

# The revision of the Posting of Workers Directive and the freedom to provide services in EU: towards a dead end?

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## **Abstract**

*The development of the internal market, based on the principle of freedom to provide services, as stated in article 56 TFEU, rendered common the posting of workers to another EU Member State. The risk of leading to social dumping in the host Member State, resulting from the less favourable working conditions of the sending Member State, justified Directive 96/71/EC. Collective bargaining, which has always taken on a prominent place in the posting of workers framework provided for in Directive 96/71/EC, is clearly reinforced by Directive (EU) 2018/957 that amended Directive 96/71/EC. The case-law of the CJEU, however, has revealed that in some cases the enforcement of the host Member State working conditions, in view of the lack of harmonization of labour law in the Member States in relation to minimum protection mandatory rules, can paradoxically constitute a restriction on the freedom to provide services. The analysis of the amendments introduced by the Directive (EU) 2018/957 will demonstrate that, despite creating a favourable legislative framework for fair competitive conditions between national undertakings and the undertakings that post workers, may compromise the delicate balance between the protection of workers and the freedom to provide services.*

**Keywords:** Directive (EU) 2018/957, posting of workers, freedom to provide services, European Union.

**JEL Classification:** K31, K33.

## **1. Introduction**

Collective bargaining, which has always taken on a prominent place in the posting of workers in the framework of the provision of services under Directive 96/71/EC, is reinforced by Directive 2018/957/EU.<sup>2</sup>

The regulation of the posting of workers through Directive 96/71/EC and the announced revision of the Directive are intended to combat social dumping

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<sup>2</sup> The Commission Work Programme 2016 states as purpose “to address unfair practices leading to social dumping and brain drain by ensuring that the same work in the same place is rewarded by the same pay”, available at [https://ec.europa.eu/info/sites/info/files/cwp\\_2016\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/cwp_2016_en_0.pdf) (consulted on 5.10.2018). This idea is stressed in the Political Guidelines for the next European Commission, available at [https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf). The ground of this directive is the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services COM/2016/0128 final - 2016/070 (COD) fulfilling the Political Guidelines and the Work Programme 2016, available at <https://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:52016PC0128&from=EN> (consulted on 5.10.2018).

resulting from the application of the less favourable conditions of the legislation of the sending country to posted workers.

The posting of workers to other Member States for the temporary provision of services, within the framework of the development of the internal market, based on the principle of freedom to provide services stated in art. 56 of the TFEU (Article 49 TEC), demanded for rules concerning the law applicable to posted workers<sup>3</sup>.

The analysis of art. 6, paragraph 2, (a) of the Rome Convention of 1980, applicable to contracts concluded up to 17 December 2009, as well as of article 8, paragraph 2 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation) applicable to contracts concluded on or after 17 December 2008 2009, leads us to conclude that, in the absence of a choice of applicable law, the employment contract will be governed by the *lex loci foris*, that is, the law of the place where the employee's activity is habitually performed, even if he is sent by his employer to carry out a service in another EU Member State on a temporary basis.<sup>4</sup>

This means that the posting of workers, understood as an activity performed by the employee on a temporary basis in a State other than the one where his activity is habitually performed, does not exclude the application of the law of the country of origin.

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<sup>3</sup> On the principle of freedom to provide services, cf. Gorjão-Henriques, *Direito da União*, 7ª Ed., Almedina, 2014, p. 579 et seq.

According to EU figures, the number of posted workers in the EU has increased by almost 41% between 2010 and 2015. In 2015 there were 2.05 million postings in the EU, up from 1.3 million in 2010 and 1.7 million in 2013. The average duration of posting is four months. See European Commission - Fact Sheet, available at [http://europa.eu/rapid/press-release\\_MEMO-16-467\\_pt.htm](http://europa.eu/rapid/press-release_MEMO-16-467_pt.htm) (consulted on 5.10.2018). Posting is particularly high in the construction sector. Poland, Germany and France accounted as the main sending countries, while Germany, France and Belgium as the main receiving countries. See Posting of workers - Report on A1 portable documents issued in 2015, available at <http://ec.europa.eu/social/BlobServlet?docId=19040&langId=en> (consulted on 5.10.2018).

