The judicialization of the EU posted workers regime through the CJEU case-law

Namouchi Amira[*]

DOI: https://doi.org/10.15170/PJIEL.2026.1.5.

Contents

Abstract

This article examines the judicialization of the EU posted workers regime and its evolution across three distinct phases: the pre-Directive period, during the 1996 Directive, and the post-2018 amendment period. Using a longitudinal doctrinal analysis of Court of Justice case law, the study investigates how judicial interpretation has shaped the balance among the freedom to provide services, social protection concerns, and Member State regulatory autonomy.

The findings demonstrate that judicialization in this case is neither linear nor uniformly expansionist. In the foundational phase, the Court constitutionally embedded posting within the freedom to provide services, effectively restructuring national competence over labour market access. During the Directive period, the Laval line of case law subjected collective labour rights and public procurement social clauses to a proportionality test. In the post-amendment phase, however, the Court validated the 2018 reform's strengthened protective rationale while simultaneously delimiting its scope through territorial criteria and by reaffirming Member State discretion concerning third-country nationals in shifting geopolitical and migratory contexts.

Overall, the study concludes that judicialization in the posted workers regime is contingent, path-dependent, and politically mediated. Rather than producing uniform regulatory expansion, judicial governance operates through iterative doctrinal stabilization shaped by institutional constraints, economic integration pressures, and evolving social policy objectives.

Keywords: Judicialization; Posted Workers; Freedom to Provide Services; CJEU; Labour Mobility.

I. Introduction

The concept of posted workers sits at the intersection of labour mobility and market integration. The posting of workers is a type of temporary mobility of non-resident foreign workers whose employment relation is with a non-resident entity, in regard to the territory where the work is habitually done. The definition of worker is understood under the law of the member state where the worker is sent[1]. It is from this regard, possible to conceptualize posted labour work as a form of labour mobility. The UN Economic Commission for Europe defined international labour mobility as "all movements of natural persons from one

---

[*] PhD Student, Doctoral School of Law and Political Sciences, University of Szeged. ORCID ID: https://orcid.org/0009-0001-6434-3905.

[1] Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, art 2.

country to another for the purpose of employment or supply of services"[2], without excluding hence temporary mobility.

However, from an EU law perspective, there is a distinction in the context of labour mobility between the freedom of movements of workers as in Article 45 of the Treaty on the Functioning of the European Union (TFEU)[3], the freedom of establishment as in Article 49 TFEU[4], and the freedom to provide services as in Article 56 TFEU.[5] Under the Directive on posted workers and its amendment, this type of work is understood under the freedom to provide services. Consequently, their understanding is rooted in transnational economic activity, rather than migration.

Since posted workers do not migrate, they remain attached to the laws of their sending country. However, such a constellation risks the creation of asymmetric work conditions and workers' protection across member states. The significance of such risks became particularly visible following the Eastern enlargements of 2004 and 2007. These enlargements substantially increased the scale of posting, especially in labour-intensive sectors such as construction and transport, where service providers from lower-wage Member States gained access to higher-wage markets.[6] Empirically, this expansion intensified the use of posting as a cost-optimization strategy, enabling firms to capitalize on wage differentials while operating within the legal framework of the internal market.[7]

The role of the Court of Justice, in this context, is observable through the delineation of the relationship between market integration and social protection and the increased intervention in policy-making through case law. This intervention can be analysed through the concept of judicialization, in which courts do not merely resolve disputes but generate normative frameworks that recursively influence politics and policy-making. In the case of posted workers, judicial decisions have both intensified political contestation and structured the terms in which such contestation unfolds.[8] Consequently, the evolution of the posting

[2] Economic Commission for Europe, Measuring international labour mobility, Conference of European Statisticians, Sixty-sixth plenary session, Geneva, 18-20 June, 2018, p.11.

[3] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 45.

[4] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/67, art 49.

[5] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/70, art 56.

[6] Dorte Sindbjerg Martinsen and Michael BlauBerger, 'The Court of Justice of the European Union and the mega-politics of posted workers' (2021) 84 Law and Contemporary Problems 29.

[7] ibid.

[8] Ninke Mussche and Dries Lens, 'The ECJ's Construction of an EU Mobility Regime Judici-

regime cannot be understood solely through legislative developments but must be situated within this broader process of judicially mediated integration.

The study investigates how the CJEU has shaped the evolution of the Posting of Workers regime by progressively defining the boundaries between market freedoms and workers' protection. The research, therefore, aims to investigate how the CJEU's judicialization of the Posting of Workers regime has constructed normative shifts between the freedom to provide services and the protection of the worker's rights.

II. Methodology

To answer the research question, we have opted for qualitative research based on longitudinal doctrinal analysis of the CJEU case law on posted workers. To comprehend the varying role of the Court, the judgments were collected based on periods that are determined vis-a-vis the adoption of the Posted Workers Directive (PWD) and its amendment, as justified by table 1.

Period	Event	Years	Justification
I. Pre-Directive Jurisprudence	Before Directive 96/71/EC	1989-1995	Construction of the concept of posting and its relation to free movement of services.
II. Directive Jurisprudence (Posted Workers Directive 96/71/EC)	From Directive 96/71/EC to the 2018 reform	1999-2018	Legal consolidation of posting as a form of freedom to provide services; rise of conflicts between market freedoms and fundamental social rights.
III. Post-Amendment Jurisprudence	After Directive 2018/957/EU and establishment of the European Labour Authority	2018-2024	Rebalancing toward social fairness, equal pay, and enforcement. Allows for early judicial tests of the amended framework.

Table 1. Division of periods and their justification based on the author's conceptualization

The Choice of selected case-law is justified by its relevance in the literature on posted workers and the CJEU.[9] Most of the selected cases demonstrate 'land-

alization and the Posting of Third-country Nationals' (2019) 57 Journal of Common Market Studies.

[9] See: Richard Mababu, 'European Union Posting of Workers Law and Equal Treatment in Internal Labour Market for Social Cohesion' (2024) 3 European Journal of Law and Political Science. And see: Marta Lasek-Markey, 'No Turning Back from Social Europe: A New Interpre-

marking' judgements in the matter of freedom to provide services.[10] The classification of the case-law does not assume its complete heterogeneity for analogical reasoning, but rather assures temporal heterogeneity in order to allow the identification of continuities and shifts in judicial reasoning. The selected judgments are treated as constituting a discursive space. Courts are commonly understood as authoritative interpreters of law and legal concepts. Thus, decisions define the intensions and extensions of key concepts through structured reasoning.[11] The texts of judgments therefore represent a specific institutional arena in which legal meaning is articulated, stabilized, and transformed.

The examined case-law consisted of eight judgments selected to represent three periods: before the adoption of the first Posted Workers Directive, after its adoption, and the post-amendment period, as summarised by Table 2.

