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ARTICLE

Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

What will change in 2020?

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1 Contextual elements

After a consultation procedure involving Member States, social partners and Union citizens, which began on 15 July 2015, the European Commission made a proposal for a revised "posting directive" on 8 March 2016.[1] After tense discussions among Member States which were extremely divided on the opportunity to revise the directive and with the European Parliament,[2] an agreement was found between the co-legislators on 28 June 2018. The new directive has been published on 28 June 2018. Three years of discussions involving the highest political authorities of Member States were therefore necessary. Member States will have to apply those new measures from 30 July 2020.[3] Until that date, Directive 96/71/EC remains applicable in its wording prior to the amendments introduced by this Directive.

The new posting directive is often presented by its promotors as a significant step toward a better protection of workers' rights. The implementation and enforcement of the freedom of movement for workers, freedom of establishment and freedom to provide services aim to guarantee "*a level playing field for businesses and respect for the rights of workers*" (§1), the objective is to reach the "*right balance between the need to promote the freedom to provide services and ensure a level playing field on the one hand and the need to protect the rights of posted workers on the other*" (§4).

[1] COM (2016) 128 final.

[2] See its position of 29 May 2018.

[3] France swiftly transposed the Directive. See Ordonnance 2019-116 of 20 February 2019.

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For the preamble, "*Ensuring greater protection for workers is necessary to safeguard the freedom to provide, in both the short and the long term, services on a fair basis, in particular by preventing abuse of the rights guaranteed by the Treaties*" (§10). Even if the preamble has no binding force, it could serve as a guide of interpretation by the Court of Justice. Furthermore, Article 1 revised insists on the need to "*ensure the protection of posted workers during their posting in relation to the freedom to provide services, by laying down mandatory provisions regarding working conditions and the protection of workers' health and safety*", adding that the Directive "*shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States*".

What is the weight of these elements in favour of the posted workers' rights against the fact the principle of freedom to provide services remains the legal basis of the directive[4]? The proposal of the European Parliament to extend the legal basis to Article 153 TFEU (social policy) has not been taken on board. Not only a double basis would have been an unusual practice but, in the specific case of posting, it would have been difficult to justify for the reason that posting of workers are based on a service contract.[5] This is also why an exclusive basis referring to Article 45 TFEU did not seem relevant.

The purpose of this short paper is make a brief presentation of the key new rules and to assess the extent to which the revised directive induces indeed significant changes for posted workers. Indeed, there are strong reasons to be suspicious. To start with, the famous guiding principle "*Equal pay for equal work at the same place* (*country*) *of work*" has no legal grounds: It is nowhere to be found in the text of the Directive.

2 The equality of treatment "basis"

Member States ensure that undertakings guarantee, "*on the basis of equality of treatment*", workers who are posted to their territory a list of rights applicable in the host country (so-called "hard core" see below point III). It is constantly said that this is a major improvement for workers' rights. Is it so sure?

The first reason to mitigate the evolution comes from the fact that Directive 96/71 already applied the principle of equality of treatment to most items of the hard core, for instance for maximum work periods and minimum rest periods, for health, safety and hygiene at work.

The second reason is far more important: the expression "*the basis of equality of treatment*", read literally, does not necessarily entail that in all cases posted workers must be treated equally. Indeed, the general principle of equal of treatment, such as understood by the Court of justice, requires that comparable situations are not treated

[4] Articles 53 and 62 TFEU.

[5] Let's notice though that an employee who crosses the border to attend a business meeting with colleagues can be considered as posting although there is no service contract. This type of posting is however not in the scope of the directive.

differently. In this respect, are posted workers, who do not belong to the labour market of the host country,[6] (always) in a comparable situation as local workers? Even if the answer was positive,[7] can a posted worker who performs his/her activity for a very short period of time be in a comparable situation as a worker permanently present on the local job market? It would not be surprising if these issues were raised before Courts, also because the equality treatment standard could be seen at odds with the free movement of services principle. With the wording "*the basis of equality of treatment*", the revised directive could leave room for a flexible and perhaps case by case interpretation. The ambiguity is underlined by §6 of the Preamble which provides no clear explanation on the meaning of the rule of equality in the context of posted workers. There is another reason to be puzzled: the Directive does not define the comparator. Who should the posted worker be compared with? Should it necessarily be any local worker? The silence of the Directive allows for interpretations.

