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# Time and Labour Markets in the Regulation of Temporary Labour Migration in the European Union.

Marco Rocca\* - Audrey Deverson<sup>+</sup>

1. Introduction. 2. Temporary Labour Migration: Our Scope. 3. Time. 4. Labour Market (a Systematic Document Analysis). 5. Conclusions.

## Abstract

The importance of the phenomenon of temporary labour migration is growing both from a quantitative and from a political point of view. Its legal regulation is grounded on concepts, such as “temporariness” and “labour market”, which are either not defined by the law or in potential conflict with their socio-economic reality. We propose two approaches to better identify the meaning of these terms in the context of European Union (EU) law, by focusing on the three categories of labour migration which are explicitly defined as temporary. These are posting of workers, seasonal work, and intra-corporate transfers. We analyse the concept of temporariness through a necessary and sufficient conditions approach, whereas to identify the meaning of “labour market” law we propose an original systematic document analysis using a corpus of more than 1800 mentions of the concept in EU “hard law”. Our article highlights the polysemic nature of these concepts and proposes operationalised criteria for further research into the legal regulation of temporary labour migration in the EU.

**Keywords:** Social Rights; European Union; Temporary Labour Migration; Empirical Legal Studies; Posting of Workers; Seasonal Workers; Intracorporate transfers.

## 1. Introduction.

The article explores the use of spatiotemporal scales to regulate temporary labour migration by analysing the use of the concepts of “labour market” and “temporariness” in the European Union (EU) legal framework. With this analysis we pursue two goals. The first is to explore the polysemic nature of these concepts and highlight the potential issues for

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their use in the context of legal regulation. We wish to address the questions: what does EU law mean when it uses the expression “labour market”? What does it mean when it defines a migration situation as “temporary”? The second goal is to provide options for operationalising the same concepts to allow further research aimed at comparing them to their empirical reality.

In focusing on temporary labour migration, we are drawn by the continuous increase in importance of the phenomenon, both from a quantitative<sup>1</sup> and from a policy perspective.<sup>2</sup> Indeed, we share the view which considers temporary labour migration as a sort of “compromise” between the political calls to “take back control of the borders” and the demands of employers to access a migrant workforce.<sup>3</sup>

We approach the phenomenon from the perspective of legal researchers focusing on labour and social rights. However, we hope that our analysis of concepts which are at the heart of the EU legal framework for temporary labour migration might have an interest beyond the scope of our discipline. Far from a purely conceptual endeavour, determining who is (or is not) inside a given labour market, who is (or is not) a “temporary” labour migrant, can have profound legal implications, notably for the access to social rights.

To identify the meaning of these concepts we propose an innovative scope, analysing together different forms of temporary labour migration which are traditionally considered separately by legal research, namely intra- and extra- EU migration. In this sense, we intentionally refer to “temporary labour *migration*” in our title, while covering situations (such as posting of workers), which are generally referred to under the term “mobility” in the EU legal community.<sup>4</sup> We will come back to the reasons underpinning this choice in Section 2. Section 3, in its turn, focuses on the concept of “temporariness”. In Section 4 we detail our use of a systematic document analysis<sup>5</sup> to develop an inductive approach to the identification of the meaning of “labour market” in (EU) law. The use of this method, as well as of the original corpus we built for this purpose, represents a further contribution of our work to the existing literature. Section 5 is devoted to our Conclusions.

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<sup>1</sup> OECD, *International Migration Outlook*, OECD, 2022.

<sup>2</sup> ILO, *Temporary labour migration: unpacking complexities*, International Labor Organization, 2022; European Council, *Improving the working and living conditions of seasonal and other mobile workers*, Council Conclusions (11726/2/20), 2; European Parliament, *European protection of cross-border and seasonal workers in the context of the COVID-19 crisis*, Resolution of 19 June 2020.

<sup>3</sup> See for instance Biffl G., Skrivanek I., *The Distinction Between Temporary Labour Migration and Posted Work in Austria*, in Howe J., Owens R. (eds.), *Temporary Labour Migration in the Global Era. The regulatory Challenges*, Hart Publishing, Oxford, 2016, 91.

<sup>4</sup> See for the same approach ILO, nt. (2), 14.

<sup>5</sup> Bijleveld C., *Research Methods For Empirical Legal Studies: An Introduction*, Eleven, 2024, 253.

## 2. Temporary Labour Migration: Our Scope.

The glossary of the European Migration Network defines temporary migration as “migration for a specific motivation and / or purpose with the intention that afterwards there will be a return to the country of origin or onward movement”<sup>6</sup>. Similarly, temporary labour migrants have been defined as “those who migrate on a temporary basis primarily for the purpose of work”<sup>7</sup>. These definitions suffer from certain limitations. The intentions of migrant workers are essentially impossible to explore and might be themselves the result of a choice operated in an unfair context,<sup>8</sup> while assuming “temporariness” as a defining characteristic creates a circular definition.

To overcome these limitations, we identify our scope through a positivistic approach. Therefore, in the context of this article we define temporary labour migrants as “all those who move to an EU Member State primarily for the purpose of work and whose migration status is defined by the applicable legislation as being limited in time”.