Case	Parties	Year
C-l 13/89	Rush Portuguesa Lda and Office national d' immigration	1990
Case C-43/93	Raymond Vander Elst and Office des Migrations Internationales	1994
Case C-341/05	Laval un Partneri Ltd vs Svenska Byggnadsarbetareförbundet and others	2007
Case C-346/06	Dirk Rüffert vs Land Niedersachsen	2008
Case C-16/18	Dobersberger v Magistrat der Stadt Wien	2019
C-620/18	Hungary v European Parliament and Council	2020
Case C-626/18	Republic of Poland v European Parliament and Council of the European Union	2020
Case C-540/22	SN and Others vs Staatssecretaris van Justitie en Veiligheid	2024

Table 2. Summary of selected case-law

III. Theoretical background

1. *The Social Europe Pillars and Social Dumping*

Discussion about the social Europe pillars started in 2015 and was amplified by the French presidency of Emanuel Macron in 2017 and the proclamation of the European Pillar of Social Rights (EPSR). The recalibration of the EU's

tation of the Refurbished Posted Workers Directive in Hungary and Poland' (2022) 51 Industrial Law Journal.

[10] Johanna Jacobsson, 'Posted Workers and Free Movement of Services in the European Union – the Impact on National Employment and Immigration Law' (Master's Thesis, University of Helsinki 2008). Accessed on 15 October 2025. And see: Mussche and Lens (n 8).

[11] Terezie Smejkalová, 'Case Law and Collective Construction of Meaning' (2023) 19 Utrecht Law Review, 87.

socio-economic narrative formed part of a broader attempt to rebalance market integration with social protection following the Eurozone crisis and growing contestation around intra-EU labour mobility.[12] France's support for revision was closely linked to the persistent invocation of "social dumping" in public and legal discourse. Although the concept lacks a codified definition in EU primary or secondary law, it has been analytically described as strategic exploitation of cross-national regulatory differentials in labour standards to secure competitive advantage. The concept of dumping itself originates in classical trade theory, where it is defined, as suggested by Viner, as price discrimination across national markets, primarily by monopolists, aimed at maximizing profits or displacing competitors.[13] A modern theory of dumping, suggested by Wilfred, shifts the focus away from monopoly power toward the structural constraints faced by competitive firms operating under demand uncertainty, rigid employment relations, and high fixed costs.[14] In this context, dumping, understood as selling below cost, becomes a rational response to macroeconomic pressures rather than a manipulation of market access.

Both social dumping and trade-related dumping share a common underlying logic: leveraging regulatory or cost asymmetries to gain a competitive advantage. Therefore, social dumping can be analogically understood as the export or imposition of lower labour standards, whether through wage suppression, deregulation, or precarious employment models, to outcompete rivals in the global or regional economy, implying negative social consequences.[15] As noted by Magdalena Bernaciak, the mere increase in the number of migrant workers does not constitute social dumping in itself. Rather, it arises when these workers are employed under conditions that fall below the standards set by host-country labour laws or collective agreements.

The reactivation of the EU's social dimension through the European Pillar of Social Rights did not emerge in an institutional vacuum. Rather, it followed a longer trajectory of changing governance instruments, most notably the Open Method of Coordination (OMC) initiated by the Lisbon European Council in 2000.[16] This momentum weakened considerably during the presidency of José

[12] Lasek-Markey (n 9).

[13] Gottfried von Haberler, 'Dumping, Cartels, Monopolies, and Export Bounties' in Gottfried von Haberler (ed), *The Theory of International Trade with Its Applications to Commercial Policy* (Macmillan 1933) 296–97.

[14] ibid.

[15] Magdalena Bernaciak, 'Social dumping: political catchphrase or threat to labour standards?' (Working Paper 2012. 06, European Trade Union Institute 2012) <https://ssrn.com/abstract=220839> accessed 27 June 2025.

[16] Martina Prpic, 'The Open Method of Coordination' (*European Parliament*, 2014) <https://www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf> accessed 25 February 2026.

Manuel Barroso during and after the 2008 financial crisis. In particular, the management of the financial and sovereign debt crises marked a retrenchment of European social policy. Fiscal consolidation, austerity and enhanced market coordination took precedence over social objectives. Instruments such as the Euro Plus Pact encouraged wage moderation, decentralization of collective bargaining and the reconsideration of wage indexation mechanisms.[17] The Barroso years were also characterized by a political shift within Member States toward centre-right dominance, which facilitated the prioritization of fiscal orthodoxy and supply-side reform. However, the social consequences of austerity, rising inequality and political disaffection progressively undermined the legitimacy of this approach.[18]

Hence, three developments contributed to the subsequent reorientation: the perceived failure of austerity strategies and associated learning processes within international and EU institutions; the political shock of Brexit, which centred debates on the Union's social legitimacy; and the rise of Eurosceptic calls, which intensified concerns about the social sustainability of market integration. Against this background, the European Commission under Jean-Claude Juncker advanced a 'triple A' Social Europe, culminating in the proclamation of the European Pillar of Social Rights. The Pillar's 20 principles are structured around equal opportunities, fair working conditions, and social protection and inclusion[19]. Under the subsequent leadership of Ursula von der Leyen, this trajectory was consolidated through the 2021 Action Plan, which translated the Pillar into quantified employment, training and poverty-reduction targets for 2030. Substantively, the revival of Social Europe can be analytically organized along three axes[20]: including the Directive (EU) 2022/2041 on adequate minimum wages[21], the Directive (EU) 2019/1152 on transparent and predictable working conditions[22] and the revision of the Posted Workers Directive 96/71/EC in 2018.[23]

[17] Sonja Bekker and Saskia Klosse, 'EU governance of economic and social policies: Chances and challenges for Social Europe' (2013) 2 European Journal of Social Law 103.

[18] Maarten Keune and Philippe Pochet, 'The revival of Social Europe: is this time different?' (2023) 29 Transfer: European Review of Labour and Research 173.

[19] Sophie Dura, 'The European Pillar of Social Rights: How strategic agency shaped the European Union's flagship social initiative' (2024) 58 Social Policy and Administration 554.

[20] Keune and Pochet (n 18).

[21] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L275/33.

[22] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186/105.

[23] 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 [2018] OJ L173/16.

These instruments, however, form part of a broader legislative landscape relative to EU labour law and the European social model. At the level of labour conditions, the Working Time Directive[24] operationalises fundamental rights related to health and just working conditions, which entered into force, as well as the Charter of Fundamental Rights of the European Union[25], in Article 31 on fair and just working conditions. In fact, the elevation of working conditions to the status of fundamental rights reflects an attempt to constitutionalise the asymmetry inherent in the employment relationship. The addition of dignity in the Charter reflects a normative shift in understanding of working conditions, not only as physical and material but also relative to the whole personality of the worker.[26] Beyond Article 31 on fair and just working conditions, the Charter encompasses a cluster of social and labour rights of direct relevance to the employment relationship: Article 27 on workers' right to information and consultation, Article 28 on the right to collective bargaining and action, Article 30 on protection against unjustified dismissal, and Article 33 on family and professional life.