<sup>4</sup> The art.8º of the Rome I Regulation, following the ambiguous formula used in art. 6º, nº 1, al. (a) of the Rome Convention of 1980, states that the country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country. The expression employed in another country legally it is not accurate to address the posting of workers, as the worker is bound by an employment contract with an employer located at the sending country that sent him to carry out a service in another EU Member State on a temporary basis. The art.8º of the Rome I Regulation and the art. 6º, nº 1, al. (a) of the Rome Convention of 1980 seem to suggest that the worker is employed by an undertaking in the hosting country. Both conventions, in tribute to the principle of private autonomy, provide for the possibility of the labor contract being regulated by the law chosen by the parties. However, the law chosen cannot derogate from the mandatory rules of the law that would be applicable, in the absence of choice, intended to protect the worker, among which are included the rules concerning the termination of employment contract, as well as those relating to liability the employer in case of work accident. Cf. Pedro Romano Martinez, *Direito do Trabalho*, 7ª Ed., Almedina, 2015, p. 264, regarding the mandatory nature in the Portuguese legal system of these matters, referring in note 520 case law.

The application of the law of the sending country, where it provided for conditions less favourable than those existing in the hosting country, could lead to social dumping and distortion of competition rules, allowing undertakings from countries where labour conditions are less favourable to offer more competitive prices than the national undertakings whose labour costs were higher in fulfilment of the national law<sup>5</sup>.

It is in this context that Directive 96/71/ EC, committed to preventing social dumping and distortion of competition, sought to establish a system which, without compromising the freedom to provide services, (Article 56 of the TFEU), promoted a healthy competition and employees' rights as provided for by law and collective regulation instruments.

## 2. The posting of workers in Directive 96/71/EC

Posted worker, for the purposes of the Directive, means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works<sup>6</sup>. In order to be applicable the Directive there must be during the period of posting an employment contract between the sending undertaking and the posted worker<sup>7</sup>.

It should also be pointed out that the Directive takes a unilateral approach, since it covers only workers who are posted to one of the Member States, leaving

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<sup>5</sup> This difference, in terms of salary scale, is notorious when we compare the monthly remuneration of a servant, provided for in the Collective Agreement between AECOPS - Association of Construction Companies and Public Works and Services and others and FETESE - Federation of Industrial and Services, published in BTE no. 26 of July 15, 2017, with the changes of BTE No. 28 of July 29, 2018, in the amount of € 581.00, with the monthly remuneration of a servant in Belgium, in the amount of € 2.239, 04, provided for in the Joint Committee for Construction (JC 124). It is though understood that the Commission in the European Commission - Fact Sheet gives, as an example, a worker posted to the construction sector in Belgium that must be granted, in addition to minimum wage according to his/her category can range from € 3,379 to € 19,319 per hour, which currently amounts to € 13,994 to € 20,207 per hour, and is also entitled to other installments included in the remuneration provided for in the collective agreement of general application to the construction sector, namely allowance for bad weather, mobility allowance, pay supplement for special works, allowance for tools wear, etc., among others. See European Commission - Fact Sheet, available at [http://europa.eu/rapid/press-release\\_MEMO-16-467\\_pt.htm](http://europa.eu/rapid/press-release_MEMO-16-467_pt.htm) (consulted on 5.10.2018).

<sup>6</sup> The Directive 96/71/EC defines in art. 1 that shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State, excluding, in accordance with paragraph 3, merchant navy undertakings as regards seagoing personnel. The Directive, however, also covers workers employed by undertakings established in a non-member State, as results from the prohibition laid down in Article 1, para 1, that those undertakings must not be given more favorable treatment than undertakings established in a Member State. See Dário De Moura Vicente, „Destacamento *internacional de trabalhadores*”, in Estudos em Homenagem ao Prof. Doutor Raúl Ventura - Volume II - Direito Comercial - Direito do Trabalho - Vária, Coimbra Editora, 2003, p. 795.

<sup>7</sup> This perspective is very close to that adopted in art. 6 of the CT/2003 (Portuguese Labour Code).

without regulation the workers hired by national undertakings who are sent to carry out his work in the territory of a Member State on a temporary basis<sup>8</sup>.

The Directive, pursuant to paragraph 3 of art. (1) covers postings: (a) under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; (b) to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; (c) in the case of a temporary employment undertaking or placement agency, the worker hired to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting<sup>9</sup>.