When applied to the EU legal framework, such a definition includes both the migration of workers already in the EU (intra-EU mobility) and migration from countries outside the EU (extra-EU mobility), covering migrant workers falling under three EU Directives, namely the Posting of Workers Directive (“PWD”),<sup>9</sup> the Seasonal Workers Directive (“SWD”),<sup>10</sup> and the Intra-corporate Transfers Directive (“ICTD”).<sup>11</sup>

Posting of workers is the main form of intra-EU temporary labour migration.<sup>12</sup> A posted worker is a worker who is temporarily sent by their employer to a Member State, other than the State in which they normally work, to carry out a provision of services.<sup>13</sup> The most recent data indicate that in 2022 there were 4.6 million individual postings in the EU/EFTA countries and the United Kingdom.<sup>14</sup> Under EU law, seasonal workers are third-country workers residing in non-EU countries who stay legally and temporarily in the territory of an EU Member State to carry out an activity dependent on the passing of the seasons.<sup>15</sup> Although seasonal work is highly concentrated in some sectors, such as agriculture and

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<sup>6</sup> European Migration Network, *Asylum and Migration Glossary: Temporary Migration*, [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/temporary-migration\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/temporary-migration_en).

<sup>7</sup> Howe J., Owens R., *Introduction*, in Howe J., Owens R. (eds.), *Temporary Labour Migration in the Global Era: The Regulatory Challenges*, Hart Publishing, Oxford, 2016, 7.

<sup>8</sup> Dauvergne C., Marsden S., *The ideology of temporary labour migration in the post-global era*, in *Citizenship Studies*, 2, 18, 2014, 236.

<sup>9</sup> Directive no. 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services.

<sup>10</sup> Directive no. 2014/36/EU of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

<sup>11</sup> Directive no. 2014/66/EU of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

<sup>12</sup> OECD, *International Migration Outlook*, OECD, 2019.

<sup>13</sup> PWD, Article 2.

<sup>14</sup> De Wispealere F., De Smedt L., Paolet J., *Posting of workers. Report on A1 Portable Documents issued in 2022*, Directorate-General for Employment, Social Affairs and Inclusion, 2023.

<sup>15</sup> SWD, Article 3(b).

tourism,<sup>16</sup> the SWD covers all economic activities. Data from Eurostat indicate that in 2022 154609 authorisations for the purpose of seasonal work were granted to third-country nationals, with an additional 13713 permits being renewed that year.<sup>17</sup> Intra-corporate transferees (ICTs) are also third-country nationals residing in non-EU countries, but their specificity is that they are sent by their employer, also established outside of the EU, in order to work in an undertaking or company established in the EU and part of the same economic group.<sup>18</sup> EU level data on ICTs, only available for 2021-2022, indicates that 10509 ICT permits were issued in 2022 with an additional 1765 ICT being renewed in the same year.<sup>19</sup>

In drawing this scope, we are aware of mixing situations which cover both intra- and extra-EU migration. We believe that the multiple similarities that characterise these phenomena justify such a choice. First, all these forms of migration are defined as temporary by their legal framework. Second, they all constitute a form of migration which is, to a greater or lesser extent, employer driven.<sup>20</sup> Intermediaries and agencies also play a fundamental role in organising this form of migration just as they do for posting.<sup>21</sup> Third, posting of workers itself involves, to an increasing extent, the mobility of third country nationals,<sup>22</sup> legally based on the *Vander Elst* decision.<sup>23</sup> Our choice to analyse these three categories together is also grounded in scholarly work done outside the legal field<sup>24</sup>. Finally, the European Committee of Social Rights famously considered posted workers as covered by Article 19 of the European Social Charter which refers to “migrant workers”.<sup>25</sup>

A further shared characteristic of the three forms of temporary labour migration covered by our scope is that the EU legal framework awards them a treatment that, when it comes to working conditions and/or access to social security in the country of arrival, is less advantageous than the one applicable to local workers or permanent migrants.

<sup>16</sup> Medland L., *Misconceiving ‘seasons’ in global food systems: The case of the EU Seasonal Workers Directive*, in *European Law Journal*, 23, 2017, 161-162.

<sup>17</sup> Eurostat, *Authorisations for the purpose of seasonal work by status, length of validity, economic sector and citizenship*, [https://doi.org/10.2908/MIGR\\_RESSW1\\_1](https://doi.org/10.2908/MIGR_RESSW1_1).

<sup>18</sup> ICTD, Article 3(b).

<sup>19</sup> Eurostat, *Intra-corporate transferee permits issued, renewed and withdrawn by type of permit, length of validity and citizenship*, [https://doi.org/10.2908/MIGR\\_RESICT1\\_1](https://doi.org/10.2908/MIGR_RESICT1_1).

<sup>20</sup> Krings T., Bobek A., Moriarty E., Salamonska J.J., Wickham J., *Large-scale migration in an open labour market: the Irish experience with post-2004 labour mobility and the regulation of employment standards*, in Bernaciak M. (ed.), *Market Expansion and Social Dumping in Europe*, Routledge, London, 2015, 25; Medland L., nt. (16), 157; Antoons J., Ghimis A., Sullivan C., *The Intra-Corporate Transfer Permit and Mobility in the European Union: The Business Perspective*, in Minderhoud P., de Lange T. (eds), *The Intra Corporate Transferee Directive. Central Themes, Problem Issues and Implementation in Selected Member States*, Wolf Legal Publishers, Chicago, 2018, 67.