At the same time, the evolution of EU labour law has been shaped by the fragmentation of the standard employment relationship with the appearance of atypical work. The Part-Time Work Directive 97/81/EC[27] and the Fixed-Term Work Directive 99/70/EC[28] introduced the principle of non-discrimination between atypical and comparable full-time or permanent workers, seeking to prevent the use of flexible employment forms as instruments of systematic disadvantage. Furthermore, the Temporary Agency Work Directive 2008/104/EC[29] extended this logic to triangular employment relationships, establishing equal treatment as the baseline standard for agency workers assigned to user undertakings. At this level, the Posted Workers Directive's amendment in 2018 also pays particular attention to the area of wages of workers, the equality of working conditions in temporary work agencies and the protection of long-term posted workers. In fact, the Directive (EU) 2019/1152 on transparent and predictable working conditions ensured the right of workers, irrespective of their nationality, to have access to all relevant information on working conditions, the essential aspects of

[24] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299.

[25] Charter of Fundamental Rights of the European Union [2000] OJ C364/1, art. 31.

[26] Brian Bercusson, 'A Framework of Principles and Fundamental Rights for European Collective Labour Law' in Brian Bercusson (ed), *European Labour Law* (Cambridge University Press 2009) 288.

[27] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L14/9.

[28] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

[29] Richard Mababu, 'European Union Posting of Workers Law and Equal Treatment in Internal Labour Market for Social Cohesion' (2024) 3 European Journal of Law and Political Science 15.

the work and the time in which the work will take place.[30] Furthermore, for the specific case of posted workers, additional information is required, regarding the country of employment, its duration, and the currency to be used for remuneration. It can be argued that the 2018 revision of the Posted Workers Directive both reflects and contributes to a broader shift in EU labour law, especially with the adoption of Directive (EU) 2022/2041 on adequate minimum wages.[31]

2. *The role of the CJEU through the concept of judicialization*

Alec Stone Sweet, referring to the process through which judges acquire authority over the rules and institutions that govern a social system, first developed the concept of judicialization.[32] It emerges from the transformation of dyadic social interactions -such as contracts- into triadic relations, where a third-party adjudicator resolves disputes. Once actors accept judicial reasoning and precedent as legitimate and authoritative, judicial decisions begin to exert recursive effects on future rulemaking and social interactions. Stone Sweet identifies two interrelated feedback loops in this process: (a) between rulemaking and third-party dispute resolution, and (b) between judicial law-making and future legislative or regulatory behaviour. These loops create a 'virtuous circle' in which adjudication stimulates further norm production, and in turn, the growing reliance on legal norms strengthens judicial authority. Thus, judicialization does not merely refer to the increase of judicial activity; it signifies the structural transformation of governance, whereby the judge's law-making becomes a constitutive mechanism of social order.[33] More specifically, in the context of labour mobility, Mussche and Lens examined the judicialization of the EU mobility regime through the increasing interpretative authority of the CJEU in creating legal and economic realities that can precede or even determine legislative action.[34] For example, in the *Laval* case, the Court's reasoning, subordinated collective bargaining rights to the free movement of services, effectively constitutionalizing a market logic within labour. The subsequent political and legislative responses, such as the revision of the Posted Workers Directive in 2018, represent institutional feedback to judicial lawmaking.

Subsequent scholarship empirically demonstrated how the case law of the Court of Justice of the European Union (CJEU) generated judicialization of the Eu-

[30] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L 186/105.

[31] Marta Lasek-Markey, *Law, Precarious Labour, and Posted Workers* (Routledge 2023) 1-10.

[32] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comparative Political Studies 147.

[33] Julien Bois and Mark Dawson, 'Towards a Legally Plausible Theory of Judicialization in the European Union' (2023) 45 Journal of European Integration 823.

[34] Mussche and Lens (n 8).

ropean legal order by addressing public policy issues, where legislative consensus was difficult to achieve.[35] In this view, the CJEU progressively accreted influence over the institutional evolution of the treaty system, shaping not only the interpretation but also the trajectory of integration. Furthermore, understanding the formation of judicialization can be explored through the principal-agent theory. Hence, member States, caught between pressures for deeper market integration and domestic political constraints, delegated authority to the Court as an enforcement agent tasked with ensuring compliance with treaty obligations.[36] However, unlike ordinary agents, the Court is empowered to enforce the law against the principals themselves. As a trustee of the Treaties' constitutional values, it operates in a position of structural supremacy and exercises a degree of discretion uncommon in domestic judicial systems. Because reversal of treaty-based jurisprudence requires unanimous treaty amendment, Member States face substantial obstacles in overriding the Court's constitutional interpretations.[37]

The concept of market constitutionalism is equally central to understanding how judicialization in the EU has primarily advanced the constitutionalisation of market freedoms. In this sense, the Court functions as a constitutional guardian of market integration: its rulings constrain domestic labour regulation whenever it is deemed to restrict cross-border economic freedoms. Consequently, market constitutionalism signals the hierarchical privileging of economic freedoms over collective social rights. However, the codification of case law through secondary legislation also reveals a political reaction to judicialization as an effort to recalibrate the constitutional balance between market integration and social protection. In this sense, scholars dispute the characterization of the Court as an unconstrained agent. Kelemen argues that judicialization has enhanced transparency, accountability and access to justice within the Union.[38] Similarly, Höreth attributes the Court's powerful position to the institutional configuration of EU multi-level governance, rather than to self-directed expansion.[39]

Empirical research further complicates the image of an all-powerful Court. In their quantitative analysis, Carrubba and Gabel demonstrate that the Court is sensitive to the risk of non-compliance and adjusts its rulings when Member State opposition is credible.[40] In this view, judicialization unfolds within an in-

35 R. Daniel Kelemen, 'Judicialisation, Democracy And European Integration' (2013) 49 Representation 295.

36 Marcus Höreth, 'The Least Dangerous Branch of European Governance? The European Court of Justice under the Checks and Balances Doctrine' in Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013).

37 Mussche and Lens (n 8).

38 Kelemen (n 35).

39 Höreth (n 36).

40 Clifford J. Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behaviour under Political

ter-institutional dialogue rather than through unilateral judicial dominance. Nevertheless, this responsiveness can be tempered by precedents' path dependency.[41] This is explained by the fact that once legal principles are established, subsequent legislative initiatives operate within their doctrinal boundaries. The court's influence is therefore variable over time, contingent on political reactions that may codify, modify, or partially override jurisprudence. Judicialization is thus best understood as a dynamic interaction between law and politics rather than as linear judicial supremacy.[42]

To sum up, from a theoretical standpoint, the judicialization of the EU mobility regime therefore reflects multiple mechanisms: delegation under conditions of political constraint; a 'trustee' of constitutional interpretation; iterative inter-institutional dialogue; and the path-dependent force of precedent. The Court neither unilaterally determines integration nor operates as a passive agent. Rather, it occupies a structurally privileged position within a multi-level governance system in which adjudication functions as a central driver of norm production.