Accordingly, Directive 96/71/EC requires that, regardless of nationality, the undertaking must guarantee workers posted the legal framework of the Member State where the work is carried out in matters such as (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes<sup>10</sup>; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment

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<sup>8</sup> This was one of the main criticisms of Law 9/2000 of 15 June, which transposed the Directive given the probability that, as the most common situation is the posing of workers by Portuguese undertakings to another EU member, it would be under Portuguese jurisdiction the posting of Portuguese workers. In this sense, Dario Moura Vicente, *op. cit. (Destacamento internacional de trabalhadores)*, p. 804. The article 8 of CT/2003 (Labour Code) solved this gap, regulating the posting of the national workers to another State, providing in arts. 6 and 7 the legal framework applicable to workers who are posted to Portugal. This was kept in the current CT/2009 Labour Code. Bearing this in mind, it should be added that, as noted by Pedro Romano Martinez, *op. cit. (Direito do Trabalho)*, p. 269, the legislator does not restrict the legal regime for the posting of workers to Portugal for industrial relations concluded and implemented in Community countries, including workers from third countries.

<sup>9</sup> In spite of the article 5 of the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work demands that the basic working and employment conditions of temporary agency workers shall be at least those that would apply if they had been recruited directly by that undertaking to occupy the same job, the Directive does not require workers posted by a temporary agency of another Member State to benefit from the conditions applicable to temporary workers in the Member State in which the work is carried out. The Directive (UE) 2018/957 added the article 1B) to Article 3 of the Directive 96/71/EC, providing that Member States shall provide that the undertakings referred to in (c) of paragraph 3 of the Article 1 guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC of the European Parliament and of the Council to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out.

<sup>10</sup> Under paragraph 7, Article 3 of the Directive 96/71/EC, shall be considered to be part of the minimum wage allowances specific to the posting, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination<sup>11</sup>.

Those working conditions, pursuant to art. 3, paragraph 1, shall be laid down by law, regulation or administrative provision or, in the case of the activities referred to in the annex concerning construction, repair, upkeep, alteration or demolition of buildings, in collective agreements or arbitration awards declared to be of general application within the meaning of paragraph 8<sup>12</sup>.

The Directive therefore seeks to promote a set of mandatory rules concerning the minimum protection in the hosting country by employers that send the employee to perform his activity on a temporary basis in the territory of the Member State in which the services are provided<sup>13</sup>.

The enforcement, within the framework of the construction sector, of collective agreements or arbitration awards declared to be of general application in accordance with paragraph 8 is of particular significance.

This is the sector in which the posting of workers is more common and where working conditions more unfavourable to workers in the sending country are more likely to be applied, as this is an activity usually carried out in the poorer countries of the European Union, which thus offer workers lower conditions, enabling the distortion of competition rules<sup>14</sup>.

Collective bargaining in the European Union is considered an important instrument for the development of the legal labour system, which regulates several matters not covered by the law<sup>15</sup>.

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<sup>11</sup> The art. 6 of the CT2009 includes, as Pedro Romano Martinez notes, *op. cit. (Direito do Trabalho)*, p. 270, in an innovative way, job security, which given the guaranteeing and protective nature of Labour Law, can benefit the posted worker, in light of the law of the country of origin. In addition to the obvious economic reasons underlying the inclusion of these matters, there are concerns about the protection of the worker, in particular the application of protective measures regarding the working and employment conditions of pregnant and postpartum women, children and young people. young. In this sense, regarding the art. 6th CT2009, cf. Pedro Romano Martinez, *op. cit. (Direito do Trabalho)*, p. 270.

<sup>12</sup> According to paragraph 8 of the Article 3 of the Directive 96/71/EC, collective agreements or arbitration awards which have been declared universally applicable means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

<sup>13</sup> Whereas 13 e 14. As Dario Moura Vicente notes, *op. cit. (Destacamento internacional de trabalhadores)*, p. 795, duration and nature may lead to deviations from the Directive, as is apparent from the analysis of Art. 3, no. 2 to 5.

<sup>14</sup> As mentioned by the Commission, the construction sector alone accounts for 41.5% of the total number of postings, although posting is also significant in the manufacturing industry (24.6%), education, health and social work services (14.2%) and in business services (10.4%). See European Commission - Fact Sheet, available at [http://europa.eu/rapid/press-release\\_MEMO-16-467\\_pt.htm](http://europa.eu/rapid/press-release_MEMO-16-467_pt.htm) (consulted on 5.10.2018).

<sup>15</sup> The importance of collective bargaining is clearly reflected in the possibility of transposing a European directive or agreement through collective bargaining at national level, in accordance with Art. 153, paragraph 3 of the TFEU and on the conclusion, on the initiative of the social partners, of an agreement which may acquire the value of a Directive, on the basis of a decision adopted by the

The Directive states, in article 3, paragraph 8, that, in the absence of 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, 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 organizations at national level and which are applied throughout national territory.