<sup>21</sup> Veron D., *Le travail détaché entre mise au travail intensive et nouvelles formes de la mobilité internationale*, in *Temporalités*, 2020, 31-32; Hedberg C., Axelsson L., Abella M., *Thai berry pickers in Sweden – A migration corridor to a low-wage sector*, Delmi, 2019, 15; Cremers J., Dekker R., *Labour Arbitrage on European Labour Markets - Free Movement and the Role of Intermediaries*, in Rijkenand C., de Lange T. (eds), *Towards a Decent Labour Market for Low-Waged Migrant Workers*, Amsterdam University Press, Amsterdam, 2019, 109.

<sup>22</sup> Mussche N., Lens D., *The ECJ’s Construction of an EU Mobility Regime-Judicialization and the Posting of Third-country Nationals*, in *Journal of Common Market Studies*, 6, 57, 2019, 1247.

<sup>23</sup> CJEU - Case C-43/93, *Vander Elst v Office des migrations internationales* [1994] ECLI:EU:C:1994:310, para. 20-22.

<sup>24</sup> Ruhs M., *The Price of Rights*, Princeton University Press, Princeton, 2013, 223-227; Ciupijus Z., *Ethical Pitfalls of Temporary Labour Migration: A Critical Review of Issues*, in *Journal of Business Ethics*, 97, 2010, 9.

<sup>25</sup> ECSR, 3 July 2013, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No 85/2012, para. 134.

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Posted workers in the EU are covered by the wages and working conditions of the Member State where they habitually work, that is, their home state. However, Article 3 of the PWD provides for a closed list of conditions in force in the country of arrival which must be applied to posted workers, including important aspects such as remuneration and maximum working time. Collective aspects are excluded from this list. Posted workers also remain affiliated to the social security system of their home country as long as the duration of posting does not exceed 24 months.<sup>26</sup>

The ICTD mandates that temporary labour migrants moving under this scheme enjoy the same treatment as posted workers, meaning that only a closed list of working conditions applicable in the country of arrival will be extended to these workers.<sup>27</sup> However, the same instrument has a broader coverage for collective rights, with the guarantee of equal treatment regarding their freedom of association. A guarantee of equal treatment with comparable local workers as regards remuneration also features in the Directive, after becoming a point of political debate during its adoption.<sup>28</sup> On the social security side, Member States can exclude intra-corporate transfers from the payment of family benefits if their period of stay does not exceed nine months.

The Directive covering seasonal workers includes a stronger commitment to equal treatment in the field of working conditions. The initial proposal of the European Commission had foreseen a treatment similar to posted workers, based on the application of a closed list of rights. Such an approach was amended during the negotiations<sup>29</sup> to include the principle of equal treatment with local workers. However, the trace of differentiated treatment remains when it comes to the access to social security, as seasonal workers can be excluded from benefits such as family and unemployment benefits, study and maintenance grants or loans, and housing.<sup>30</sup>

The differentiated treatment which EU law allows or mandates for these three categories of temporary labour migrants represents a deviation from the treatment which these workers would receive if they were defined as “permanent” migrants. In the case of posted workers, one can compare their situation with the one of workers moving under the free movement of workers<sup>31</sup> who benefit from the principle of equal treatment with local workers and are affiliated to the social security system of the country of arrival from the start of their work there. For third country nationals arriving in the EU under the SWD and ICTD, the same comparison can be drawn with third country nationals who reside in the EU under more

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<sup>26</sup> Reg. no 883/2004 of the European Parliament and of the Council on the coordination of social security systems, Article 12.

<sup>27</sup> Costello C., Freedland M., *Seasonal Workers and Intra-corporate Transferees in EU Law: Capital's Handmaidens?*, in Howe J., Owens R. (eds.), *Temporary Labour Migration in the Global Era. The regulatory Challenges*, Hart Publishing, Oxford, 2016, 60.

<sup>28</sup> Verschueren H., *The Role of Employment and Social Security in the ICT Directive*, in Minderhoud P., de Lange T. (eds.), *The Intra Corporate Transferee Directive. Central Themes, Problem Issues and Implementation in Selected Member States*, Wolf Legal Publishers, Chicago, 2018, 39.

<sup>29</sup> Fudge J., Herzfeld Olsson P., *The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights*, in *European Journal of Migration and Law*, 16, 2014, 457.

<sup>30</sup> Zoetewij-Turhan M.H., *The Seasonal Workers Directive: ‘... but some are more equal than others’*, in *European Labour Law Journal*, 8, 1, 2017, 34.

<sup>31</sup> Article 45 TFEU.

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permanent forms of residency permits.<sup>32</sup> EU law,<sup>33</sup> as well as international law,<sup>34</sup> mandate that migrant workers, legally residing in a given country, should be awarded a treatment which is not less favourable than that which is applied to the nationals of that country regarding, among other aspects, wages, working conditions and access to social security.

