

**Report of the subgroup on the transposition of  
Directive (EU) 2018/957**

**Report to the Committee of  
Experts on Posting of Workers  
(ECPW)**

**This report is of a purely informal nature and does not reflect the official opinion of the European Commission or of Member States.**

## 1. INTRODUCTION

Directive (EU) 2018/957 (hereafter "the Directive") was adopted by the European Parliament and the Council on 28 June 2018 in order to amend Directive 96/71/EC.

The amendments introduced to Directive 96/71/EC are set out in several different paragraphs of Article 1 of the Directive. The main changes include:

- the terms and conditions of employment that are to be applied to posted workers under Article 3.1 of Directive 96/71/EC are extended to include:
  - "remuneration" instead of "minimum rates of pay";
  - the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;
  - allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons during the posting assignment.
- A new provision on long-term posting: where the effective duration of posting exceeds 12 months, or 18 months in case of motivated notification is submitted, all the applicable terms and conditions of employment of the host Member State, which are laid down by law or by collective agreement within the meaning of Article 3(8) must be guaranteed, with the two exceptions provided thereon.
- On the collective agreements, the Directive: 1) makes it mandatory to apply the collective agreements which have been declared universally applicable in any sector; 2) opens the possibility to all Member States, including those that have a system for declaring collective agreements universally applicable, to also apply other generally applicable collective agreements or collective agreements concluded by the most representative social partners at national level, under the conditions set out in the Directive.
- With regard to posted temporary agency workers, that they are treated the same way as workers hired-out by temporary-work agencies established in the Member State where the work is carried out with regard to the matters covered by Article 5 of the Directive 2008/104/EC on temporary agency work and allows Member States to ensure the equality of treatment in other matters. It is also clarified that, in case of a chain posting, the temporary agency is deemed to have made the posting as it is the employer of the posted worker.

The Directive provides that it must be transposed by Member States into their national law by 30 July 2020. It also determines that the national measures transposing the Directive cannot be applied before that date.

Finally, for the road transport sector, the Directive aligns its date of application with that 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<sup>1</sup>.

## **2. THE SUBGROUP ON THE TRANSPOSITION OF THE DIRECTIVE**

After the adoption of the Directive, the Commission proposed to the Expert Committee on Posting of Workers (ECPW), created by Commission Decision 2009/17/EC of 19 December 2008, to set up a subgroup aimed at assisting Member States in transposing the provisions of the Directive into their national legal order.

Article 4(2) of Decision 2009/17/EC provides that "sub-groups may be set up to examine specific issues under terms of reference established by the Committee".

Article 4(1) of the terms rules of procedure states that "[o]n the initiative of the Commission, or at the request of a simple majority of members, the Committee may set up sub-groups to examine specific questions on the basis of terms of reference defined by the Committee".

The terms of reference were adopted by the ECPW in September 2018 through a written procedure. They provided that the sub-group would be composed by one representative and one alternate per Member State, as members, and one representative of each EFTA State and EFTA Authority, as well as representatives of EU-level social partners, as observers. One in every three meetings would be held with the participation of social partners.

The terms of reference request that the sub-group keeps the ECPW regularly updated on the progress made and provide for the sub-group to "draft a report of its work addressed to the Committee of Experts on Posting of Workers. The report shall by no means be binding and shall not be considered as representing the official position of the European Commission or of Member States represented in the sub-group".

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<sup>1</sup> COM(2017) 278, "Proposal for a Directive of the European Parliament and of the Council 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".

This document responds to this request.

### **3. THE PROVISIONS OF THE DIRECTIVE**

#### **3.1. Article 1**

Article 1 contains the amendments introduced to Directive 96/71/EC: paragraph 1 introduces amendments to Article 1; paragraph 2 introduces five amendments to Article 3; paragraph 3 amends Article 4(2); paragraph 4 replaces Article 5; and paragraph 5 amends the Annex to the directive.

##### **3.1.1. Article 1(1): amendments to Article 1**

###### **3.1.1.1. Point (a)**

Point (a) amends the title of Article 1 to better reflect its content following the changes.