The State Member, however, must assure the equality of treatment between the sending undertakings and the national undertakings, which, for the purposes of the Directive, means that national undertakings in a similar position are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and are required to fulfil such obligations with the same effect<sup>16</sup>.

This set of mandatory rules regarding the minimum protection of workers, in accordance with the principle of more favourable treatment of workers, does not prevent the application of more favourable conditions of employment to the workers, in accordance with art. 3, no. 7.

Member States according article 3, paragraph 10 may apply to national undertakings and to the undertakings of other States, on a basis of equality of treatment, terms and conditions of employment on matters other than those referred to in paragraph 1 in the case of public policy provisions and terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.

This rule, by allowing the enforcement of mandatory rules of the national labour law of the hosting country, besides the matters referred to in article 3, paragraph 1, has enabled, as is clear from the CJEU case law, in some cases,

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Council, on a proposal from the Commission, 154 and 155 of the TFEU. Cf. Monteiro Fernandes, *Direito do Trabalho*, 16th Ed., Almedina, 2012, p. 72. As an example, see the Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Unfortunately, in our country, collective contracting has been plunged, in recent years, into doldrums that have contributed little to the development of the legal-labour system.

<sup>16</sup> In CJEU 25 October 2001 *Finalarte Sociedade de Construção Civil Lda (C-49/98)*, *Portugaia Construções Lda (C-70/98)*, *Engil Sociedade de Construção Civil SA (C-71/98)* and *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft, Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98*, European Court Reports 2001 I-0783, ECLI:EU:C:2001:564, perante a exigência às empresas que destacavam trabalhadores para Alemanha para contribuírem para o sistema de caixas de férias alemão, o tribunal decidiu que violava o princípio da livre prestação de serviços a aplicação do regime de um Estado-membro em matéria de férias pagas a todas as empresas estabelecidas noutros Estados-membros que prestem serviços no sector da construção civil no território do primeiro Estado-membro quando nem todas as empresas estabelecidas no primeiro Estado-membro estão sujeitas ao referido regime no que respeita aos seus trabalhadores ocupados no mesmo sector.

restrictions on the freedom to provide services, enshrined in the article 56 TFEU, pursuing a protectionist scope of national undertakings<sup>17</sup>.

The Court has consistently and unequivocally demanded that the application of the national rules of a Member State to providers established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it, clarifying that Article 3, paragraph of the Directive allows Member States to impose, in compliance with the Treaty and in a non-discriminatory manner, to undertakings which post workers to their territory, employment terms and in matters other than those referred to in the paragraph 1 of this Article, in so far as they concern provisions relating to the public interest<sup>18</sup>.

In effect, the enforcement of the national labour law to matters that are not included in set of matters, foreseen in Article 3, paragraph 1, can impose such high costs that prevents undertakings from providing services in other Member States, creating unequal competitive conditions in favour of national undertakings.

The enforcement of the employment terms and conditions provided for in collective agreements relating to sectors other than construction can also produce the same result.

For that reason, the Court has held that, since Article 3, paragraph 10 of the Directive is a derogation of the principle laid down in Article 3, paragraph 1, according to which the matters that the hosting Member States may apply to sending undertakings which post workers to their territory are utterly defined in that paragraph, it must therefore be interpreted strictly<sup>19</sup>.

In that regard, in view of the imposition of the obligation to make automatic adjustment of wages, other than minimum wages, to changes in the cost of living, the Court held that that rule did not fall within the scope of Article 3, paragraph 10 of Directive 96/71/EC, which was not part of public policy within the restrictive meaning of that provision of the Directive<sup>20</sup>.

The Court also held that a provision rendering the award public works contracts dependent on the obligation of the undertakings to pay their employees the rate of pay provided for in the collective agreement applicable, as it is not a minimum rate of pay within the meaning of Article 3 (1) (c) of the Directive, contrary to Directive 96/71/EC, interpreted in the light of Article 49 EC (Article 56 TFEU) inasmuch as enforcement of the minimum wage laid down by the collective agreement on service providers established in another Member State, where

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<sup>17</sup> See CJEU decisions on the 23 November 1999 Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96) European Court Reports 1999 I-08453, ECLI:EU:C: 1999:575 and 19 June 2008, Commission of the European Communities v Grand Duchy of Luxembourg (Case C-319/06), European Court Reports 2008 I-04323ECLI identifier: ECLI:EU:C:2008:350.