### 3. Time.

Laws and regulations usually define temporary migration as the admission of foreign nationals for a definite and pre-established period of time.<sup>35</sup> Here we are concerned with the conceptualisation of “temporariness” through the identification of the conditions necessary and sufficient for something to be defined as such<sup>36</sup> under the EU legal framework for temporary labour migration. The temporary status has consequences for the entitlement of social rights,<sup>37</sup> but also the access to permanent status or citizenship.<sup>38</sup> Therefore, time is then used as a tool to regulate the presence of migrants within a given territory,<sup>39</sup> and it heavily impacts the migratory path<sup>40</sup> at all stages: the decision, the journey, the arrival, and even the settlement and citizenship or the return.<sup>41</sup>

It should be noted that the very idea of the “temporary” nature of temporary labour migration has been criticised and included under what defines the “ideology” of this phenomenon.<sup>42</sup> The reliance on temporary labour migrants can also lead to the worsening of the conditions which made the recourse to migrant workforce necessary in the first place, making *temporary* labour migration a *permanent* feature of a given sector.<sup>43</sup> Even when individual plans for temporary migration are considered<sup>44</sup>, these are subject to change, with temporary experiences turning into permanent settlement,<sup>45</sup> leading the ILO to conclude that policies aimed at bringing in migrant workers when they are needed and then send them back

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<sup>32</sup> Medland L., nt. (16), 160; Guild E., *The EU's Internal Market and the Fragmentary Nature of EU Labour Migration*, in Costello C. and Freedland M. (eds.), *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford University Press, Oxford, 2014, 110.

<sup>33</sup> Article 15(3) of the EU Charter of Fundamental Rights.

<sup>34</sup> Article 6 of ILO Convention n° 97; Article 19 European Social Charter.

<sup>35</sup> Abella M., *Policies and Best Practices for Management of Temporary Migration*, United Nations Secretariat, 2006.

<sup>36</sup> Goertz G., *Social Science Concepts: A User's Guide*, Princeton University Press, 2006, 7.

<sup>37</sup> Howe J., Owens R., nt. (7).

<sup>38</sup> Triandafyllidou A., *Temporary Migration: Category of Analysis or Category of Practice?*, in *Journal of Ethnic and Migration Studies*, 48, 16, 2022, 3850.

<sup>39</sup> Stronks M., *Grasping Legal Time: Temporality and European Migration Law*, Cambridge University Press, Cambridge, 2022, 2.

<sup>40</sup> Mercier D., Chiffolleau S., Thoemmes J., *Temps et Migrations*, in *Temporalités*, 33, 2021.

<sup>41</sup> Anderson B., *Labor, Race, and Temporality*, in Boris E., Gottfried H., Greene J., Tham J.C. (eds.), *Global Labor Migration: New Directions*, University of Illinois Press, Champaign, 2023, 315.

<sup>42</sup> Dauvergne C., Marsden S., nt. (8), 236.

<sup>43</sup> House of Lords, *The Economic Impact of Immigration*, House of Lords, 2008, 39; Costa D., Martin P., *Temporary labor migration programs Governance, migrant worker rights, and recommendations for the U.N. Global Compact for Migration*, Economic Policy Institute, 2018.

<sup>44</sup> Ottonelli V., Torresi T., *Temporary Migration Projects, Special Rights and Social Dumping*, in *Ethical Theory and Moral Practice*, 22, 2019, 267.

<sup>45</sup> Piore M.J., *Birds of Passage: Migrant Labor and Industrial Societies*, Cambridge University Press, 1980, 64.

once their job is done have “failed in every region where they have been tried”.<sup>46</sup> Finally, in the case of posting of workers, the lack of time limits can lead to situations which are difficult to distinguish from the free movement of workers,<sup>47</sup> since this form of intra-EU mobility can also entail a migration which is limited in time.<sup>48</sup>

This leads us back to the forms of temporary labour migration included in our scope. The PWD defines posting as a “limited period” where the worker is sent to a Member State other than the one where they are habitually employed. The lack of any indication of a maximum duration has been criticised as it can lead to temporary situations extending over long periods.<sup>49</sup> However, posting is a facet of the (fundamental) freedom to provide services and the EU Court of Justice has, so far, accepted no limitation in time for the provision of services.<sup>50</sup> The 2018 reform of the Directive has attached legal effects to the passage of time, by establishing the rule that after 12 months of posting, which can be extended by further 6 months, most labour law regulations in force in the country of arrival will be applicable to posted workers. Similarly, the Social Security Coordination Regulation establishes that after 24 months of posting, the posted worker will be affiliated to the social security system of the country of arrival.<sup>51</sup>

The SWD establishes hard temporal limits for the presence in the Member State of arrival. The maximum period of stay of seasonal workers must be fixed at no less than 5 months and no more than 9 over a 12-month period.<sup>52</sup> However, the same Directive has the objective to encourage “circular” migration,<sup>53</sup> that is to facilitate the re-entry of third country nationals who have been admitted as seasonal workers in the past.

The ICTD also includes temporal limits, with a maximum of one year for trainees and three years for managers and specialists. Authors have highlighted how the length of these periods gives rise to doubts as to the “temporariness” of this form of migration, considering that other forms of “standard” migration can often end up being shorter.<sup>54</sup> Under this instrument the “circularity” of migration is discouraged, as Member States can require a

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<sup>46</sup> ILO, *International Labour Migration: A Rights-Based Approach*, International Labour Office, 2010, 144.

<sup>47</sup> Houwerzijl M., Berntsen L., *Posting of Workers: From a Blurred Notion Associated with ‘Cheap Labour’ to a Tool for Fair Labour Mobility?*, in Lillie N., Arnholtz J. (eds.), *Posted Work in the European Union. The Political Economy of Free Movement*, Routledge, London, 2020, 157.