3. *The impact on the socio-economic position of workers*

From a socio-economic perspective, the EU's posting framework generates an institutionalized form of labour market segmentation by enabling firms to combine transnational service provision with differentiated labour standards and to "use an available, qualified and, above all, less expensive workforce".[43] Interpreted through a social transformation lens, such segmentation is not an isolated regulatory problem but part of a wider structural shift associated with neoliberal market integration, the reconfiguration of national labour regimes, and employer-driven flexibilisation.[44] Posting thus exemplifies a disembedded regulatory arrangement in which economic freedoms take precedence over socially embedded protections, producing stratified employment positions and prompting protective regulatory counter movements at EU and national levels.[45] The legal fiction that posted workers do not "access" the host labour market but merely provide services through their home-country employer, produces

Constraints: Evidence From The European Court Of Justice' (2008) 102 American Political Science, 435–452.

[41] Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015) 7.

[42] ibid.

[43] Sophie Robin-Olivier, 'Posting of Workers in the European Union: An Exploitative Labour System' (2022) 1 European Law Open, 679.

[44] Stephen Castles, 'Understanding Global Migration: A Social Transformation Perspective' (2010) 36 Journal of Ethnic and Migration Studies 1565.

[45] ibid.

a secondary labour market segment within the EU.[46] Drawing on Anderson's argument that immigration controls create legal statuses shaping labour-market positions, the posting framework similarly generates a hybrid and unstable status that combines formal legality with structurally limited rights. Although posting does not rely on immigration authorization, it constructs a category of workers who are present on the territory yet only partially incorporated into host-state protections, remaining tied to home-country labour law, social security, and employer-dependent mobility.[47] This arrangement generates temporal and spatial forms of precarity analogous to those documented in scholarship on 'managed temporariness': the assumption of short-term presence restricts workers' time horizons, limits possibilities for contesting violations, and embeds them in employer-controlled arrangements of accommodation, transportation, and subcontracted deployment.[48] The result is a labour-market position that lies between legality and unfreedom, where triangular employment structures, cross-border liability gaps, and restricted capacity to change employers institutionalize uncertainty rather than merely reflect individual vulnerability. In this sense, the posting regime exemplifies a form of constructed precarity consistent with segmented labour market theory, in which employers' demand for flexible, low-rights labour is matched with a regulatory design that fabricates a workforce with curtailed expectations and constrained agency.[49] Rather than an incidental outcome of EU market integration, this segmentation is produced through the legal architecture itself, confirming that precarity in transnational labour mobility emerges through regulatory design and the differentiated statuses it creates. The posting regime, particularly in the context of East-West labour mobility within the EU, facilitates informalisation strategies by enabling employers, to partially or fully, circumvent host-state labour standards. As Likic-Brboric, Slavnic and Woolfson demonstrate, informalisation is a systemic feature of contemporary labour markets shaped by post-Fordist restructuring, subcontracting chains, deregulation, and the reconfiguration of welfare states. In Central and Eastern Europe, where neoliberal transition produced extensive informalisation, weak enforcement capacities, and segmented labour markets, posting interacts with pre-existing structural vulnerabilities by enabling employers to rely on a mobile workforce positioned at the intersection of formal EU mobility rights and informal employment practices. The result is a mutually reinforcing configuration

[46] Marco Rocca and Frederic De Wispelaere, 'Posting of workers and the border of the labour market' (2023) 14 European Labour Law Journal.

[47] Bridget Anderson, 'Migration, immigration controls and the fashioning of precarious workers' (2010) 24 Work, Employment and Society 300.

[48] Xinying Chi, 'Challenging Managed Temporary Labor Migration as a Model for Rights and Development for Labor-Sending Countries' (2008) 40 New York University Journal of International Law and Politics 497.

[49] Branka Likic-Brboric, Zoran Slavnic and Charles Woolfson, 'Labour migration and informalisation: East meets West' (2013) 33 International Journal of Sociology and Social Policy, 677.

in which state strategies of flexibilisation, corporate cost-minimizing practices, and migrant workers' constrained agency produce "informalisation from above and below," as Slavnic describes.[50] Posted workers in this sense, absorb the risks of regulatory evasion while employers benefit from institutional loopholes that externalize labour costs. As a result, they are particularly vulnerable to exploitation and restricted social protection. Castles' analysis of the global labour market demonstrates how states and firms rely on differentiated legal statuses to supply flexible, low-cost labour while insulating core labour markets from risk.[51]Posting exemplifies this logic by creating a legally mobile yet institutionally subordinated category of workers whose partial detachment from host-country protections lowers labour costs while sustaining the demand for a hyper-flexible migrant workforce. Building on this, Anderson, Khadka and Ruhs's framework on institutional system effects shows that employer demand for migrant workers is shaped not only by national labour-market conditions but by cross-border regulatory interactions.[52] These institutional effects shape employer preferences for workers whose rights are fragmented, whose employment relationships are mediated through transnational subcontracting chains, and whose capacity to exit or contest abuse is constrained. Analysing the CJEU's jurisprudence through the combined lenses of segmentation, global labour-market governance, and institutional system effects therefore makes it possible to move beyond a doctrinal account of compliance with the posted workers regime. It highlights how judicial interpretations contribute to consolidating a transnational labour regime in which mobility rights, market freedoms, and differential inclusion co-produce a structurally precarious workforce.

IV. Results

The judicialization of the EU's posted workers regime illustrates the Court of Justice's evolving role in shaping the normative balance between market integration and labour protection. The analysis proceeds across three distinct phases, demarcated by the applicable regulatory framework throughout different periods: the period preceding the adoption of the Posted Workers Directive 96/71/EC; the period from its entry into force until the 2018 amendment; and the period following the adoption of Directive 2018/957/EU.

[50] Zoran Slavnic, 'Political Economy of Informalization' (2010) 12 European Societies, 3.

[51] Stephen Castles, 'Migration, Crisis, and the Global Labour Market' (2011) 8 Globalizations 311.

[52] Bridget Anderson, Upasana Khadka and Martin Ruhs, 'Demand for migrant workers: institutional system effects beyond national borders' (2024) 50 Journal of Ethnic and Migration Studies 1202.

1. The period preceding the adoption of the Posted Workers Directive 96/71/EC

The regime governing posted workers in the European Union sits at the intersection of private international law and EU labour law. Under the Rome I Regulation[53], the general principle is party autonomy as cited in Article 3, allowing contracting parties to choose the governing law of the contract, subject to overriding mandatory provisions and public interest considerations as excluded in Article 9. In the absence of such a choice, Article 4 designates the law of the service provider's habitual residence as applicable to contracts for the provision of services. For individual employment contracts, the applicable law is that of the country where or from which the employee habitually carries out their work, with the rule that temporary work abroad does not alter the habitual place of employment.