<sup>18</sup> See CJEU decisions on the 23 November 1999, Jean-Claude Arblade, point 35 and 19 June 2008, Commission of the European Communities v Grand Duchy of Luxembourg, point 27.

<sup>19</sup> CJEU decision on 19 June 2008, Commission of the European Communities v Grand Duchy of Luxembourg, point 31.

<sup>20</sup> *Idem*, points 54 and 55.

minimum rates of pay are lower, may produce an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State<sup>21</sup>.

Directive (EU) 2018/957 amended Article 3, paragraph 1 in order to apply to posted workers all the mandatory elements of remuneration instead of the “minimum rates of pay”, as laid down by law or by collective agreements of general application, including bonuses, allowances or subsidies, also requiring the posted workers to be paid at least the same allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons that apply to local workers in that Member State.

Contrary to Directive 96/71 / EC in its original version, which considers applicable rules laid down by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex, regarding the construction sector, Directive 2018/957 amended Article 3, paragraph 1, in order to make the rules laid down in collective agreements mandatory for posted workers in all economic sectors.

### 3. The revision of the directive

Before we consider the revision of the Directive 96/71/CEE, it is advisable a brief reference to the Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services<sup>22</sup>.

This directive was adopted with the aim of strengthening the practical application of the rules on the posting of workers, covering issues related to fraud, circumvention of rules, inspections and monitoring, joint liability in subcontracting chains and exchange of information between the Member States.<sup>23</sup>

Therefore, in order to strengthen the protection of workers in subcontracting chains, it requires, in Article 12 that Member States take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer (service provider) covered by Article 1, paragraph 3 of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum

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<sup>21</sup> CJEU decision on 3 April 2008, Dirk Ruffert v Land Niedersachsen, Case C-346/06, European Court Reports 2008 I-01989, ECLI: EU:C:2008:189, points 32, 33, 34, 38 and 39.

<sup>22</sup> Directive 2014/67/EC of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71 / EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024 / 2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') OJ L 159, 28.5.2014, p. 11-31.

<sup>23</sup> This Directive was transposed into our legal system through Lei n° 29/2017 of 30 May.

rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC.<sup>24</sup>

This concern was also present in the proposal for a revision of Directive 96/71/EC which added a new paragraph to Art 3 of the Directive conferring the Member States gives the faculty to Member States to oblige undertakings to subcontract only to undertakings that grant workers certain conditions on remuneration applicable to the contractor, including those resulting from non-universally applicable collective agreements. This is only possible on a proportionate and non-discriminatory basis and would thus in particular require that the same obligations be imposed on all national sub-contractors<sup>25</sup>.

This amendment, however, was not enshrined in Directive 2018/957, which only predicts that in Article 2 that by 30 July 2023, the Commission shall submit a report on the application and implementation of this Directive to the European Parliament, the Council and the European Economic and Social Committee that shall include an assessment of whether further measures to ensure a level playing field and protect workers are required in the case of subcontracting<sup>26</sup>.

In order to prevent abuses and circumvention of the rules applicable to posting of workers, Directive 2014/67/EU, in Article 4 lists a set of facts intended to identify genuine situations of posting of workers in order to prevent workers from being denied the protection of the Directive<sup>27</sup>.

In order to improve the access of workers and undertakings to their rights and obligations, the Directive imposes, in article 5 that Member States shall ensure that Member States shall take the appropriate measures to ensure that the information on the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC which are to be applied and complied with by service providers is made generally available free of charge in a clear, transparent, comprehensive and easily

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<sup>24</sup> Solution provided for in art. 12 of Law No. 29/2017 of 30 May. Pursuant to paragraph 6 of art. 12, Member States may, instead of the liability rules referred to in paragraph 2, take further implementing measures to enable effective and appropriate sanctions against the contractor to be applied in a direct subcontracting fraud and abuse in situations where workers have difficulties in realizing their rights. However, the Directive admits in art. 12, paragraph 4, that Member States lay down stricter national rules on liability with regard to the scope and extent of liability in subcontracting and provide for such liability in sectors other than construction.

<sup>25</sup> Cf. Art. 3,1A. of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services - COM (2016) 128.

<sup>26</sup> Whereas 25.