<sup>48</sup> van Ostaijen M., Scholten P., *Between Mobility and Migration: The Consequences and Governance of Intra-European Movement*, in Scholten P., van Ostaijen M. (eds.), *Between Mobility and Migration - The Multi-Level Governance of Intra-European Movement*, Springer, Cham, 2018, 3.

<sup>49</sup> Voivozeanu A., *Precarious Posted Migration: The Case of Romanian Construction and Meat-Industry Workers in Germany*, in *Central and Eastern European Migration Review*, 85, 2, 2019, 95; Berntsen L., Lillie N., *Hyper-mobile migrant workers and Dutch trade union representation strategies at the Eemshaven construction sites*, in *Economic and Industrial Democracy*, 37, 1, 2016, 174.

<sup>50</sup> Houwerzijl M., van Hoek A., *Where do EU mobile workers belong, according to Rome I and the (E)PWD*, in Verschuere H. (ed.), *Residence, employment and social rights of mobile persons: on how EU law defines where they belong*, Intersentia Publishing, Cambridge, 2016, 243.

<sup>51</sup> Reg. no. 883/2004, Article 12.

<sup>52</sup> SWD, Article 14.

<sup>53</sup> United Nations Economic Commission for Europe, *Defining and Measuring Circular Migration*, United Nations, 2016.

<sup>54</sup> Herzfeld Olsson P., *Giving to those who have and taking from those who have not – the development of an EU policy on workers from third countries*, FORMULA Working Paper 26, 2011, 49.



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waiting period of up to six months between the end of a period and the start of the next for the same worker.

Therefore, the duration of a “temporary” migration in our scope is to be understood as stretching between one day (or even less, in the case of posted workers)<sup>55</sup> and three years (or even more, again in the case of posted workers). Even when it comes to minimum duration, we are faced with the absence of a minimum for both posted workers and intra-company transfers, as well as for seasonal workers. Therefore, the only necessary *and* sufficient condition which can be identified is that the labour migration must have a *foreseeable* end after a given period of time. In the case of seasonal workers and intra-corporate transferees, this is set explicitly by the relevant Directives. For posted workers, this can be derived from the definition of the freedom to provide services and has been confirmed by the CJEU.<sup>56</sup> On the other hand, while the existence of a *specific* pre-established duration would satisfy such a condition, the same cannot be considered as a necessary characteristic but only a sufficient one.

In addition to this, it has also been noted that the question of temporariness in temporary migration is even more ambiguous when referring to circular migration, as circular migration entails the possibility of entry and re-entry in the host country.<sup>57</sup> Can the recurrent pattern of migration created by circularity be considered as temporary?<sup>58</sup>

This leads to our second point, which deals with the conceptual delimitation of the micro-level of temporariness, that is the individual dimension. Notably, should the passing of time be considered only at an individual level? While this might appear as a rhetorical question, the law after all attaches rights and status to the individual situation, in formulating it we are guided by a concrete legal reality. Indeed, for the calculation of the time limit to apply most of the labour regulations in the country of arrival (12 months), the PWD takes into account the duration of the posting *including possible replacements*.<sup>59</sup> As such, EU law already attaches legal consequences to a situation which goes beyond the individual circumstances, to take into account the status of the individual temporary labour migrant as part of a larger phenomenon, in this case a posting operation collectively lasting for longer than 12 months. In the same vein, the Social Security Coordination Regulation<sup>60</sup> also establishes that a posted worker sent to a Member State to replace another posted worker for the same task, will also be immediately affiliated to the social security system of the country of arrival. Both these elements were confirmed by the CJEU.<sup>61</sup>

Should this dimension be included in the assessment of the *foreseeable* temporary nature of the labour migration? The well-known lack of decisions on the Seasonal Workers and the

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<sup>55</sup> CJEU - Case C-165/09, Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL [2001] ECLI:EU:C:2001:162.

<sup>56</sup> CJEU - Case C-456/02 Trojani v CPAS [2004] ECLI:EU:C:2004:488, para. 28..

<sup>57</sup> Geddes A., *Temporary and circular migration in the construction of European migration governance*, in *Cambridge Review of International Affairs*, 28, 4, 2015, 573.

<sup>58</sup> Gomes V., Doornik J., *State-of-the-art on temporary labour migration schemes in Europe*, AdMiGov Paper, 2020, 7.

<sup>59</sup> PWD, Article 3(1a).

<sup>60</sup> Reg. no. 883/2004, Article 11.

<sup>61</sup> CJEU - Case C-626/18, Poland v Parliament and Council [2020] ECLI:EU:C:2020:1000, para. 137; CJEU - Case C-527/16, Alpenrind and Others [2018] ECLI:EU:C:2018:669.

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ICTD does not allow to further investigate the potential role of the collective aspect beyond the (lack of) consideration provided by the legal text. In terms of the application of the necessary and sufficient conditions approach, we tentatively conclude that, to be included in the category “temporary labour migration”, it is sufficient for an individual migrant to be present in the country of arrival for a foreseeable limited duration.