3 A new hard core: remuneration and reimbursement of expenditure

The main input of the new wording of Article 3(1) is about the remuneration to be paid to posted workers. In line with what Article 3(1) calls "*basis of equal treatment*", posted workers will receive the "*remuneration*" paid to a local worker of the host country[8] instead of, under existing rules, the "*minimum rates of pay*". Doubts have already been expressed about the exact meaning and therefore the method of implementation of the rule of equality of treatment.[9] Let us say that, for its concrete application to posted workers' remuneration, many challenges need to be overcome. In particular, with regard to job classification, it will be necessary to find out with which local worker the work carried out by the posted worker is comparable. In the specific context of gender equality, the Court of Justice showed the complexity of this process.[10] Should experience and qualification be taken into account to assess if the remuneration is comparable?

Beyond these serious practical problems, it is possible to wonder whether the equal treatment rule really revolutionary in the field of remuneration. The *Sähköalojen* case[11] demonstrates that the same remuneration principle is *de facto* already applied in many countries.

[6] CJEU 27 mars 1990, *Rush Portuguesa*, case C-113/89.

[7] "*The comparability of different situations must be assessed with regard to all the elements which characterise them. These elements must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account*" (CJEU 12 May 2011, case C-176/09, *Luxembourg v. European Parliament and Council*).

[8] If we assume that this is the right comparator.

[9] Which amounts to applying the principle of non-discrimination provided for in Article 45 TFEU on free movement of workers.

[10] "It is therefore necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question in the case, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work" (case C-381/99, *Brunnhofer*).

[11] Case C-396/13.

The new directive indicates that the concept of remuneration "*shall be determined by the national law and/or practice*". This provision is in our view partially misleading. According to settled case law indeed, "*The task of defining what are the constituent elements of the minimum wage, for the application of that directive, therefore comes within the scope of the law of the Member State concerned, but only in so far as that definition, deriving from the legislation or relevant national collective agreements, or as interpreted by the national courts, does not have the effect of impeding the free movement of services between Member States*".[12] This case law, which puts national definitions under an EU control, is surely transposable in the context of the concept of remuneration.

The preamble adds that "*When comparing the remuneration paid to a posted worker and the remuneration due in accordance with the national law and/or practice of the host Member State, the gross amount of remuneration should be taken into account*" (§18). This addition (which could have been inserted in the provisions themselves) is actually a mere codification of the case law of the CJEU.[13]

The posted worker's employer may be tempted to include into the remuneration which must be paid some components that, in reality, amount to reimbursement of expenditure. Such components should therefore not be counted as part of the remuneration. The new directive tries to address the risk of confusing costs reimbursement and remuneration by first recalling that "*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*", then by adding that the employer must "*reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship*" and that "*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*" (amended Article 3§7). With this last rule, there should be a strong incentive to clarify the posted workers' pay slip by identifying more clearly what is remuneration (including the posting allowance) and what is reimbursement of expenditure. Will this measure facilitate the prevention of illegal behaviours[14]? In theory, as the revised Directive provides, "*The employer shall, without prejudice to point (h) of the first 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*".

A second input deals with the extension of the hard core to two new items. Posted workers will benefit from "*the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work*" and will be entitled to "*allowances or reimbursement of expenditure to cover travel, board*

[12] CJEU 7 November 2013, *Isbir*, case C-522/12.

[13] CJEU 14 April 2005, *Commission v. Germany*, case C-341/02.

[14] Among many unlawful practices: the posted worker receives the remeuneration and afterwards must give back part of it.

and lodging expenses for workers away from home for professional reasons". These new hard core components are inspired by the *Sähköalojen* case. The innovation is all the more limited that they concern specific cases where mobile workers within the country are granted specific rights.

4 Extended hard core: postings exceeding 12 months

The extension of the hard core in case of long term postings has been intensively debated. The following compromise has been found: "*Where the effective duration of a posting exceeds 12 months, Member States shall ensure that, irrespective of the which law applies to the employment relationship, undertakings guarantee workers who are posted to their territory, on the basis of equality of treatment, in addition to the terms and conditions of employment referred to in the "hard core", all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out: by laws, regulations or administrative provisions, and/or by collective agreements or arbitral awards which have been declared universally applicable or otherwise apply accordance with paragraph 8*" (Article 3(1a)).