<sup>27</sup> Solution provided for in art. 4 of Lei n° 29/2017 of 30 May. The European legislator, aware that the protection of workers' rights depends on the effectiveness of the implementation and application of the secondment scheme, and considers it essential that Member States have effective control procedures. 9, a list of national control measures considered to be justified and proportionate for the purpose of monitoring compliance with Directive 96/71/EC and the Directive. In articulation, effective and adequate inspections are foreseen in their respective territories, through duly qualified personnel. Cf. Art. 9 of Law no. 29/2017 of 30 May.

accessible way at a distance and by electronic means, in formats and in accordance with web accessibility standards that ensure access to persons with disabilities<sup>28</sup>.

Therefore, it is referred in article 5 that Member States to make generally available on the single official national website and by other suitable means information on which collective agreements are applicable and to whom they are applicable, and which terms and conditions of employment are to be applied by service providers from other Member States in accordance with Directive 96/71/EC, including where possible, links to existing websites and other contact points, in particular the relevant social partners<sup>29</sup>.

Directive (EU) 2018/957/EC also amended article 3 in order to impose ensure that the information provided on the single official national website is accurate and up to date. The Commission shall publish on its website the addresses of the single official national websites.

It also states that 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.

Directive 2014/67/EU also aims at improving administrative cooperation between the authorities of the Member States, laying down rules to promote the cooperation and mutual assistance without undue delay in order to facilitate the implementation, application and enforcement in practice of this Directive and Directive 96/71/EC. In order to facilitate better and more uniform application of Directive 96/71/EC, it is appropriate to provide for an electronic information

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<sup>28</sup> Furthermore, in order to facilitate the implementation of Directive 96/71/EC and to ensure more effective practical implementation of this Directive, Mechanisms to enable workers posted to submit complaints or to institute proceedings directly or, with their agreement, through designated third parties such as trade unions or other associations or common organizations of social partners, with trade unions and others recognized as legitimate third parties, associations, organizations of other entities having a legitimate interest in enforcing Directive 96/71 / EC and the Enforcement Directive, to bring complaints and to intervene in legal or administrative proceedings against employers of posted workers. In this sense, art. 9 of Lei n° 29/2017 of 30 May recognizes the right of the worker, in case of non-compliance with the working conditions set forth in art. 7 of the Labor Code, to file a complaint against the employer with the ACT and to institute legal proceedings in a competent court for any damages resulting from such non-compliance, even after termination of employment in accordance with the law. In accordance with the Directive, procedural legitimacy is also granted to trade union organizations and other third parties, such as associations and other legal organizations which have a legitimate interest, in accordance with their statutes, to ensure compliance with the provisions of this law, as well as rules laid down in the Labor Code relating to the posting of workers, procedural standing to intervene on behalf of or in support of the posted worker or his employer, subject to the express authorization of the person represented. The employee is expressly granted protection against discriminatory treatment, as a result of the exercise of these rights, under the terms of arts. 24 and 25 of the Labour Code. This reference seems redundant, since it already derives from the aforementioned articles of the Labor Code, as well as from art. 331, 1, a) of the Labour Code.

<sup>29</sup> Cf. Article 5 of Lei n° 29/2017 of 30 May.

exchange system to facilitate administrative cooperation and competent authorities should use the IMI as much as possible.<sup>30</sup>

While it is recognized that these measures under Directive 2014/67/EU can make the application of Directive 96/71/EC more effective in procedural terms, the substantial problems surrounding the implementation of the Directive remain to be addressed, especially, the balance between the principle of freedom to provide services and the fight against social dumping, which includes strengthening collective bargaining<sup>31</sup>.

Bearing this in mind, the Commission announced in March 2016 a specific revision of the Directive 96/71/CE, whose main purposes oriented Directive 2018/957/EC, which we will analyse.

The Commission, based on changes in the labour market in the European Union, following enlargement to other countries, argues that the legal regime provided for in the Directive is no longer adequate for the international posting of workers.

The growth of the internal market and the economic crisis have accentuated the pay gap, fostering the promotion of social dumping through the posting of workers from countries with lower wage levels.

One of the main criticisms is that undertakings are only obliged to apply minimum wage in force in the host country, producing wage differences that lead to distortions of competition between undertakings, compromising the proper functioning of the single market<sup>32</sup>.