#### 4. Labour Market (a Systematic Document Analysis).

To explore the spatial dimension of temporary labour migration, we focus on the concept of “labour market”, which we consider as the “space” of destination of temporary labour migrants. Indeed, all the forms of temporary labour migration included in our scope feature a connection with the concept of “labour market” in their legal framework. However, the concept itself is not a legal one. Gumbrell-McCormick and Hyman highlight how “economists, and also lawyers, have long struggled” to identify the nature of “the labour market”.<sup>62</sup> As such, we could not address the conceptualisation of this second concept with the “necessary and sufficient conditions” approach, leading us to develop a different methodology.

Since its first appearance in front of the EU Court of Justice posting of workers has been construed based on the assumed lack of access to the labour market of the country of arrival. Notably, the EU Court of Justice considered that posted workers “return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State”.<sup>63</sup> This underpins the distinction between workers moving under the free movement of workers and posted workers. Turning to seasonal work, EU Member States can make the entry of seasonal workers conditional upon a labour market test.<sup>64</sup> On the other hand, the EU Directive on intra-corporate transfers explicitly forbids the application of such a test.

Where they exist, these tests are based on the existence of labour shortages in the country of arrival, identified using a variety of instruments including taking stock of the number of unfilled vacancies, surveys, sector analysis and qualitative studies.<sup>65</sup> States use these tests in order to manage their labour market, verifying that the admission of the third-country worker responds to a need for a labour force in the host society.<sup>66</sup> EU law leaves broad discretion to the Member States to choose the conditions of their application.<sup>67</sup>

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<sup>62</sup> Gumbrell-McCormick R., Hyman R., *In search of global labour markets*, in *Journal of Industrial Relations*, 62, 2, 2020, 171.

<sup>63</sup> CJEU - C-113/89, *Rush Portuguesa v Office national d'immigration* [1990] ECLI:EU:C:1990:142, para. 15.

<sup>64</sup> European Migration Network, *Labour market tests in the migratory context*, European Commission, 2019.

<sup>65</sup> European Migration Network, *Determining labour shortages and the need for labour migration from third countries in the EU*, European Commission, 2015, 5.

<sup>66</sup> Farcy J-B., *L'Union européenne et l'immigration économique: Les défis d'une gouvernance multiniveaux*, Anthemis, Limal, 2021, 198.

<sup>67</sup> Robin-Olivier S., *The Community Preference Principle in Labour Migration Policy in the European Union*, in *OECD Social, Employment and Migration Working Papers*, 182, 2016, 27.

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In general, to realise a labour market test means that before admitting a third-country national to fill a job vacancy, it is necessary for employers to verify if there is no available worker in the domestic labour market, including national, EU citizens and third-country nationals who are already legally residing in the given Member State.<sup>68</sup>

The difference in treatment between the admission of seasonal workers and the one of intra-corporate transferees, suggests an implicit vision of these two phenomena, where the former is believed to have an impact on the labour market of country of arrival, while the latter is not. The Impact assessment for the SWD states that “posted workers remain linked to the labour market on their country of recruitment, whereas seasonal workers, although they are temporary workers, they form a part of the national labour market where they work”.<sup>69</sup> This allows the sketching of a “legal border” of the labour market: posted workers stand outside of this border, whereas seasonal workers are inside. The impact assessment for the ICTD signals an intermediate position where “The labour market is not likely to be affected by these movements of migrants endowed with very specific skills, as they do not substitute any national or EU”.<sup>70</sup>

Common definitions of labour market, such as the one of the ILO Glossary, point to “the system consisting of employers as buyers and workers as sellers, the purpose of which is to match job vacancies with job applicants and to set wages”. All the forms of temporary labour migration covered by the present paper are routinely described as tools to address labour shortages in a given country,<sup>71</sup> and, thus, as a way to match demand and supply of labour. Indeed, authors have described international migration as a form of regulation of the labour market,<sup>72</sup> and highlighted the role of borders in shaping labour markets.<sup>73</sup> Therefore, we hypothesise that, when EU legislation and decisions by the CJEU use the expression “labour market”, they do so in a formulaic way which has no connection with a single meaning of such expression.

Perhaps unpromisingly, as soon as we started to track down the use of the expression “labour market” across various categories of documents pertaining to the broader area of “EU Law”, we were quickly confronted with the polysemic nature of said expression. In light of this we propose a different approach, to which we will refer as a “systematic document analysis”. A double goal drove us to design and then refine this method. First, we wanted to reinforce the “systematic” nature of legal research. In reflecting on this characteristic, we were confronted by the problem of how to *prove* that the corpus we selected to analyse in

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<sup>68</sup> European Migration Network, *Summary of European Migration Network Ad-Hoc Query No. 2021-17: Labour Market test*, European Commission 2021, 7.

<sup>69</sup> Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purpose of seasonal employment, COM(2010) 379 final, 8.

<sup>70</sup> Commission Staff Working Document, Impact Assessment Accompanying the Proposal for a Directive of the European Parliament And The Council on conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer, COM(2010) 378 final, 22.

<sup>71</sup> Ruhs M., Anderson B., *Migrant Workers: Who needs them? A framework for the Analyses of Staff Shortages, Immigration and Public Policy*, in Anderson B., Ruhs M. (eds.), *Who needs migrant Workers: Labour Shortages, immigration and public policy* Oxford University Press, Oxford, 2011, 15.

<sup>72</sup> Bauder H., *How Migration Regulates Labor Markets*, Oxford University Press, Oxford, 2006, 16.