However, the extended scope of the principle of equal treatment after 12 months of posting is subject to two limitations. First, it does not apply to "*procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses; supplementary occupational retirement pension schemes*". Secondly, "*where the service provider submits a motivated notification, the Member State where the service is provided shall extend the period referred to in the first subparagraph to 18 months*". In order to avoid fraud, Article 3(1a) adds that "*Where a company replaces a posted worker with another posted worker performing the same task at the same place, the duration of the posting for the purposes of this paragraph shall be the cumulative duration of the posting periods of the individual posted workers concerned*".[15]

The hard core extension for "long term" missions does not mean that the posted worker ceases to be posted. He retains the status of posted worker even after 12 (or 18) months of posting[16] which is a way to guarantee the benefit of the hard core of the host Member State. Had the new directive provided that after 12 or 18 months, the status of posted worker had been lost, the worker would have become exclusively subject to the Rome I Regulation on the law applicable to the contract which is less protective than the posting directive.[17]

[15]The concept of "the same task at the same place" referred to in the fourth subparagraph of this paragraph shall be determined taking into consideration, inter alia, the nature of the service to be provided, the work to be performed and the address(es) of the workplace.

[16]As long as the worker meets the posting definition of Article 2 of the directive.

[17]If the choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable, the country work is habitually carried out, which determines the law that would have been applicable, is not deemed to have changed if he is temporarily employed in another country.

All things considered, by not being able to agree on a 24-month limit for being posted, the legislator lost an opportunity to harmonise the rules on social security and labour posting.

All in all, the extension of the hard core for long term postings does not look like a significant improvement, not only because, in most cases, postings are short-time missions, but also because of the exclusion of the extended hard core of the rules on contract termination. The matter of the application of termination contract rules to posted workers may however be apprehended from a different legal perspective. Since the law applicable to the employment contract continues to be governed by Regulation Rome I, it may indeed be argued that, in case of long-term postings, the habitual place work may have become the place of the mission. In that case, host country rules on contract termination would become applicable to posted workers under Article 8 of Rome I. Furthermore, some national Courts may hold that national rules (or some of them) on contract termination are mandatory provisions under Article 9 of Regulation Rome I and are therefore applicable to posted workers.[18] The question of coordination between the (revised) posting directive and Rome I is renewed by the voting of the revised directive.

5 Hard core and collective agreements

Readers remember the *Ruffert* case where the CJEU held that a local German collective agreement imposing a minimum wage was not applicable to posted workers because the agreement had not been declared universally applicable.[19] After tough negotiations, the revised directive makes some adjustments.

In essence, the distinction between countries having a universal declaration system of collective agreements and those who do not have such a system remains. For the first group of countries, with the inclusion into Article 3(8) of the words '*or in addition to*",[20] it will become possible to apply to posted workers "*collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned*" and/or "*collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory*" provided that "*their application to undertakings ensures equality of treatment on matters listed* [*in the hard core*], *between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position*". To

[18]The classification of "mandatory provisions" is narrowly controled by the Court of Justice: "*While the Member States are still, in principle, free to determine the requirements of public policy in the light of their national needs, the notion of public policy in the Community context, particularly when it is cited as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Community institutions*". See CJEU 19 June 2008, case C-319/06, *Commission v. Luxembourg*.

[19]Case C-346/06. See also Case C-341/05, *Laval*.

[20]"In the absence of, or in addition to, a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on…".

take the example of France, whereas only extended industry level agreements[21] were within the scope of the directive, all sectoral agreements could also be covered in the future by national decisions.[22] In countries without a system of generally applicable collective agreements, the system of declaration (by national decision) of collective agreements is maintained without any adjustments.[23]

An important change is that, whereas under Directive 96/71, only collective agreements from the construction sector could be included into the hard core, all sectors will be covered by the revised directive. Company agreements remain outside of the scope of the directive though.

