Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance)

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amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) The freedom of movement for workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market enshrined in the Treaty on the Functioning of the European Union (TFEU). The implementation and enforcement of those principles are further developed by the Union and aim to guarantee a level playing field for businesses and respect for the rights of workers.

(2) The freedom to provide services includes the right of undertakings to provide services in the territory of another Member State and to post their own workers temporarily to the territory of that Member State for that purpose. In accordance with Article 56 TFEU, restrictions on the freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

(3) According to Article 3 of the Treaty on European Union, the Union is to promote social justice and protection. According to Article 9 TFEU, in defining and implementing its policies and activities, the Union is to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

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(4) More than 20 years after its adoption, it has become necessary to assess whether Directive 96/71/EC of the European Parliament and of the Council[(4)] still strikes 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. To ensure that the rules are applied uniformly and to bring about genuine social convergence, alongside the revision of Directive 96/71/EC, priority should be given to the implementation and enforcement of Directive 2014/67/EU of the European Parliament and of the Council[(5)].

(5) Sufficient and accurate statistical data in the area of posted workers is of utmost importance, in particular with regard to the number of posted workers in specific employment sectors and per Member State. The Member States and the Commission should collect and monitor such data.

(6) The principle of equal treatment and the prohibition of any discrimination on grounds of nationality have been enshrined in Union law since the founding Treaties. The principle of equal pay has been implemented through secondary law not only between women and men, but also between workers with fixed term contracts and comparable permanent workers, between part-time and full-time workers and between temporary agency workers and comparable workers of the user undertaking. Those principles include the prohibition of any measures which directly or indirectly discriminate on grounds of nationality. In applying those principles, the relevant case-law of the Court of Justice of the European Union is to be taken into consideration.

(7) The competent authorities and bodies, in accordance with national law and/or practice, should be able to verify whether the conditions of accommodation for posted workers directly or indirectly provided by the employer comply with the national rules in the Member State to whose territory the workers are posted (host Member State) that also apply to posted workers.

(8) Posted workers who are temporarily sent from their regular place of work in the host Member State to another place of work, should receive 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. The same should apply as regards the expenditure incurred by posted workers required to travel to and from their regular place of work in the host Member State. Double payment of travel, board and lodging expenses should be avoided.

(9) Posting is temporary in nature. Posted workers usually return to the Member State from which they were posted after completion of the work for which they were posted. However, in view of the long duration of some postings and in acknowledgment of the link between the labour market of the host Member State and the workers posted for such long periods, where posting lasts for periods longer than 12 months host Member States should ensure that undertakings which post workers to their territory guarantee those workers an additional set of terms and conditions of employment that are mandatorily applicable to workers in the Member State where the work is carried out. That period should be extended where the service provider submits a motivated notification.

(10) 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. However, the rules ensuring such protection for workers cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services, including in cases where a posting exceeds 12 or, where applicable, 18 months. Any provision applicable to posted workers in the context of a posting exceeding 12 or, where applicable, 18 months must thus be compatible with that freedom. In accordance with settled case law, restrictions to the freedom to provide services are permissible only if they are justified by overriding reasons in the public interest and if they are proportionate and necessary.

(11) Where a posting exceeds 12 or, where applicable, 18 months, the additional set of terms and conditions of employment to be guaranteed by the undertaking posting workers to the territory of another Member State should also cover workers who are posted to replace other posted workers performing the same task at the same place, to ensure that such replacements are not used to circumvent the otherwise applicable rules.

(12) Directive 2008/104/EC of the European Parliament and of the Council[(6)] gives expression 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. That principle should also apply to temporary agency workers posted to the territory of another Member State. Where that principle applies, the user undertaking should inform the temporary-work agency about the working conditions and remuneration it applies to its workers. Member States are able, under certain conditions to derogate from the principles of equal treatment and equal pay pursuant to Article 5(2) and (3) of Directive 2008/104/EC. Where such a derogation applies, the temporary-work agency has no need for the information about the user undertaking's working conditions and the information requirement should therefore not apply.

(13) Experience shows that workers who have been hired out by a temporary employment undertaking or placement agency to a user undertaking are sometimes sent to the territory of another Member State in the framework of the transnational provision of services. The protection of those workers should be ensured. Member States should ensure that the user undertaking informs the temporary employment undertaking or placement agency about the posted workers who are temporarily working in the territory of a Member State other than the Member State in which they normally work for the temporary employment undertaking or placement agency or for the user undertaking, in order to allow the employer to apply, as appropriate, the terms and conditions of employment that are more favourable to the posted worker.

(14) This Directive, in the same way as Directive 96/71/EC, should not prejudice the application of Regulations (EC) No 883/2004[(7)] and (EC) No 987/2009[(8)] of the European Parliament and of the Council.

