

**Discussions on new EU-wide regulations on the posting of workers.  
Special consideration for Directive (EU) 2018/957 amending Directive  
96/71/EC on the posting of workers in the framework of the provision  
of services**

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**Abstract**

*Posting of workers in the framework of the provision of services within the European Union is governed by Directive 96/71/EC. Recently, this Directive has been amended by Directive (EU) 2018/957 which has improved the legal framework in the field of the rights of posted workers in the provision of services. This study includes an analysis of the main changes made by the amending directive, which will need to be incorporated into national law by 30 July 2020.*

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**JEL Classification:** K31

## **1. Introductory considerations**

The Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC on the posting of workers in the framework of the provision of services has introduced a number of impressive changes in the posting of workers within the Member States<sup>2</sup>.

The changes introduced by the new Directive are the result from the application of the original Directive, thus the effect of facing the practice.

It should be noted that the new Directive is not a special regulation derogating from the initial Directive 96/71/EC.

In fact, the Directive itself is changed by this successive Directive, which means that Directive 96/71/EC remains applicable with the express provision "with further amendments".

The scope of the Directive also includes the following situation, according to art. 1 paragraph 3 lit. c): "being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating

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<sup>2</sup> For juridical regime of posting, see I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, fourth edition, revised and added, Universul Juridic Publishing House, Bucharest, 2017, pp. 416-428; R. Dimitriu, *Dreptul muncii. Anxietăți ale prezentului*, Rentrop & Straton Publishing House, Bucharest, 2016, p. 125.

in the territory of a Member State, provided that there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

## 2. The main novelty aspects of the Directive (EU) 2018/957

The Directive does not affect the exercise by employees of fundamental rights, as provided for in Member States' legislation and EU law. This is mainly the right to strike or other specific actions at Member State level, including collective bargaining and the possibility of conclude collective agreements.

A temporary worker who carries out work in the territory of a Member State in the framework of the transnational provision of services shall be deemed to have been posted on the territory of that Member State by the temporary employment undertaking or the temporary employment agent with whom the worker is in a as required by the new paragraph introduced in Art. 1, par. (3) of the Directive. In this context, the temporary employment undertaking or the temporary employment agency is considered to be an undertaking within the meaning of the Directive<sup>3</sup>.

The new Directive introduces the principle of equal treatment between posted workers and workers in the Member State of posting under the terms of employment and employment conditions, regardless of the law applicable to employment relationships (Article 3 (1) of the Directive).

The undertakings to which the posting of workers is subject have the obligation to provide them, according to the new regulations under art. 3 of the Directive:

- Conditions for the accommodation of workers when offered by the employer to workers posted from their usual place of work;
- Allowances or reimbursement of transport, accommodation and meals for workers sent away from home for professional reasons.

Regarding the remuneration, the Directive provides in Art. 3 that “for the purposes of this Directive, the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8”.

It should be noted that the amending Directive refers to collective agreements or arbitration awards which have been declared with general application which may be very relevant in determining the concept of remuneration.

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<sup>3</sup> According to art. 1 of the Directive 96/71/EC this act applies to undertakings established in a Member State which, in the context of the provision of transnational services, post workers within the territory of a Member State.

Member States have the obligation to publish information about remuneration, working conditions and employment on the sole site in accordance with national law or national practices<sup>4</sup>.

An important novelty is the introduction of a new paragraph (1a) to art. 3, which provides the following: “Where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) *guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out: — by law, regulation or administrative provision, and/or — by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8*”.

According to the Directive, these provisions shall not apply to the procedures, formalities and conditions for concluding and termination of the employment contract, including non-compete clauses and supplementary occupational pension schemes.

That period may be extended by the Member State to 18 months when the service provider submits a reasoned notification to that effect.

It should be noted, on the contrary basis, that the above provisions on equal treatment do not apply where the effective duration of a posting does not exceed 12 months, and Member States are not obliged to provide additional conditions for posted workers to national workers, being valid only the general provisions of the Directive.

According to the Directive, where an undertaking replaces a posted worker with another posted worker who performs the same task at the same place, the duration of secondment for the purposes of this paragraph is the cumulative duration of the secondment periods of each posted workers concerned.

The concept of 'the same task in the same place' shall be determined taking into account, inter alia, the nature of the service to be provided, the work to be performed and the address (s) of the place of employment.

Another element of novelty is par. (7) of art. 3 of the Directive, which provides as follows:

“Allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. The employer shall, without prejudice to point (h) of the first

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<sup>4</sup> According to the Directive, if, contrary to Article 5 of Directive 2014/67/EU, the information on the sole national official website does not specify the conditions of employment and employment that apply, account shall be taken of that fact in accordance with national law and / or national practice, to determine the penalties applicable in the event of infringements of the national provisions adopted pursuant to this Directive to the extent necessary to ensure that they are proportionate.

subparagraph of paragraph 1, reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship. Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure”.