###### **3.1.1.2. Point (b)**

Point (b) inserts two new subparagraphs to Article 1. The first (new subparagraph -1) is worded as follows:

-1. This Directive shall 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 that must be respected.

This provision makes explicit the aim of the Directive: the protection of posted workers during their posting in relation to the freedom to provide services.

As such, the provision creates neither rights nor legal obligations. The subgroup underlines that it is for each Member State to consider whether the aim of the Directive, as referred to in this new subparagraph, is already sufficiently clear in national law and to ensure that the aim is reflected in the national law transposing the Directive.

The second (new subparagraph -1a) reads as follows:

-1a. This 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, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice.

The so-called "Monti clause" is present in the EU legal order since the adoption of the

Monti Regulation in 1998<sup>2</sup>. In the area of the freedom to provide services and posting, it is present in the Services Directive<sup>3</sup> (Article 1(7), with a different wording) and in Directive 2014/67/EU (Article 1(2)). Directive 96/71/EC, in its recital (22), also states that “this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions”.

The subgroup is of the opinion that it is for each Member State to consider whether the relationship between national provisions transposing the directives on posting and the exercise of fundamental rights, including the fact that the Directive shall not affect in any way fundamental rights, including the right or freedom to strike or to take other action covered by the specific industrial relations systems of the Member State concerned, is already expressed with sufficient clarity, taking into account national law and practice.

### 3.1.1.3. Point (c)

Point (c) introduces two amendments to paragraph 3 of Article 1.

The first amendment is of purely editorial nature.

The second amendment adds to Article 1(3) two new subparagraphs, worded as follows:

Where a worker who has been hired out by a temporary employment undertaking or placement agency to a user undertaking as referred to in point (c) is to carry out work in the framework of the transnational provision of services within the meaning of point (a), (b) or (c) by the user undertaking in the territory of a Member State other than where the worker normally works for the temporary employment undertaking or placement agency, or for the user undertaking, the worker shall be considered to be posted to the territory of that Member State by the temporary employment undertaking or placement agency with which the worker is in an employment relationship. The temporary employment undertaking or placement agency shall be considered to be an undertaking as referred to in paragraph 1 and shall fully comply with the relevant provisions of this Directive and Directive 2014/67/EU of the European Parliament and of the Council.

The user undertaking shall inform the temporary employment undertaking or placement agency which hired out the worker in due time before commencement of the work referred to in the second subparagraph.

The first new subparagraph addresses the situation frequently known as double or chain posting: a situation where a worker is recruited by a temporary employment undertaking or placement agency (hereinafter referred as “temporary agency”) and

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<sup>2</sup> Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ L 337, 12.12.1998, p. 8–9.

<sup>3</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36.

hired out to a user undertaking. Subsequently, the user undertaking sends the worker to temporarily carry out activities in a Member State other than where the worker normally works for the temporary employment undertaking or placement agency or for the user undertaking.

For the purpose of this provision, it should be understood that the temporary agency and the user undertaking can be established/operating in the same Member State or in two different Member States. The provision is applicable in both cases, provided the user undertaking sends the worker to carry out activities in a Member State other than the Member State where the worker normally works for the temporary agency or for the user undertaking.

The sub-group underlines that regarding this provision any Member State might be concerned from three different perspectives:

- as a Member State of establishment of the temporary agency;
- as a Member State of establishment (or operation) of the user undertaking;
- as the Member State where the activities are carried out following the double or chain posting.

Therefore, the sub-group considers that all Member States should transpose this provision by making sure that:

- the temporary agencies established in their territories are aware that they will be considered as the undertaking having made the posting in case the user undertaking sends the worker to another Member State and that they will bear all the responsibilities for that posting (ensure that the worker benefits from the adequate terms and conditions of employment and comply with the relevant provisions of Directive 2014/67/EU). As mentioned, this would be the case even when the temporary agency and the user undertaking are established in the same Member State.
- the user undertakings established or operating in their territory inform in due time the temporary agency in case they are planning to send the worker hired out by the temporary agency to carry out activities in another Member State. It should be noted that two different opinions were developed on which Member State should regulate this information obligation: some experts were of the opinion that this information obligation should be regulated by the law of the Member State to which the worker hired out is sent by the user undertaking, while other experts were of the opinion that this obligation should be regulated by the Member State of establishment of the user undertaking.