<sup>73</sup> Mezzadra S., Neilson B., *Border as Method*, Duke University Press, Durham, 2013, 19.

order to identify the meaning of the expression “labour market” was not simply cherry picked to lead to a pre-determined conclusion. Second, we hope to improve the transparency of our process, allowing for debate and critique of our choices, both in terms of the scope of the corpus, the definitions adopted, and the coding of the items.

We built our corpus<sup>74</sup> using the Eur-Lex database, which we picked because it includes, in a searchable database, the broadest set of EU law documents. Our query<sup>75</sup> was a search for the precise expression “labour market” through four types of documents: EU Regulations; EU Directives; EU Decisions; Decisions of the CJEU. After the removal of duplicates, this first step gave us a corpus of 588 individual documents and 1803 individual mentions (“items”) of the expression “labour market”.

In our second step we eliminated irrelevant items. On the basis of pre-established criteria, we identified these as the mentions of “labour market” which were included in a) as part of a verbatim reference to a different document; b) in a title or heading or footnote; c) as part of the question sent from a national court to the CJEU; d) in a table or as a simple item in a list. Applying these criteria led to the exclusion of 518 items, leaving us with 1285 to analyse. It is important to note that we applied this test separately and used the “confidence” method explained below in Step 3 to solve our disagreements.

In our third step each of us separately analysed each item and coded it as belonging to one of the 5 definitions of “labour market” which we had identified prior to building our corpus or analysing any items included therein. These are discussed below. The coding was based on the contents of the specific paragraph where “labour market” was mentioned. Having multiple coders is a standard practice in coding qualitative social sciences data.<sup>76</sup>

Our fourth step consisted of comparing our results and determining the final coding for each item. To do so, together with the coding for labour market definitions, we attached a confidence value to each item (either 0 or 1). This entailed four possible scenarios:

*Table 1: Handling intercoder discrepancies*

	Same level of confidence	Different level of confidence
Same “labour market” coding	The shared label is applied	The shared label is applied
Different “labour market” coding	The item is left UNDECIDED	The item is coded as the label characterised by a strong confidence.

As stated above, prior to the construction of the corpus, we identified five different definitions to create the categories for our coding, to which we added a sixth (UNDECIDED) to allow for the abovementioned disagreement between the coders to emerge.

<sup>74</sup> Rocca M., Deverson A., *EU Law Labour Market Corpus*, <https://doi.org/10.57745/GGSEBH>, Recherche Data Gouv, 2023, V1.

<sup>75</sup> Our query was performed on 27 March 2023.

<sup>76</sup> O’Connor C., Joffe H., *Intercoder Reliability in Qualitative Research: Debates and Practical Guidelines*, in *International Journal of Qualitative Methods*, 19, 2020.

The first definition (coded as 1) concerns what we deemed the “textbook economic definition” (TEXTBOOK), that is the vision of the labour market as a marketplace where workers sell their services to competitive employers in return for a wage, the level of which is determined by the interaction of the demand and supply of labour. The second definition (coded as 2) is a “sociological” definition (SOCIOLOGICAL). It defines our object as the collection of institutions and practices that govern the purchase, sale, and pricing of labour. The third definition (coded as 3) also looks at the determination of the price of labour but focuses on firm-specific rules which determine said price (INTERNAL). As such, it is a definition which identifies an internal labour market. With the fourth definition (coded as 4) we wanted to capture the spatial dimension of the labour market (SPATIAL). As such, we retained a definition which indicates the area (which can be geographical but also industrial) within which workers can move comparatively freely from one job to another. Finally, for the fifth definition (coded as 5) we did not rely on scientific definition, opting instead to include a definition of the labour market as a statistical object, that is an object composed by the sum of people employed (or unemployed) in a given area or profession (STATISTICAL).

The following table presents the overall results of our coding:

*Table 2: Coding Results*

<b>Labour Market Definition</b>	<b>Total</b>
TEXTBOOK	359
SOCIOLOGICAL	100
INTERNAL	2
SPATIAL	175
STATISTICAL	110
UNDECIDED	538

The first thing that we had to confront was the vast number of UNDECIDED items. As a reminder, these are items which we separately placed in different categories and with the same amount of confidence. The fact that more than a third of our items ended up as UNDECIDED in way confirms the relevance of our initial question. While EU law and legal actors use in multiple occasions the expression “labour market” across binding legal acts, its meaning remains often uncertain.

To test the impact of the UNDECIDED category, we also tracked the result before addressing our disagreements. This was done by calculating the average number of items placed in each category by of our separate coding, so that the UNDECIDED items are redistributed back across the remaining categories:<sup>77</sup>

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<sup>77</sup> The slight difference in the total number of items (60) is due to the fact that we disagreed on the exclusion of those items as irrelevant.

Table 3: Coding Results without UNDECIDED

Labour Market Definition	Total	Average
TEXTBOOK	359	531
SOCIOLOGICAL	100	238.5
INTERNAL	2	3
SPATIAL	175	258
STATISTICAL	110	190
UNDECIDED	538	0

The main result of our coding is the predominance of the TEXTBOOK items. While this can be partly explained by the specific competences of the EU in social and economic policies, its prevalence leads us to consider it as the starting point when trying to assess the actual meaning of the expression “labour market” when used by (EU) legal actors. Checking our results, we also found that the predominance of the TEXTBOOK definitions holds true across four out of five of the institutional actors adopting the texts covered by our corpus.<sup>78</sup>

That having been said, as our goal is not to identify one ultimate meaning of the expression “labour market”, we also retain the SPATIAL definition as a second option to take into account when assessing the conceptual scope of this expression.