6 Sectoral rules: road transport and interim

The status of cross-border road transport workers is particularly sensitive. The final choice made—against the wish of some Member States—was to avoid the topic in the revised directive. As it is clearly put, "*this Directive shall apply to the road transport sector from the date of application of a legislative act amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector*" (Article 3(3), Directive 2018/957).

To express it more clearly, as long as Directive 2006/22 is not amended, cross-border transport workers remain covered by Directive 96/71. This presupposes though that these workers perform their activity in the framework of posting which is not so certain since, by definition, they carry out their activity simultaneously in several countries. They may even spend only a short amount of time in each country they drive through. Does the fact that the Court of justice held in a case relating to international driving that "*in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer*"[24] suffice to qualify the drivers' activity as posting?

Interim was a less difficult subject of discussion. The revised directive slightly modifies the definition of interim posting. It applies to "*temporary employment undertaking or placement agency*, [*which*] *hire out a worker to a user undertaking established or operating in the territory of a Member State, provided that there is an*

[21] Accords collectifs étendus.

[22] France already transposed the directive and did not make us of this possibility. See Ordonnance 2019-116 of 20 February 2019.

[23] "*The absence of* (...) *a system for declaring collective agreements will not prevent from including in the scope of the directive collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory*".

[24] CJEU 15 March 2011, case C-29/10, *Koelzsch*.

employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting" (revised Article 1(3)c). This new wording implies that a service provider established in country A can perform a service in country B with interim workers posted by an interim company established in country C.

The new directive also contains specific measure for interim workers aiming at guaranteeing equal treatment. According to amended Article 3(1b), "*Member States shall provide that the undertakings guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC on temporary agency work to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out*". There, contrary to the case analysed in part II, the comparator is clearly defined. Let us recall that Article 5 of Directive 2008/104 provides that "*the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job*".[25] Finally, Article 3(9) is modified: "*Member States may require undertakings* (. . .) *to guarantee workers referred to in point* (*c*) *of Article 1*(*3*), *in addition to the terms and conditions of employment referred to in paragraph 1b of this Article other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out*".

7 Posted workers' fundamental rights

The amended directive states that it "*shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in the Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and apply collective agreements or take collective action in accordance with national law and/or practice*" (art. 1a new). This statement is an implicit reaction to the *Laval* case where the CJEU ruled that "*Article 56 TFEU precludes a trade union from attempting, by means of collective action in the form of a blockade of sites such as that at issue in the main proceedings, to force provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers in a Member State in which the terms and conditions of employment concerning the matters referred to in the hard core are contained in legislative provisions, save from minimum rates of pay. . .* ".[26]

Does it mean that, if a similar case to *Laval* were brought tomorrow before the Court of Justice, the solution would be different? It is difficult to answer. The fact that the legal basis of the directive remains free movement of services makes it hard to believe that the solution would go in a totally opposite direction, but adjustments are plausible.

[25] Basic working and employment conditions" cover remuneration, working time, breaks, rest periods, night work, paid leave, collective facilities. . .

[26] CJEU 18 Dec. 2007, Case C-341/05, *Laval*.

8 Enforcement

Pursuant to amended Article 3(1) Member States "*shall publish the information on working and employment conditions, in accordance with national law and/or practice, without undue delay and in a transparent manner, on the single official national website* (...), *including the constituent elements of remuneration* (...) *and all terms and conditions of employment*". Member States must ensure "*that the information provided on the single official national website is accurate and up to date*". The Commission will publish "*on its website the addresses of the single official national websites*".

What are the consequences of the absence or of the incompleteness of information? The response is found in the last paragraph of amended Article 3(1): "*Where, contrary to Article 5 of Directive 2014/67/EU, the information on the single official national website does not indicate which terms and conditions of employment are to be applied, that circumstance shall be taken into account, in accordance with national law and/or practice, in determining penalties in the event of infringements of the national provisions adopted pursuant to this Directive, to the extent necessary to ensure the proportionality thereof*". The unclear wording of this provision leaves space for interpretation and, therefore, for disputes before Courts.

9 Conclusion

Directive 2018/957 is probably less innovative than it seems. Many new rules are subject to interpretation and could lead to Court cases. The key question remains though its enforceability. To take the sole example of the remuneration paid to posted workers, the gap between the rule of equal treatment and the practices (to the disadvantage of posted workers) is huge.