The subgroup underlines that a worker posted following a double or chain posting is

to be considered as posted to the host Member State under Article 1(3)(c) of Directive 96/71/EC, since the temporary agency is considered as the undertaking making the posting. All the terms and conditions of employment applicable in the Member State in which the worker is carrying out the activities to posted temporary agency workers are also applicable in case of double or chain posting.

The second subparagraph imposes an obligation on the user undertaking to inform the temporary agency “in due time before commencement of the work” about the double or chain posting. The sub-group is of the opinion that it is up to the Member State to decide whether and how the “due time” should be qualified.

The subgroup is of the opinion that the aim of the mentioned two new subparagraphs is not to encourage chain posting. The subgroup therefore considers that Member States are entitled to make posting dependent on the existence of an employment relationship between the worker and the undertaking making the posting.

### 3.1.2. Article 1(2)

Article 1(2) introduces amendments to Article 3 of the Directive. It is divided in five points: point (a) amends Article 3(1), point (b) introduces a new paragraph 1a on long-term posting, point (c) amends Article 3(7), point (d) amends Article 3(8) and finally point (e) replaces Article 3(9) and (10).

#### 3.1.2.1. Point (a)

Point (a) replaces Article 3(1) by the following text.

1. Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment covering the following matters 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:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual leave;

(c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment 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;
- (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;
- (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

Point (i) shall apply exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work.

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

Without prejudice to Article 5 of Directive 2014/67/EU, Member States shall publish the information on the terms and conditions of employment, in accordance with national law and/or practice, without undue delay and in a transparent manner, on the single official national website referred to in that Article, including the constituent elements of remuneration as referred to in the third subparagraph of this paragraph and all the terms and conditions of employment in accordance with paragraph 1a of this Article.

Member States shall 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.

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 main three changes introduced to Article 3(1) are the following: 1) the concept of remuneration replaces the previous notion of "minimum rates of pay"; 2) two new elements are added to the core terms and conditions of employment of the host Member State that must be granted to posted workers; 3) information obligations are reinforced.

#### **3.1.2.1.1. Remuneration**

The Directive now provides that Member States must ensure that workers posted to their territory benefit from "remuneration", defined as all the elements of



remuneration rendered mandatory by national law or collective agreement within the meaning of Article 3(8).

It is within Member States' competence to determine the concept of remuneration, in accordance with their law and/or practice. Thus, the Directive does not determine which elements should exist in national law or collective agreements. It is up to the Member State and to the social partners, as the case may be, to determine which elements are mandatory for the workers in that Member State. Any element that is mandatory in the host Member State for workers will also need to be granted to posted workers on the basis of equality of treatment, including overtime rates and with the exception of supplementary occupational retirement pension schemes.

The discussions in the subgroup showed that in some Member States, the term "remuneration" is not used in the legal provisions dealing with the payment due to the workers. The subgroup came to the conclusion that Member States have no obligation to use the term "remuneration" for the purpose of transposing the Directive. They are bound by the objective of the Directive, not by its terminology. Nevertheless, if a Member State opts for introducing a definition of "remuneration" for the purpose of transposing the Directive, it has to ensure that it includes, on the basis of equality of treatment, no more and no less than all the mandatory elements laid down by law and/or by collective agreement within the meaning of Article 3(8).

It should be noted that the concept of "remuneration" includes, but is of course not limited to, the notion of "minimum rates of pay". The subgroup notes that the case law of the European Court of Justice on the scope of this notion remains *mutatis mutandis* applicable.

#### **3.1.2.1.2. New elements of the core terms**

The Directive introduces two new elements to the list of terms and conditions of employment of the host Member State that are to be granted to a worker posted to that Member State: the conditions of workers' accommodation and allowances or reimbursement of expenditure to cover travel, board and lodging.

##### **3.1.2.1.2.1. Point (h): the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work**

New point (h) makes it clear that the rules of the host Member State concerning the conditions of workers' accommodation are also applicable to workers posted to the territory of that Member State.