In the pre-Directive period, the Court's jurisprudence established the functional foundations of cross-border mobility in the freedom to provide services by interpreting the free movement of services as encompassing the temporary movement of workers employed by a service provider. For instance, it interpreted Articles 59 and 60 EEC as encompassing the temporary cross-border movement of workers employed by a service provider. Thus, it redefined the allocation of competences between Member States and the Community.

In the case of *Rush Portuguesa* in 1990, the Court distinguished between the movement of workers and the cross-border movement within the provision of services. Such distinction therefore decouples the concept of posted workers from the mobility of workers and positions it within the economic activity of undertakings.

The facts of the case concerned a Portuguese undertaking subcontracted to carry out railway construction works in France. French authorities required, on their side, work permits for the Portuguese workers brought temporarily by the employer. The Court rejected this requirement, holding that Articles 59 and 60 EEC precluded Member States from imposing conditions such as local recruitment obligations or work permits on workers temporarily posted in the framework of cross-border service provision. Indeed, the requirement for work permits was deemed an unjustified restriction in the single market.

The implication of this decision excludes, as a result, the application of host-state labour market access conditions for other member states' service providers. That reads that the court established by its interpretation of service provision in the ECC Treaty, the principle of non-discrimination against service providers

[53] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

by reason of nationality or place of establishment. In this context, its stance relates to what Joseph Weiler described as a mutation of competences without Treaty amendment. That is to say, that in this context, national law –on the requirement of work permits– was not relevant to the expansion of community competence in the matter of providing services.[54] The mutation of competences led to an "absorption"[55] process by national courts, since these freedoms were transformed from programmatic objectives into directly invocable subjective rights, enforceable before them.

In fact, one year later, the Commission suggested a proposal for a directive concerning the posting of workers, esteemed necessary for the functioning of the internal market and the avoidance of uncertainty that might arise from the sole application of the conflict of law rules. In its explanatory memorandum, it explicitly cites the *Rush Portuguesa* Case to derive general principles in the posting of workers and freedom to provide services based on Article 59 of the ECC Treaty.[56] Thereby it illustrates how judicialization in this phase precedes and conditions subsequent codification.

For the case of third country nationals, the *Vander Elst* case illustrates the role of the Court in shaping principles of the posting regime but within different circumstances. The facts of the case concern a Belgian undertaking that sought to post Moroccan workers –legally employed and resident in Belgium– to France. However, as the French authorities required work permits, the Court similarly held that such requirements constituted a restriction on the freedom to provide services in the case of lawful employment of third-country nationals (TCNs). Through this case, the Court effectively constructs a distinct mobility regime for posted TCN workers, decoupling their legal status from national immigration controls insofar as they are integrated into a cross-border service provision, with the condition of lawful employment and residence rights in the sending country. In the terms of Alec Stone Sweet, this phase reflects a "direct design" mode of judicialization.[57] In the absence of legislative harmonisation, the Court defines both the scope and limits of permissible national regulation, thereby pre-empting Member State control over labour market access for this category of workers. However, during that period, the European Commission sought to codify aspects of the emerging regime through a 1999 draft proposal addressing the posting of third-country nationals.[58] In this regard, the proposal translates

[54] Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

[55] ibid.

[56] Commission, 'Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services' COM (91) 230 final.

[57] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comparative Political Studies,147.

[58] Commission, 'Proposal for a Directive of the European Parliament and of the Council on the

the Court's jurisprudential principles by affirming that the freedom to provide services extends to the posting of legally employed third-country nationals. Therefore, a common framework would remove duplicative national controls by centralising verification in the Member State of establishment. In this sense, the proposal can be understood as an attempt to translate "direct design" judicialization into legislation; however, it simultaneously exposes the political boundaries of such a process with the abandonment of the proposal in 2005.

2. *The period of the entry into force of Directive 96/71/EC until its amendment*

The Posted Workers Directive was later on adopted without distinguishing between TCNs and workers from the EU. The Directive is applicable to, rather, "undertakings established in a Member State which, in the framework of the transnational provision of services, post workers".[59] The Directive's proposal builds upon the insufficiency of conflict-of-law rules to address the legal uncertainty surrounding posting and to improve the working conditions of posted workers while eliminating distortions of competition between undertakings.[60] In this regard, the Directive manifests as a shift towards a harmonised community-level model. A comparison of the regulatory framework under the Convention of Rome of 1980 and under the Directive of 1996 reveals the specificity of the posted workers regime and its advancement in terms of legal certainty and the protection of workers.

At the scope level, the Rome Convention provides a general framework for determining the applicable law to contractual obligations, including employment contracts. Article 7 allows for the application of overriding mandatory provisions of the forum or the place of performance. However, this mechanism remains indeterminate, as it neither defines the content of such mandatory rules nor guarantees their systematic application. By contrast, the Directive explicitly specifies such provision with "public policy provisions"[61] in article 3(10). At the level of substantive labour protection, the Directive establishes hard-core rules including: "maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, the conditions of hiring-out

posting of workers who are third-country nationals for the provision of cross-border services' COM (99) 0003 final.

[59] 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 [1997] OJ L18/1, art 1.

[60] European Commission, Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services COM (91) 230 final.

[61] 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 [1997] OJ L18/1, art. 3(10).

of workers".[62] Such rules introduce a minimum floor of protection, which is absent under the Rome Convention. Another distinguishable addition of the Directive is the provisions related to collective agreements. Whereas the Rome Convention is silent on the role of collective agreements, article 3(8) of the Directive allows Member States –even in the absence of formal universal applicability mechanisms– to rely on agreements that are generally applicable "to all similar undertakings in the geographical area and in the profession or industry"[63] or concluded by the most representative social partners. While this framework represented an advance in legal certainty and worker protection relative to the Rome Convention, the manner in which the Directive's hard-core provisions were interpreted by the CJEU proved decisive in determining their practical scope. While the Court formally recognized Member States' right to apply local labour standards, its doctrine subordinated social protection to the logic of economic functionality. This orientation is most clearly illustrated by the *Laval* judgment[64], which raised concerns regarding the manner in which minimum harmonization directives must be interpreted.[65] In the case facts, Laval un Partneri Ltd, posted workers to Sweden through its subsidiary to carry out renovation works on school premises in Sweden. After unsuccessful negotiations with the Swedish building workers' union over wage levels and accession to the sectoral collective agreement, Swedish unions initiated a blockade and sympathy action that halted the works and led to the subsidiary's bankruptcy. The Swedish labour court asked, hence, whether Articles 49 and 50 EC precluded such collective action.

The Court of Justice held that the right to take collective action constitutes a fundamental right forming part of the general principles of EU law, yet it does not fall outside the scope of the Treaty and must be reconciled with the freedom to provide services. The relevance of the Court's stance relies on the subjection of collective action by trade unions to the free movement of services. Therefore, collective action aimed at compelling a foreign Service provider to negotiate and sign a collective agreement fixing wage levels beyond the "hard core" defined in the Posted Workers Directive constituted a restriction on Article 49 EC. Such theological interpretation of the Directive 96/71/EC in the context of the freedom to provide services could imply in this case a repositioning of collective

[62] 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 [1997] OJ L18/1, art. 3(1).