Directive (EU) 2018/957/EC, in this sense, provides in article 3 to apply the same rules on pay in force in the host Member State as are laid down by law or by collective agreements of general application, so that posted workers receive the same remuneration as local workers, which will include other remuneration

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<sup>30</sup> Cf. Arts. 6th to 8th of Lei n° 29/2017 of 30 May. It is therefore justified that the Directive has introduced, in art. 22, amendments to Regulation (EU) No 1024/2012. The IMI system is a multilingual software application accessible through the Internet, which is intended to facilitate the cross-border exchange of information and mutual assistance to national authorities. The Directive, with the aim of facilitating the application of administrative penalties and fines imposed on a service provider for non-compliance with the rules applicable in a Member State of the EU, 15, in view of the impossibility of applying or imposing administrative penalties, that enforcement and recovery may be requested from another Member State. In the same sense, cf. Art. 15 of Lei n° 29/2017 of 30 May.

<sup>31</sup> The conflict between collective action and freedom to provide services is particularly acute in the CJEU decision on the 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, European Court Reports 2007 I-10779. ECLI:EU:C:2007:772 and *Laval un Partneri Ltd*, Case C-341/05, European Court Reports 2007 I-11767. ECLI identifier: ECLI:EU:C:2007:809, resulting, in particular in *Laval*, the affirmation of limitations on the right to strike. This subject, however, goes beyond the scope of this paper. See Regina Redinha, *A vol d'oiseau: desenvolvimentos recentes no direito de greve na União Europeia*, Revista Electrónica de Direito – Junho 2013 – N°1, pp. 1 e ss.

<sup>32</sup> According to information provided by the Commission, in some sectors and Member States, seconded workers earn 50% lower wages than workers in companies established in the host Member State. Cf *Ficha Informativa relativa à Revisão da Directiva relativa ao destacamento de trabalhadores*.

benefits such as bonuses or allowances (Christmas allowance or Weather subsidy) or salary increases based on length of service, as well allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons<sup>33</sup>.

The article 3 has been amended to make clear that rules laid down by collective agreements of general application become mandatory for posted workers in all economic sectors and are not restricted to the construction sector provided for in the Annex to Directive 96/71/EC.

Directive (EU) 2018/957/EC in article 1a further provides that when effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that the sending undertaking 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, excluding procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses and supplementary occupational retirement pension schemes<sup>34</sup>.

Pursuant to the principle that the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job enshrined in Directive 2008/104/EC of the European Parliament and of the Council, the Directive added 1b requiring that Member States shall provide that the undertakings referred to in point (c) of Article 1 paragraph 3 guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5

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<sup>33</sup> It is in this context that it is introduced, in article 3 the obligation for Member States to disclose, in a transparent manner, the different elements that make up the remuneration in their territory, on the official website referred to in art. 5 of Directive 2014/67/ EU. The example given by the Commission, cited in footnote 5 above, is paradigmatic because Belgium is one of the countries which has had the most disputes in the CJEU, given the very high minimum remuneration and pay components such as loyalty stamps, subsidy for adverse weather conditions, travel allowances, laid down in the collective agreement of the construction sector, which in future will be due, without exception, to posted workers. Cf. *Ficha Informativa relativa à Revisão da Directiva relativa ao destacamento de trabalhadores*. The payment of these funds raises many questions, particularly where the worker in the country of origin receives other benefits, such as the Christmas allowance, which are not paid to Belgian workers. So far, these benefits paid in the country of origin were valued, following the case-law of the CJEU, namely Acórdão do Tribunal de Justiça de 23.11.1999 Arblade CJEU decision on the 23 November 1999 Arblade, for the purposes of exemption from contributions to the loyalty stamp system. We fear that this may no longer be the case if this proposal is approved.

<sup>34</sup> This criteria, according to art. 8 of the Rome I Regulation, determines the regulation of the employment relationship by the law of the host country, namely in the system of termination of employment contract.

of Directive 2008/104/EC of the European Parliament and of the Council to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out. The user undertaking shall inform the undertakings referred to in point (c) of Article 1, paragraph 3 of the terms and conditions of employment that it applies regarding the working conditions and remuneration to the extent covered by the first subparagraph of this paragraph.

The Directive also safeguards the possibility for workers to benefit from different conditions of work and remuneration provided that these conditions are more favourable than those laid down in the legislation of the host Member State.

Notwithstanding the good intentions of the Commission, as reflected in the various amendments to Directive 96/71/EC which we have now examined, we believe that, without solving the lack of harmonization of labour legislation in the Member States with regard to the mandatory rules of minimum protection, accepted as an objective of the social policy in art. 151 of the TFEU, the Directive 96/71/CE after the amendments of Directive 2018/957 may have a harmful effect on the freedom to provide services.