The sub-group notes that:

- it concerns "the conditions" of workers' accommodation, including, for instance, requirements for the quality and the decency of the accommodation, it is not about the provision of the accommodation itself;

- in order to be applicable to posted workers such conditions must be provided for by law or by collective agreement within the meaning of Article 3(8) for national workers when they are away from their regular place of work;
- it only applies when the accommodation is to be "provided by the employer". Recital (7) specifies that it concerns conditions of accommodation "directly or indirectly provided by the employer". It is therefore not necessary that the accommodation belongs to or is arranged by the employer, it is sufficient when it is indirectly provided by the employer.

The sub-group underlines that it is for each Member State to consider how the application of this provision is to be ensured. For the purpose of legal clarity and transparency, it is preferable to transpose this provision into national law even when national law does not regulate this issue in case the conditions of accommodation might be provided for in collective agreements within the meaning of Article 3(8), at any moment in the future. The law transposing the Directive must ensure that, in such a case, it is also applied to posted workers.

#### **3.1.2.1.2.2. Point (i): allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons**

New point (i) provides that the allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons provided for by law or collective agreement within the meaning of Article 3(8) in the host Member State also applies to workers posted to that territory.

The first subparagraph clarifies that point (i) "shall apply exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work".

The sub-group understands that:

- point (i) does not concern any allowances or reimbursement due to the posting itself (from the home to the host Member State): it concerns exclusively mobility during the posting assignment for professional reasons.
- it applies in two situations: 1) where the workers are required to travel to and from their regular place of work in the host Member State; and 2) where the workers are temporarily sent by their employer from that regular place of work to another place of work.

The first situation is expressly restricted to mobility within the host Member State, while the second could involve different Member States. It is nevertheless a mobility during the same posting assignment, it is not applicable in case the worker is posted

successively to different assignments.

In order to be applicable to posted workers such rules must be provided for by law or by collective agreement within the meaning of Article 3(8) for workers at national level in similar situations.

The sub-group underlines that it is for each Member State to consider how the application of this provision is to be ensured. For the purpose of legal clarity and transparency, it is preferable to transpose this provision into national law even when national law does not regulate this issue, in case the rules on allowances or reimbursement of expenses might be provided for in collective agreements within the meaning of Article 3(8), at any moment in the future. The law transposing the Directive must ensure that, in such a case, they are also applied to posted workers.

#### **3.1.2.1.3. Reinforced information obligations**

(4) Article 5 is replaced by the following:

‘Article 5

Monitoring, control and enforcement

The Member State to whose territory the worker is posted and the Member State from which the worker is posted shall be responsible for the monitoring, control and enforcement of the obligations laid down in this Directive and in Directive 2014/67/EU and shall take appropriate measures in the event of failure to comply with this Directive.

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

Member States shall in particular ensure that adequate procedures are available to workers and/or workers’ representatives for the enforcement of obligations under this Directive.

Where, following an overall assessment made pursuant to Article 4 of Directive 2014/67/EU by a Member State, it is established that an undertaking is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of this Directive, that Member State shall ensure that the worker benefits from relevant law and practice.

Member States shall ensure that this Article does not lead to the worker concerned being subject to less favourable conditions than those applicable to posted workers.’

Article 5 of Directive 2014/67/EU (“the Enforcement Directive”) already provides for an obligations for Member States to ensure that the information on the terms and conditions of employment, 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 accessible way and to further improve access to information

by setting up single official national websites.

Directive 2018/957/EU complements the provisions of Article 5 of the Enforcement Directive by laying down that Member States must publish the information on the terms and conditions of employment applicable under Article 3(1), without undue delay and in a transparent manner, including the constituent elements of remuneration, as well as on the terms and conditions of employment applicable to long-term posted workers.

The prescriptions of Article 5 of the Enforcement Directive on the accessibility, languages, etc. remain applicable.

The Directive also provides that, whenever the information does not indicate which terms and conditions of employment are to be applied, that circumstance shall be taken into account in determining the penalties to the extent necessary to ensure the proportionality thereof.

The subgroup underlined that it is up to each Member State to consider how to transpose this provision, taking into account national law and/or practice.