## 5. Conclusions.

As put by Andrea Iossa, “spatial and temporal scales work together and simultaneously to create legal meaning”.<sup>79</sup> In this article we identified the relevant temporal and spatial scales for exploring the legal meaning of temporary labour migration, respectively, in the legally established “temporariness” of said migration and its relationship with the “border” of the labour market.

Therefore, the first goal of our article was to highlight the polysemic nature of the concepts which are at the heart of the EU legal framework for temporary labour migration. The broad conceptual scope of “temporariness” identified in Section 3, as well as the multiple definitions of “labour market” which we traced through the systematic document analysis proposed in Section 4, prove the elusive nature of these important concepts. Our further conclusion on this point deals with the importance of making explicit the scope of meaning when discussing temporary labour migration. As an example, in their book on justice in temporary (labour) migration situations,<sup>80</sup> Ottonelli and Torresi are only concerned about “voluntary” situations. According to their criteria, this excludes all situations where “migrants

<sup>78</sup> Notably we categorised the items as been adopted by one of the following: 1) the Court of Justice; 2) the Council; 3) the EU Commission; 4) the European Parliament and the Council; 5) the European Commission and Eurostat. The Council of the European Union used more (42%) the STATISTICAL definition than the TEXTBOOK one (36%).

<sup>79</sup> Iossa A., *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*, in *European Law Open*, 1, 3, 2022, 673.

<sup>80</sup> Ottonelli V., Torresi T., *The Right not to Stay - Justice in Migration, the Liberal Democratic State, and the Case of Temporary Migration Projects*, Oxford University Press, Oxford, 2022.

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are forced to return to their country of origin after a fixed period of residence abroad as guest workers”.<sup>81</sup> Evidently, while we appear to discuss the same topic, virtually all forms of temporary labour migration included in our scope would be excluded by such a criterion.

The second goal of our article was to build on top of our conceptualisation to provide a stepping stone for further exploration of these fundamental elements, notably aimed at comparing their internal meaning with the empirical reality.

As remarked in Section 3, the vastness of the conceptual space occupied by the legal “temporariness” of temporary labour migration, makes it harder to design an operational definition thereof. That having been said, two elements emerged from our analysis which could inform said further research. On the one hand, we identified the possibility to foresee an “end date” of the labour migration from the start. On the other, we pointed out how the duration of migration might have to be considered beyond its strictly individual dimension. This would also allow for a better representation of the importance of temporary labour migration highlighted during the COVID-19 pandemic. As such, the “temporariness” of temporary labour migration should be confronted with its structural dimension,<sup>82</sup> by exploring its presence in given Member States and/or sector of the economy and/or workplace across time, adjusting for economic variations. In addition, the role of circular migration, defined as the same temporary labour migrants repeatedly returning to the same Member under a temporary labour migration situation, should be considered.

On the “labour market” side, our systematic document analysis has allowed the identification of two potential meanings which can form the basis for further exploration, by extrapolating the criteria for a worker to be considered as being *inside* the labour market in question.

For our TEXTBOOK definition it would be tempting to define this as the fact of providing labour supply in a given labour market. However, this is quite apparently a tautological definition. Instead, we believe it more productive to focus on the results of the interplay between supply and demand (of labour) that is, the fixation of wages and working conditions. As such, a worker will be inside a given labour market if their presence has an impact on the wage levels in that market.

For the SPATIAL definition we run into a similar problem. At first blush, it seems that being “inside” a spatially defined labour market means to be able to move freely from one job to another in the context of said labour market. Again, this would create a circular definition, as the law itself would determine who enjoys such a possibility, hence leading us back to the situation where a worker is inside a labour market if the law says so. Our tentative improvement to this is to consider the possibility to move between jobs over a period of time, which can cover multiple migration events. Therefore, a worker will be inside a given labour market if they return to the same market in multiple occasion to perform the same job or a different job in the same industry or geographical area.

As a final point, it seems interesting to come back to the assumption that seasonal workers are part of the labour market of the country of arrival, whereas posted workers are not. None

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<sup>81</sup> Ottonelli V., Torresi T., *ibid.*, 84.

<sup>82</sup> Rasnača Z., *Enforcing Migrant and Mobile Workers' Rights*, in Rasnača Z., Koukiadaki A., Bruun N., Lörcher K. (eds.), *Effective Enforcement of EU Labour Law*, Hart Publishing, Oxford, 2022, 266.

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of the definitions we retained allows for a straightforward verification of both these statements. Our tentative answer to this conundrum is to refer to a non-legal source. Indeed, under the European system of national and regional accounts,<sup>83</sup> the territory of the “resident production unit” (i.e., “the resident employer”) is the criteria for counting employment. Consequently, employment in a Member State includes only those persons who were paid during the reference period by an employer established in that Member State. While this influence is hard to verify, it confirms our proposed approach, namely that the internal meaning of the concepts underpinning the legal framework for temporary labour migration should be further tested through the comparison with the findings stemming from the empirical reality.

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<sup>83</sup> European Commission, *European Systems of accounts – ESA 2010*, European Commission, 2013, 307.



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