[63] 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 [1997] OJ L18/1, art. 3(8).

[64] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

[65] European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)) [2010] OJ C15E/50.

labour rights as prima facie infringements requiring proportionate justification. Thereby, it looks from this case that collective labour rights are not only subordinate to internal market logic but are also in tension with it. Tension between workers' protection and the freedoms of the market is particularly relevant in decentralised collective bargaining systems, where the *Laval* judgment seems to privilege the legal predictability for service providers over the autonomy of national industrial relations systems, on one hand, and the workers' access to more favourable terms, on the other hand. Thus, the decision implies a transformation of minimum labour terms and conditions into a ceiling rather than a floor of protection.

Similarly, the relevance of the *Rüffert* case[66] lies in the way it consolidated and extended the doctrinal trajectory initiated in *Laval*. The Court of Justice was confronted with a public procurement clause requiring contractors, in Germany, to comply with locally negotiated wage standards, in applicable collective agreements. By interpreting the Posting of Workers Directive strictly through the framework of Article 49 EC, the Court held that only minimum rates of pay, fixed by universally applicable collective agreements or by statute, could be imposed on foreign service providers. Collective agreements applicable solely to public contracts, even when embedded in regional social policy aimed at preventing wage undercutting, were excluded from the Directive's protective scope.

The doctrinal logic of *Laval* was extended in the *Rüffert* case*,* subjecting public procurement-based social clauses to the same market-oriented proportionality. Taken together, Laval and Rüffert produced a coherent but contested doctrinal background, in which host-state social regulation, whether pursued through collective action or public procurement clauses, was subjected to internal market. The political and institutional reactions to this jurisprudence confirm that judicial interpretation did not settle the posted workers regime but instead opened a sustained phase of inter-institutional negotiation –precisely the political reaction that judicialization theory predicts.[67] For instance, in 2008, the European Parliament issued a resolution on challenges to collective agreements in the EU calling for legislative clarification of the relationship between fundamental social rights and economic freedoms. In this sense, the resolution constitutes evidence on the existence of a legitimacy deficit that secondary legislation alone could not absorb. Hence, the evolution of the posted workers regime cannot be understood solely through case-law analysis; rather, it reflects a dynamic interaction between judicial interpretation and political mobilisation. In fact, in 2014, the Enforcement Directive[68] and ultimately, in 2018, the revision of the PWD were

[66] Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989.

[67] Mussche and Lens (n 8).

[68] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework

adopted[69], aiming to recalibrate the social dimension of market integration and to restore coherence with the EU's proclaimed social market economy.[70]

3. The period after the adoption of Directive 2018/957/EU

The process of the 2018 amendment can be understood against the background of growing tensions within the internal market following Eastern enlargement and the intensification of cross-border service provision. This tension, coupled with the persistent wage differentials between Member States, generates concerns about social dumping and regulatory arbitrage. In this context, the European Commission launched its proposal in 2016 to strengthen the protection of posted workers within the regime of posting established with the directive of 1996. Under this proposal, the Commission introduces the principle of "equal remuneration for the same work in the same place", thereby shifting the normative baseline of the Directive from minimal protection toward a more substantive equality framework. However, opposition by Central and Eastern member states reflects the political tensions that this rights-based approach to the market entails. Particularly, wage differentials are, in smaller economies, defined as a legitimate competitive advantage that contributes to increased service exports.

In this context, Hungary and Poland raised actions of annulment of the amendment in front of the Court. Both applicants advanced a structurally similar line of argument: that the 2018 reform altered the centre of gravity of the Directive from market facilitation to social regulation, thereby exceeding the legal basis in Articles 53(1) and 62 TFEU and disproportionately restricting the freedom to provide services under Article 56 TFEU. As contested by both countries, if the amendment's legal basis concerns the protection of workers it should be rather based on Article 153, which excludes EU competence over pay.[71] The action for annulment, thus, crystallises around the boundary of EU competences, particularly whether the notion of "remuneration" constitutes indirect wage regulation within the internal market.

The main role of the court in this regard was to clarify the scope and the interpretation of specific clauses of the new Directive of 2018. More substantively, the Court reformulated the Directive's dual objective: facilitating service provision while ensuring protection of posted workers on a fair competitive basis.

of the provision of services [2014] OJ L159/11.

[69] 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 [2018] OJ L173/16.

[70] Catherine Jacqueson, 'The Internal Market at a Social Turn? Social dumping and the protection of workers' (2020) 22 European Journal of Social Security 403.

[71] See: Case C-620/18 *Hungary v Parliament and Council* [2020] ECLI:EU:C:2020:1001.

This reformulation signals a doctrinal recalibration, where social protection is no longer merely ancillary but embedded in the functioning of the internal market. In contrast to the earlier rhetoric of the Laval line of case law, the Grand Chamber conceptualized ‘fair competition’ as competition not grounded in excessive disparities in employment conditions within the same host state.[72] Hence, workers’ protection becomes an integrated part of this fair competition.

The differentiation between posted workers and the free movement of workers was further highlighted by the court within the examination of the basis of the principle of equal treatment for posted workers. The attention accorded to posted workers’ right of equal treatment does not emanate from Article 45 of TFEU, but rather from the freedom to provide services. In this reagard, the Court preserves the functional logic of posting as a form of service provision rather than labour mobility, in line with its previous judgments and with the Directive 96/71/EC. The employment relationship, therefore, continues to be governed primarily by the home state, subject only to a defined set of host-state mandatory rules.

However, this application of the home state’s law is limited by the definition of the work limit period. In fact, the 2018 revision of the Posting Directive stipulates that after 12 months –extendable to 18 months upon justified notification– the posted worker becomes subject to the host country’s mandatory labour provisions. However, this shift does not establish full equality as certain contractual aspects such as dismissal rules or non-competition clauses remain governed by the law of the sending state.

Overall, the amendment introduced a set of innovations compared to the previous Directive 96/71/EC, especially regarding the wages of posted workers, the equality of working conditions and the protection of long-term posted workers. Table 3 provides a comparative summary between the two directives on different levels. For instance, the introduction of the concept of remuneration implies a larger meaning than wages by including different bonuses and allowances. The Directive 2018/957 consolidates that all the components of remuneration applicable to local employees apply as well to posted workers. As a result, workers can benefit from travel costs and accommodation expenses, reimbursement and lodging expenditure.

[72] Marta Lasek-Markey, ‘No Turning Back from Social Europe: A New Interpretation of the Refurbished Posted Workers Directive in Hungary and Poland’ (2022) 51 Industrial Law Journal.