The subgroup also recalled that this provision has no impact on the rights of workers. Member States are to ensure that the information on the single official national website is accurate and up to date. In any case, workers are entitled to the adequate terms and conditions of employment, irrespective of the information or absence of information provided for in the single national website.

#### **3.1.2.2. Point (b)**

Point (b) adds two new paragraphs to Article 3: paragraph 1a deals with the terms and conditions of employment applicable to postings exceeding 12 (or 18) months, paragraph 1b concerns temporary agency workers.

##### **3.1.2.2.1. Paragraph 1a**

New paragraph 1a reads as follows.

1a. Where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8.

The first subparagraph of this paragraph shall not apply to the following matters:

- (a) procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses;
- (b) supplementary occupational retirement pension schemes.

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.

Where an undertaking as referred to in Article 1(1) replaces a posted worker by another posted worker performing the same task at the same place, the duration of the posting shall, for the purposes of this paragraph, be the cumulative duration of the posting periods of the individual posted workers concerned.

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.

The new paragraph 1a regulates the terms and conditions of employment of the host Member State that are to be granted to workers when the effective duration of their posting exceeds 12 months or 18 months following a motivated notification submitted by the service provider.

The subgroup recalls that no provision of the Directive can be applied before the date of application of the Directive, i.e. 30 July 2020. The subgroup is nevertheless of the view that Member States are entitled to take into account the period of posting before the date of application, provided it is within the same posting assignment and the posting continues after that date. Some experts have expressed the view that only the periods of posting occurred after the date of application are to be taken into account.

The subgroup agrees that the effective duration to take into account when calculating the length of the posting is, in principle, 12 months. It is only in case the service provider makes the “motivated notification” that the effective duration is extended to 18 months.

The subgroup considers that the extension by motivated notification does not entail a formal authorisation of the host Member State. Nevertheless, the Directive provides that the notification includes a motivation for the extension. The subgroup understands that it is up to Member States to regulate the procedure for the notification.

The subgroup interpreted the effective duration as including all the period of posting including short interruptions (for instance, daily and weekly rests and annual leave).

The sub-group recalls that the provision on replacement is intended to avoid easy

circumvention of the provisions on long-term posting by artificially dividing a posting assignment into different posting assignments, which are carried out by more than one worker. It needs therefore to be distinguished from successive postings, but for different posting assignments, of the same worker.

#### **3.1.2.2.2. Paragraph 1b**

New paragraph 1b reads as follows.

1b. Member States shall provide that the undertakings referred to in point (c) of Article 1(3) 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.

The user undertaking shall inform the undertakings referred to in point (c) of Article 1(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 sub-group agreed that paragraph 1b sets out additional terms and conditions of employment for temporary agency workers. It therefore applies in addition to Article 3, paragraphs 1 and 1a, to all workers posted by a temporary agency, including in case of double or chain posting.

This paragraph provides that the terms of conditions of employment of temporary agency posted workers shall be those which apply pursuant to Article 5 of Directive 2008/104/EC to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out.

The sub-group recalls that Member States can also make use of the possibility to require the application of other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out, in accordance with Article 3(9) as amended by the Directive.

The terms and conditions of employment applicable to temporary agency workers in accordance with this paragraph are not limited to those set up by law or collective agreement within the meaning of Article 3(8).

Because Article 5 of Directive 2008/104/EC only concerns the "basic" terms and conditions of employment as defined in that Directive, the sub-group recalled that the terms and conditions of employment provided for under Articles 3(1) and, as the case may be, Article 3(1a) which are not part of the basic terms and conditions of employment remain applicable to temporary agency workers under the conditions determined by these provisions.

### 3.1.3. Point (c)

Point (c) amends Article 3(7), as follows.

7. Paragraphs 1 to 6 shall not prevent the application of terms and conditions of employment which are more favourable to workers.

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

Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.

The principle according to which allowances specific to posting are to be considered as part of remuneration unless they are paid in reimbursement of expenditure actually incurred, such as expenditure on travel, board and lodging, was already expressed in Directive 96/71/EC.

The last sentence of the first subparagraph is a new addition. It provides that the employer shall reimburse the posted worker for travel, board and lodging expenditure "in accordance with the national law and/or practice applicable to the employment relationship".