The Directive establishes that, in the absence or complement of a system of declaring collective agreements or arbitration awards with general application, the parties may base themselves on:

- collective agreements or arbitration awards with general application on all similar businesses belonging to the respective sector or profession in the geographical area concerned; and / or -

- collective agreements concluded by the most representative organizations of the social partners at national level, applied throughout the state.

According to the Directive, equal treatment is considered when national enterprises in a similar situation:

- "shall, in place and in the sector concerned, have the same obligations as the undertakings referred to in Article 1 (1) with respect to the matters listed in the first subparagraph of paragraph 1 of this Article and, where appropriate, concerning the conditions of employment and employment to be guaranteed to workers posted in accordance with paragraph 1a of this Article, and

- are subject to such obligations with the same effect".

Member States are free to impose other conditions of employment or employment, but have the obligation to comply with the relevant legislation and the principle of equal treatment.

With regard to monitoring the Member States' compliance with the provisions of the directives on working and employment conditions, the Directive lays down powers for competent authorities or bodies, including public administration authorities.

According to art. 4 par. (2) of the Directive, that cooperation consists, in particular, in responding to reasoned requests for information from those authorities or bodies concerning the provision of transnational workers and in the fight against manifest abuse or instances of activities deemed unlawful, such as to be transnational cases of undeclared work and fictitious independence in the field of posting of workers.

If the above mentioned provisions are not met, the Commission will be informed and will take the necessary action.

With regard to monitoring, compliance and control of the applicability of directives, the amending legislative act introduced a number of important novelties, replacing the old provisions of Art. 5 of the Directive.

The Member State in whose territory the worker and the Member State from which the worker concerned is posted shall be responsible for monitoring the application of the Directive.

Member States have the role of establishing the applicable sanctions if national provisions transposing the Directive are not complied with.

According to the same art. (5) of the Directive if, following an overall assessment carried out pursuant to Article 4 of Directive 2014/67/EU by a Member State, it is found that a misleadingly or fraudulently creates the impression that a worker's situation falls under this Directive, the Member State concerned shall ensure that the worker benefits from the applicable law and practices.

The principle of equal treatment laid down by the Directive also applies to national workers, so they must not have a disadvantageous legal status compared to posted workers in other Member States.

Member States have the obligation to transpose the Directive by 30 July 2020, until that date Directive 96/71/EC remains applicable.

### 3. Conclusions

As set out, the provisions of Directive (EU) 2018/957 amending Directive 96/71/EC on the posting of workers in the framework of the provision of services bring about significant changes in the rights of workers posted to EU Member States.

The principle of equal treatment is an important change, with the European legislator laying down the principle of equal treatment between national workers and posted workers with regard to working and employment conditions.

Other additional rights are provided for accommodation and transport allowances for posted workers.

A special regulation of the legislator concerns the temporary employment contract, the Directive frequently referring to the legal status of this contract.

In the following period, the Romanian legislator must implement the provisions of the Directive under review. Thus, it is necessary to amend Law no. 53/2003 (Labor Code) in order to insert the provisions concerning the posting.

At the same time, it is necessary to amend Law no. 16/2017 on the posting of workers in the framework of the provision of transnational services.

The Directive is an important legislative document, given that worker mobility is one of the main priorities on the agenda of the European Union's social policy.

Given the fact that the provision of transnational services by workers is a phenomenon that is widespread, regarding and from the point of view of the free movement of persons, regulation was needed to improve the legal provisions in the field by establishing a higher level of rights for employees.

In conclusion, we mention the fact that the new legislative amendments brought by Directive (EU) 2018/957 are also the result of the CJEU case law. Thus, in a significant case of the *Court of Justice of the European Union (CJEU)*, the

Laval cause, it has been established that "article 56 of the *Treaty on the Functioning of the European Union* (T.F.E.U.) and article 3 of Directive 96/71/EC exclude that in a Member State where, apart from minimum salary, employment and labor conditions are to be laid down by law, a trade union can constrain by collective action (blocking some sites), a service provider established in another Member State, to negotiate on the salaries of posted workers and to adhere to a collective agreement which establishes for some of those aspects, more favorable conditions than those resulting from the relevant law power documents"<sup>5</sup>.

### Bibliography

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- Law no. 16/2017 on the posting of workers in the framework of the provision of transnational services.

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<sup>5</sup> See I. T. Ștefănescu, *op. cit.*, pp. 427-428.