Issue	Directive 96/71/EC	Directive 2018/957
Posting Period	Undefined.	12 months, with possible 6 months extension upon justification.
Applicable Law	Home country by default with exceptions related to "core" terms and employment conditions of the host state.	The host country's law starts to apply beyond the posting period (from 12 to 18 months).
Remuneration	"Minimum" rates of pay were applicable.	The concept of remuneration replaces the minimum pay; it includes broader costs such as allowances and bonuses.

Table 3. Comparative summary of the changes between the two directives on the posting of workers

Yet, in the case of *Dobersberger v Magistrat der Stadt Wien*[73], and broadly after the entry of the amendment in force, the Court's stance does not reflect much change from the market constitutionalist logic. After clarifying the normative shift towards balancing the social dimension of posting and its economic benefits, the question with *Dobersberger*'s case shifted towards the definition of who might be considered as posted and thus who is willing to benefit from this new normative shift. The case concerned on-board catering workers employed by a Hungarian undertaking and subcontracted within a transnational railway service. The Court concluded that these workers lacked a "sufficient connection" with Austrian territory and therefore did not fall under the scope of the Posted Workers Directive.

This means that the sufficient connection to the host country in this case was not determined by the cross-border nature of the service contract but the spatial distribution of the workers' activities, particularly the location where shifts began and ended. This criterion does not derogate the constant jurisprudence in the matter such as in the case of *Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV* or *OL and Others v Rapidsped.*[74]

The court's role in this case was to assert the territorial connection as the organizing principle in posting. As a result, sectors characterized by high mobility and fragmented work patterns, such as cross-border logistics work, are less likely

[73] Case C-16/18 *Michael Dobersberger v Magistrat der Stadt Wien* ECLI:EU:C:2019:1110.

[74] See: Andrea Iossa, '"This is not a posted worker" – short-term cross-border mobility of logistics workers and spatio-temporal dimensions of exploitation in the EU: evidence from the case law of the Court of Justice' (2022) 1(3) European Law Open 669-678. And see: Case C-429/19 *OL and Others v Rapidsped Fuvarozási és Szállítmányozási Zrt* [2021] ECLI:EU:C:2021:548; Case C-815/18 *Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV and Others* [2020] ECLI:EU:C:2020:976.

to benefit from the Directive's protective framework. The relevance of this jurisprudence shows that if the reform aimed to rebalance economic freedoms and social rights, *Dobersberger* indicates that such rebalancing operates only within a stable and restrictive definition of posting.

In the *SN and Others v Staatssecretaris van Justitie en Veiligheid* case[75], the Court of Justice addressed the intersection between the posting regime and national immigration control in the context of Third Country Nationals (TCNs). The case concerned Ukrainian workers holding valid residence permits in Slovakia and employed by a Slovak undertaking that posted them to the Netherlands. When the duration of the construction project to which they had been posted exceeded initial expectations, the Dutch authorities required additional residence permits, limited in duration and subject to administrative fees. The employer challenged these requirements under Articles 56 and 57 TFEU, arguing that they constituted unjustified restrictions on the free movement of services.

The Court's position is relevant in two respects. First, regarding the posting of third-country nationals (TCNs) and the continuity of the posting regime as operating without prejudice to national rules on entry and residence. Second, in light of the broader political context surrounding immigration and the potential security concerns that may arise where service provision is invoked. The Court held, first, that undertakings cannot rely on a derived right of residence, since such rights are conceptually linked to Union citizenship and therefore to natural persons rather than legal entities. Second, while acknowledging that the Dutch residence requirement constituted a restriction on the freedom to provide services, the Court accepted that such a restriction might be justified by overriding reasons in the public interest, including public policy and the protection of legal certainty for workers, if the measures satisfy the proportionality test. Accordingly, the limited duration of the permits and the administrative fees were considered compatible with EU law.

Although the Court did not explicitly rely on the *Vander Elst* doctrine, it implicitly limited its scope by emphasizing that lawful employment in the sending Member State must be genuine and verifiable. The judgment therefore, shows awareness about the possibility of using posting to circumvent national immigration control, and makes it a legitimate public policy concern that overrides market freedoms. In doing so, the Court reinforces Member State discretion in supervising the residence conditions of TCN posted workers, even where a transnational service provision formally complies with posting notification requirements.

[75] Case C-540/22 *SN and Others v Staatssecretaris van Justitie en Veiligheid* [2024] ECLI:EU:C:2024:530.

V. Implications

1. *Synthesis of the judicialization of the posted workers regime*

The longitudinal analysis of the Court's case law reveals a non-linear trajectory of judicialization that both confirms and refines the theoretical expectations outlined in the literature. Across the three studied periods the Court's role evolves from constitutive market-builder to doctrinal consolidator and, ultimately, to selective stabilizer within a politically constrained environment.

In the pre-Directive period, the jurisprudence established the constitutional foundations of posting through an expansive interpretation of the freedom to provide services. In *Rush Portuguesa*, the Court distinguished the temporary movement of workers in the context of service provision from free movement of workers, thereby insulating cross-border service mobility from host-state entry and work permit requirements. This interpretative move exemplifies what Joseph Weiler described as a "mutation of competences" where national authority over labor market access was effectively displaced through judicial construction of internal market freedoms.[76] The subsequent consolidation of this logic in *Vander Elst* extended the regime to third-country nationals lawfully employed in a Member State, reinforcing the Court's capacity to generate a distinct transnational mobility status through adjudication. In terms of judicialization theory, as developed by Stone Sweet[77], this phase reflects constitutive judicial law-making: the Court did not merely interpret existing norms but structured the governance architecture of labour mobility itself.

During the Directive period, however, the jurisprudence reveals a shift from competence expansion to market-oriented discipline of social regulation. In *Laval un Partneri*, collective action aimed at enforcing wage standards was framed as a restriction on the freedom to provide services, subject to a proportionality test. By granting horizontal effect to economic freedoms, the Court subordinated collective labour rights to internal market logic. This reasoning was reinforced in Rüffert, where public procurement-based social clauses were excluded from the Directive's protective framework. Analogically, if *Laval* subjected trade union action to market scrutiny, *Rüffert* extended that scrutiny to public regulatory strategies designed to prevent wage undercutting. The combined effect transformed minimum harmonization into a ceiling rather than a floor of protection, confirming the socio-economic literature's argument that the posting framework institutionalized labour market segmentation.[78] Considering that posted workers

[76] Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

[77] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comparative Political Studies 147.

[78] Robin-Olivier (n 43); Castles (n 44); Rocca and De Wispelaere (n 46); Anderson (n 47).

do not access the host labour market, it can be used as a mechanism of regulatory disembedding, enabling cost differentials consistent with strategies of informalisation.

Yet the post-amendment period complicates the narrative of unilateral judicial marketization. In the annulment actions brought by Hungary and Poland against the 2018 revision, the Court upheld the amended Directive and reformulated its dual objective: facilitating service provision while ensuring fair competition grounded in equivalent employment conditions within the host state. The Grand Chamber recognized that competition based on excessive disparities in working conditions undermines both social protection and market integrity. This doctrinal recalibration aligns with the broader revival of Social Europe under the European Pillar of Social Rights[79] and its legislative concretizations, including Directive (EU) 2018/957, Directive (EU) 2019/1152, and Directive (EU) 2022/2041[80]. Here, judicialization operates less as an expansion of market freedoms and more as a constitutional validation of a rebalanced compromise between market freedoms and social rights.