In a statement made to the minutes of the Council meeting that adopted the Directive, the Commission declared that it "understands the words "national law and/or practice applicable to the employment relationship of the posted worker" to refer in principle to the national law and /or practice of the home Member State, unless otherwise determined in accordance with EU rules on private international law". The Commission also stated that "[i]n the light of the Court's judgment in Case C-396/13 (paragraph 59), reimbursement also covers the situation where the employer defrays costs of the workers without the latter having first to pay them and then seek to have them reimbursed".

The sub-group shares the interpretation given by the Commission in its statement.

The sub-group underlined this provision should be transposed into national law. The sub-group nevertheless recalled that the regulation of this obligation can be left to "national practice", including therefore any kind of collective agreement binding to the employer.

### 3.1.4. Point (d)

Point (d) amends Article 3(8).

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:

- 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 as referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article and, where applicable, with regard to the terms and conditions of employment to be guaranteed posted workers in accordance with paragraph 1a of this Article, between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as undertakings as referred to in Article 1(1) as regards the matters listed in the first subparagraph of paragraph 1 of this Article and, where applicable, as regards the terms and conditions of employment to be guaranteed posted workers in accordance with paragraph 1a of this Article, and
- are required to fulfil such obligations with the same effects.

The Directive introduced two amendments to Article 3(8):

- it extends the possibility to apply to posted workers collective agreements not made universally applicable to the Member States who do have a system for declaring collective agreements universally applicable;
- it adds a reference to the terms and conditions of employment applicable to long-term posted workers in accordance with new paragraph 1a.

The rest of the provision remains unchanged, including the definition of equality of treatment.

The sub-group underlines that Member States which want to avail themselves of this faculty must make it clear in national law transposing the Directive which type of collective agreements they apply.

### 3.1.5. Point (e)

Point (e) amends paragraphs (9) and (10) of Article 3.



Paragraph 9 is now worded as follows:

Member States may require undertakings as referred to in Article 1(1) 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.

In addition to the terms and conditions of employment that must be granted to temporary agency posted workers in accordance with the new paragraph 1b, Article 3(9) allows Member States to provide that other terms and conditions that apply to temporary agency workers in the Member State where the work is carried out are also to be granted to temporary agency workers posted to that Member State.

The terms and conditions of employment at stake are not limited to those set out by law or collective agreement within the meaning of Article 3(8), they could be set out by any type of collective agreement that is binding to the user undertaking.

No change of substance was introduced to paragraph (10).

The subgroup discussed whether Member States which avail themselves of this faculty should or could require that the information obligation upon the user undertaking in accordance with in the second subparagraph of the new Art. 3 (1b) is extended to all the terms and conditions of employment that are to be applied to the worker in accordance with the new Article 3(9).

### 3.1.6. Article 1(3)

Article 1(3) introduces amendments to Article 4(2) of the Directive, which is now worded as follows:

2. Member States shall make provision for cooperation between the competent authorities or bodies, including public authorities, which, in accordance with national law, are responsible for monitoring the terms and conditions of employment referred to in Article 3, including at Union level. Such cooperation shall in particular consist in replying to reasoned requests from those authorities or bodies for information on the transnational hiring-out of workers, and in tackling manifest abuses or possible cases of unlawful activities, such as transnational cases of undeclared work and bogus self-employment linked to the posting of workers. Where the competent authority or body in the Member State from which the worker is posted does not possess the information requested by the competent authority or body of the Member State to whose territory the worker is posted, it shall seek to obtain that information from other authorities or bodies in that Member State. In the event of persistent delays in the provision of such information to the Member State to whose territory the worker is posted, the Commission shall be informed and shall take appropriate measures.

The new Article 4(2) is to be read in conjunction with Articles 6 to 8 of Directive 2014/67/EU.

The sub-group is of the opinion that it is up to each Member State to appreciate whether an explicit transposition of the new Article 4(2) is required, taking account of

the situation following the transposition of the Enforcement Directive.

The sub-group underlines the need for Member States to take the necessary and appropriate measures to ensure compliance with the requirement that the requested authority, whenever it is not in possession of the information requested by the requesting authority seeks to obtain that information from other authorities or bodies in that Member State.