The application of the rules laid down in the labour law of the host country, including the contribution, by virtue of collective agreements, to the German holiday fund or the Belgian Stamp system, or the imposition of minimum wages provide for in collective agreements as a condition for the award of contracts public services may be a restriction on the freedom to provide services, by creating a situation of competitive inequality for undertakings established in other Member States which, in compliance with their legislation, provide remuneration for the same purpose.

The Directive 96/71/CE after the amendments of Directive 2018/957 may prove to be an inhibitor of freedom to provide services, on the one hand, dissuading Member States' companies from posting workers, while encouraging protectionism of national undertakings, creating a scenario hostile to competition between undertakings in the Member States, with inevitable consequences for the economic development of the internal market<sup>35</sup>.

#### 4. Conclusions

The legal framework applicable to the posting of workers, provided for in Directive 96/71/EC, is very complex, being understandable that this has led, over the years, to the intervention of the CJEU<sup>36</sup>.

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<sup>35</sup> It is a clear indication of the doubts raised by the national parliaments regarding the breach of the subsidiarity principle set out in Art. 5 of the TFEU. The European Parliament, the Council and the national parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, available at: [https://ec.europa.eu/portugal/node/3730\\_en](https://ec.europa.eu/portugal/node/3730_en) (consulted on 5.10.2018).

<sup>36</sup> This matter, however, goes beyond the subject of this writing and should therefore be analyzed at a later date.

This complexity is, in our opinion, explained by the difficulties arising from the difficult balance between the protection of competition and posted workers, by applying the legislation of the host country, including collective contracting, adopted by Directive 96/71/EC and reinforced by the amendments introduced by Directive 2018/957/EC, and the principle of freedom to provide services.

The Directive 2018/957/EC, nevertheless assumes as core aim to create a legal framework favourable to the existence of fair competitive conditions between national undertakings and undertakings that post workers, while at the same time aims at protecting workers and fair competition between companies, it is likely that it may jeopardize the delicate balance between the protection of workers and the freedom to provide services by undertakings.

The application of the same rules regarding remuneration in force in the host country as laid down by law or collective agreements of general application or provided by collective agreements of general application in all economic sectors, nonetheless strengthen and reinforce collective bargaining, is contrary to the position that has been taken by the CJEU.

The ECJ, as is clear from the case-law referred, has proposed over the years solutions which, by reconciling these different and apparently conflicting interests, demonstrate their peaceful coexistence.

We also believe that it is possible to protect the interests of workers and the rights provided for by law and collective agreements, without neglecting the need to promote the freedom to provide services by Member States' undertakings, the freedom on which the internal market has been built.

The amendments done by Directive (EU) 2018/957, in the light of the principle "the same work in the same place is rewarded by the same pay"<sup>37</sup>, deepens the unevenness between the interests underlying the Directive, namely the protection of workers and the maintenance of fair competition, and the principle of freedom to provide services, as a result of the enforcement of the working conditions of the host country, above minimum wages, whether in the construction sector or in other sectors, where this protection does not even assume the same relevance.

We therefore believe that Directive 96/71/CE after amended by Directive (EU) 2018/957 may have a harmful an effect on the development of the internal market similar to the one resulting from the social dumping, which intends to prevent at all costs.

In fact, undertakings will be deterred from providing services in other Member States with more favourable working conditions, choosing not to post workers.

The Directive 896/71/CE, after the amendments by Directive (EU) 2018/957, my become an instrument of protection of national undertakings from the competition of undertakings placed in other Member States.

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<sup>37</sup> See The Commission Work Programme 2016 available at [https://ec.europa.eu/info/sites/info/files/cwp\\_2016\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/cwp_2016_en_0.pdf) (consulted on 5.10.2018).

We understand that, at the origin of this harmful effect, there is the lack of harmonization of labour legislation in the Member States with regard to the mandatory rules of minimum protection, but it is also true that the Directive, as well as being an obstacle to the principle of freedom to provide services and to the consolidation of the single market, can paradoxically boost the distortion of competition it wishes to avoid.

It is therefore, our opinion, that the difficulties arising from the posting of workers will only be mitigated when the European Union has in fact addressed the harmonization of working conditions identified as an objective of social policy in Art. 151 of the TFEU, a mission in which it has so far failed.

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