However, subsequent case law demonstrates that this recalibration remains bounded. In *Dobersberger*, the Court re-centred territorial connection as the organizing principle of posting, excluding certain cross-border logistical activities from the Directive's scope. The decision illustrates path dependency[81]: while the amendment strengthened host-state labour standards, the Court simultaneously defined the boundaries of who qualifies as a posted worker, thereby delimiting the reach of the new protective logic. Judicialization here operates through categorization rather than expansion.

This containment logic is also visible in *SN and Others v Staatssecretaris van Justitie en Veiligheid*, where the Court addressed the posting of third-country nationals. While acknowledging that residence requirements restrict service provision, it accepted such measures when justified by public policy and proportionality. Hence, compatible with the principal-agent accounts, the Court adjusts its jurisprudence where legitimate Member State concerns related to public policy and

---

[79] Dura (n 19).

[80] 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 [2018] OJ L173/16; Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L275/33; Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186/105.

[81] Martinsen (n 41) 7.

security exist.[82]

2. Implications on the socio-economic position of workers

The primary implication is that the Court's rulings have established a hierarchy of norms where the logic of market integration is sometimes privileged. The Court's subsequent post-amendment jurisprudence, characterized by a technocratic retreat and functional exclusions, such as in the case of logistics workers, implies a stabilization of this asymmetry. The normative shift is not a simple pendulum swing from market to social, but rather the permanent embedding of social protection as a secondary or conditional consideration that should be proportionate to the primary objective of market freedom.

The second implication relates to the limits of this regime in reducing segmentation and precarity. In fact, the early jurisprudence facilitated regulatory segmentation by constructing a legally mobile yet partially disembedded workforce. The Directive-period case law entrenched this segmentation through a market-oriented proportionality test. The post-2018 phase, however, does not dismantle segmentation but re-regulates its boundaries. The reform strengthened the host-state working condition application, yet the court's decision still limits its scope territorially and preserves Member State authority in migration-sensitive contexts. Precarity remains structurally embedded, particularly for third-country nationals, whose status continues to combine formal legality with constrained incorporation into host labour markets.

VI. Conclusions

1. Summary of the findings

The trajectory of the CJEU's jurisprudence on posted work reveals that judicialization constitutes a process of legal and institutional construction of a labour mobility regime. Judicialization operates through interactive feedback between adjudication and governance, whereby judicial reasoning not only interprets norms but also generates new rules and meanings. In the case of EU labour mobility and posted workers, this process has unfolded different functions such as absorption and rule-making.

Through absorption, the Court has progressively declared national protective measures incompatible with market freedoms, as exemplified in the cases *Laval* and *Viking*, thereby reconfiguring the balance between collective rights and economic integration. The political reaction to this judicial absorption embodied in the codification of case law through the 1996 Posting of Workers Directive and

[82] Carrubba (n 40).

its 2018 revision, illustrates how legislation has followed, rather than directed, the Court's interpretative agenda. The rule-making function reflects the Court's capacity to invent legal categories and regulatory effects ex nihilo. In *Vander Elst*, the recognition of third-country nationals' mobility rights created a new directive, which redefined the relationship between immigration control and market access. Similarly, in *Dobersberger*, the Court's exclusion of mobile railway workers from the PWD's scope exemplified the judiciary's power to delimit rights' applicability, effectively designing the material boundaries of EU labour law.

Overall, the judicialization of the posted workers regime illustrates the transformation of the CJEU from an adjudicative to a governance institution, capable of producing binding norms and entailing policy orientations that pre-structure legislative outcomes. The Court's jurisprudence continues to mediate the tensions between market integration and social concerns, oscillating between market-constitutional imperatives and the normative aspirations of the EU's social market economy. This ongoing dialectic confirms that in EU labour governance, judicialization is both the engine and the constraint of integration: it stabilizes the legal order while reproducing its foundational imbalance.

2. *Theoretical and empirical contributions*

This study contributes to the literature on judicialization, European integration, and transnational labour mobility in three different ways. First, it refines the concept of judicialization in the field of labour mobility by demonstrating its temporal variability. Rather than confirming a linear narrative of judicial empowerment, the longitudinal analysis shows that the Court's role shifts across phases: from constitutive expansion of market freedoms in the pre-Directive period, to proportionate market-social balance in the Directive period and finally to institutional stabilization and boundary-setting in the post-amendment period. Judicialization thus emerges as a dynamic interaction between jurisprudential path dependency and political recalibration, rather than as continuous judicial supremacy. Second, the study bridges legal-doctrinal analysis with principal-agent theory. While early case law supports delegation-based accounts of judicial empowerment, the post-2018 jurisprudence reveals judicial sensitivity to political constraints, particularly in shifting geopolitical and migratory contexts. The findings, therefore, refine Stone Sweet's intake of judicialization by incorporating political responsiveness without reducing judicial agency. Lastly, the analysis repositions the 2018 revision of the Posted Workers Directive within the broader Social Europe trajectory. The findings slightly differ from the literature that situates the amendment as a corrective to the Laval doctrine. In this paper, the amendment is seen as a corrective but also judicial interpretation simultaneously delineates the categories and situations to which these 'corrections' apply. Empirically, the study provides a diachronic design of the Court's case law, in order to identify doctrinal continuities and discontinuities that are often obscured in single-case analyses.

However, several limitations to the study should be acknowledged. In the study of posted workers regime, especially when it comes to its implications on the socio-economic position of workers, it is beneficial to study implementation outcomes, enforcement practices, or the lived experiences of posted workers. The gap between jurisprudence and practice remains empirically underexplored. Furthermore, the collection of 'landmark' decisions may underrepresent lower-profile decisions or national case law that could nuance the picture of judicial influence. The national level of compliance and implementation is also understudied. Although it could be theorized within the principal-agent model. Overall, the conclusions on the socio-economic position of workers are more theoretical rather than quantitatively assessed. Hence, the structural consequences of jurisprudence are not statistically demonstrated.

3. Avenues for future research

Building on the contributions and limitations of the study, research could examine how national authorities apply post-2018 jurisprudence in practice, applying mixed methods combining doctrinal and empirical analysis. Comparative analysis of national implementation and litigation can take research further to test principal-agent claims about judicial responsiveness. On the other hand, qualitative research can allow further exploration of the socio-economic outcomes by involving posted workers or trade unions and experts.

In conclusion, the study demonstrates that judicialization in the posting regime is neither uniformly expansionist nor purely restrained. It is contingent, path-dependent, and politically mediated. Further understanding of the intersection of posting and labour mobility governance, can be expanded through econometrics, social fieldwork and comparative political analysis.