(15) Because of the highly mobile nature of work in international road transport, the implementation of this Directive in that sector raises particular legal questions and

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difficulties, which are to be addressed, in the framework of the mobility package, through specific rules for road transport also reinforcing the combating of fraud and abuse.

(16) In a truly integrated and competitive internal market, undertakings compete on the basis of factors such as productivity, efficiency, and the education and skill level of the labour force, as well as the quality of their goods and services and the degree of innovation thereof.

(17) It is within Member States' competence to set rules on remuneration in accordance with national law and/or practice. The setting of wages is a matter for the Member States and the social partners alone. Particular care should be taken not to undermine national systems of wage setting or the freedom of the parties involved.

(18) 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. The total gross amounts of remuneration should be compared, rather than the individual constituent elements of remuneration which are rendered mandatory as provided for by this Directive. Nevertheless, in order to ensure transparency and to assist the competent authorities and bodies in carrying out checks and controls it is necessary that the constituent elements of remuneration can be identified in enough detail according to the national law and/or practice of the Member State from which the worker was posted. Unless the allowances specific to the posting concern expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging, they should be considered to be part of the remuneration and should be taken into account for the purposes of comparing the total gross amounts of remuneration.

(19) Allowances specific to posting often serve several purposes. Insofar as their purpose is the reimbursement of expenditure incurred on account of the posting, such as expenditure on travel, board and lodging, they should not be considered to be part of remuneration. It is for Member States, in accordance with their national law and/or practice, to set rules with regard to the reimbursement of such expenditure. The employer should reimburse posted workers for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.

(20) In view of the relevance of allowances specific to posting, uncertainty as to which elements of such allowances are allocated to the reimbursement of expenditure incurred on account of the posting should be avoided. The entire allowance should be considered to be paid in reimbursement of expenditure unless the terms and conditions of employment resulting from the law, regulation or administrative provision, collective agreements, arbitration awards or contractual agreements that apply to the employment relationship determine which elements of the allowance are allocated to the reimbursement of expenditure incurred on account of the posting and which are part of remuneration.

(21) The constituent elements of remuneration and other terms and conditions of employment under national law or collective agreements as referred to in this Directive should be clear and transparent to all undertakings and posted workers. As transparency

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of, and access to, information are essential for legal certainty and law enforcement, it is, with regard to Article 5 of Directive 2014/67/EU, justified to extend Member States' obligation to publish the information on the terms and conditions of employment, on the single official national website, to the constituent elements of remuneration rendered mandatory as well as to the additional set of terms and conditions of employment applicable to postings exceeding 12 or, where applicable, 18 months under this Directive. Each Member State should ensure that the information provided on the single official national website is accurate and is updated on a regular basis. Any penalty imposed on an undertaking for non-compliance with the terms and conditions of employment to be ensured to posted workers should be proportionate, and the determination of the penalty should take into account, in particular, whether the information on the single official national website on the terms and conditions of employment was provided in accordance with Article 5 of Directive 2014/67/EU, respecting the autonomy of the social partners.

(22) Directive 2014/67/EU lays down a number of provisions to ensure that rules on the posting of workers are enforced and are respected by all undertakings. Article 4 of that Directive provides for factual elements that may be taken into account in the overall assessment of the specific situations in order to identify genuine posting situations and to prevent abuse and circumvention of the rules.

(23) Employers should, before the beginning of a posting, take appropriate measures to provide essential information to the worker about the terms and conditions of employment as regards the posting in accordance with Council Directive 91/533/EEC[(9)].

(24) This Directive establishes a balanced framework with regard to the freedom to provide services and the protection of posted workers, which is non-discriminatory, transparent and proportionate while respecting the diversity of national industrial relations. This Directive does not prevent the application of terms and conditions of employment which are more favourable to posted workers.

(25) With a view to tackling abuses in subcontracting situations and in order to protect the rights of posted workers, Member States should take appropriate measures, in accordance with Article 12 of Directive 2014/67/EU, to ensure subcontracting liability.

(26) In order to ensure that Directive 96/71/EC is correctly applied, coordination between the Member States' competent authorities and/or bodies and cooperation at Union level on combating fraud relating to the posting of workers should be strengthened.

(27) In the context of combating fraud related to the posting of workers, the European Platform to enhance cooperation in tackling undeclared work (the 'Platform'), established by Decision (EU) 2016/344 of the European Parliament and the Council[(10)], should, in accordance with its mandate, participate in the monitoring and the evaluation of cases of fraud, improve the implementation and efficiency of administrative cooperation between Member States, develop alert mechanisms and bring assistance and support to reinforced administrative cooperation and information exchanges between the competent authorities or bodies. In doing so, the Platform is to work in close cooperation with the Committee of Experts on Posting of Workers, established by Commission Decision 2009/17/EC[(11)].