### 3.1.7. Article 1(4)

Article 1(4) replaces Article 5 as follows:

<p>Article 5</p> <p>Monitoring, control and enforcement</p> <p>The Member State to whose territory the worker is posted and the Member State from which the worker is posted shall be responsible for the monitoring, control and enforcement of the obligations laid down in this Directive and in Directive 2014/67/EU and shall take appropriate measures in the event of failure to comply with this Directive.</p> <p>Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.</p> <p>Member States shall in particular ensure that adequate procedures are available to workers and/or workers' representatives for the enforcement of obligations under this Directive.</p> <p>Where, following an overall assessment made pursuant to Article 4 of Directive 2014/67/EU by a Member State, it is established that an undertaking is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of this Directive, that Member State shall ensure that the worker benefits from relevant law and practice.</p> <p>Member States shall ensure that this Article does not lead to the worker concerned being subject to less favourable conditions than those applicable to posted workers.'</p>
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The first paragraph of new Article 5 is to be read in conjunction with Article 7 of Directive 2014/67.

The wording of the second subparagraph on penalties is the same as Article 20 of the Enforcement Directive.

The third subparagraph is to be read in conjunction with Article 11(3) of Directive 2014/67/EU.

The sub-group believes that it is up to each Member State to consider how to transpose these subparagraphs, taking into account the situation following the transposition of the Enforcement Directive.

The fourth and fifth subparagraphs concern the situation of workers who have been found not to be genuinely posted because the undertaking has improperly or fraudulently created the impression that the situation of the workers would fall within the scope of this Directive. For such workers, the Directive now provides that Member States must ensure that the workers benefit from relevant law and practice which should not lead to the application of less favourable conditions than those applicable to posted workers.

The sub-group underlines that the new provision leaves it up to Member States to decide, probably on a case-by-case basis, which is the relevant law and practice to apply, provided it does not lead to the application of less favourable conditions than those applicable to posted workers.

The sub-group also points out that this new provision only applies to workers who have been sent to the host Member State as posted workers (and who benefitted from the terms and conditions of employment applicable to posted workers) until their situation has been requalified by the competent authorities of the host Member State.

The sub-group believes the fourth and fifth paragraph of new Article 5 should be transposed into national law.

### **3.2. Article 2**

Article 2 is worded as follows:

#### **Review**

1. The Commission shall review the application and implementation of this Directive. 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 and propose, where appropriate, necessary amendments to this Directive and to Directive 96/71/EC.
2. The report referred to in paragraph 1 shall include an assessment of whether further measures to ensure a level playing field and protect workers are required:
  - (a) in the case of subcontracting;
  - (b) in the light of Article 3(3) of this Directive, taking into account the developments concerning the legislative act amending Directive 2006/22/EC of the European Parliament and of the Council (13) 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.

The sub-group considers that Article 2 imposes obligations only on the Commission and does not need to be transposed into national law.

### 3.3. Article 3

Article 3 is worded as follows:

#### **Transposition and application**

1. Member States shall adopt and publish, by 30 July 2020, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the Commission.

They shall apply those measures from 30 July 2020. Until that date, Directive 96/71/EC shall remain applicable in its wording prior to the amendments introduced by this Directive.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

3. 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.

The sub-group underlines that Member States are free to transpose the Directive as soon as they can but are obliged to provide that the national transposing measures are not applied before 30 July 2020.

As for the road transport, the sub-group considers that Member States must ensure:

- that the rules of Directive 96/71/EC continue to be applied to the workers of the road transport sector, pending adoption of the *lex specialis* in posting for the road transport; some experts raised the attention to the fact that the application of Directive 96/71/EC to the road transport sector is at stake in cases pending before the Court of Justice<sup>4</sup>.
- that the national measures transposing Directive 2018/957/EU are applied to the road transport "from the date of application" of the *lex specialis*;

The sub-group believes the date of application for the purpose of Article 3(3) corresponds to the date by which Member States must transpose the Directive on *lex specialis* into national law.

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<sup>4</sup> Cases C-818/18, C-620/18 and C-626/18.