler, M. Leibfingler, A. Benazha, *Truly legal!?*, op. cit., p. 73-74.

<sup>134</sup> Albrecht, C., Duran, S., Giesing, Y., Niederhoefer, B., Rude, B., & Steigmeier, J. (2022). *Posted workers from and to Germany. Facts and figures*; op. cit., p. 28.

<sup>135</sup> At the as of 30 September 2020, a total of 2,305,917 foreign EU nationals were employed in Germany on a compulsory social security basis. This represents an increase of 28,959 persons or 1.3% compared to the same month last year. In 2019, this increase was significantly higher at 5.4%. An effect of the COVID-19 pandemic can be assumed here, but the increase was already declining in the previous year. The situation is similar with the employment of third-country nationals, whose growth last year fell from 9.8% to 3.7% compared to the same month in the previous year – cf. J. Graf, Reports on Migration and Integration – Series 2. Freedom of Movement Monitoring: Migration of EU Nationals to Germany Annual Report 2020, [https://www.bamf.de/SharedDocs/Anlagen/EN/Forschung/BerichtsreihenMigrationIntegration/Freizuegigkeitsmonitoring/freizuegigkeitsmonitoring-jahresbericht-2020.pdf?\\_\\_blob=publicationFile&v=9](https://www.bamf.de/SharedDocs/Anlagen/EN/Forschung/BerichtsreihenMigrationIntegration/Freizuegigkeitsmonitoring/freizuegigkeitsmonitoring-jahresbericht-2020.pdf?__blob=publicationFile&v=9)

<sup>136</sup> Cf. Albrecht, C., Duran, S., Giesing, Y., Niederhoefer, B., Rude, B., & Steigmeier, J. (2022). *Posted workers from and to Germany. Facts and figures*; op. cit., p. 29.



The challenges faced by migrant care workers were exacerbated by the Covid-19 pandemic. The circular migration of these workers was restricted, and their freedom to return home after their two- to twelve-week shifts was inhibited. Forced to provide care without any opportunity for rest, the burden of work, as well as psychological distress on migrant and posted caregiver increased. Since many caregivers were not under German work contracts (e.g. TCN posted worker), they could not benefit from German relief programs. The experience of the COVID-19 pandemic has exposed the non-sustainability of the current live-in care model<sup>137</sup>.

Last, but not least, what remains the major challenge are ‘Visas according to Vander Elst’, also given the jurisprudence of the German courts, that fail to recognize the violation of the EU law by the keeping of such Visas. Latest example of such infamous rulings is the judgment of the administrative Court in Dresden of 11 July 2022<sup>138</sup>.

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<sup>137</sup> Cf. Leiblfinger, et al., 2020.

<sup>138</sup> Cf. file no. 3 B 299/21.