HUNGARIAN LABOUR LAW
E - J O U R N A L

Posting of Workers in the EU

Some Critical Remarks on the Normative Development

Pedro Oliveira*

Abstract

Posting workers abroad is not only a relevant competitive mechanism to expand the Internal Market, but it also plays an important role within the scope of the intracommunity provision of services. This is a subject that must be understood not only from a fundamentally economic perspective, but also from an important social dimension, particularly in terms of labour. Although the original Directive on posted workers (96/71/EC) laid down a set of rules in their favour, it was not approved under the scope of a social desideratum. Considering the complex and delicate problems raised by social dumping, the European Parliament and the Council have finally decided to review the legal regime concerning the posting of workers, by means of Directive 2018/957/EU. This new instrument introduced significant amendments to the previous normative one, reflecting the mantra 'equal pay for equal work in the same place'. Such amendments seek to encourage fair competition among Member States on the one hand and, on the other, reinforce the legal-labour guarantees concerning posted workers. The article provides a critical description of the main changes resulting from Directive 2018/957/EU, compared with the previous normative document.

Keywords:
Posting of workers – Social dumping – Directive 96/71 – Directive 2018/957 – equal pay

1. Introduction

Posting workers abroad is not only a highly relevant competitive mechanism to integrate and expand the Internal Market, it also continues to play an important role within the scope of the intracommunity provision of services.[1] However, the manner in which the phenomena has been trivialised has multiplied the systemic disruption which seems to be worsened (or strengthened) by the intentionality described in the normative operators, and particularly by the (shaping) way in which they are interpreted by the Court of Justice of the European Union (CJEU).[2]

As we know, this is a subject that must be understood not only from a fundamentally economic perspective, but also from an important social dimension, particularly in terms of labour – an expressive example of the fracture between the constitutive economic freedoms and the Union's social policy. In truth, although the original Directive on posted workers (96/71/EC)[3] laid down a set of rules in their favour, it was not approved under the scope of a social desideratum.[4] Indeed, and contrary to what happens with most workers in the European Union travelling to another Member State exercising their right to circulate freely (Article 45 of the Treaty on the Functioning of the European Union)[5], and who enjoy the same guarantees given to local workers, a worker qualified as being 'posted' is

---

* Ph.D candidate in Public Law at the Faculty of Law of the University of Coimbra; Fulbright scholar (Cohort 2021); Fellow of the Portuguese Foundation for Science and Technology SFRH/BD/146029/2019); Member of the Community for Labour Studies and Researchers (CIELO).

1 A recent survey by the European Commission refers that, from 2010 to 2014, the number of workers posted from one Member State to another increased by nearly 49% of approximately 1,9 million workers in total. i.e., 0.7% of the workforce in the European Union: 42% takes place in the civil construction sector, 21.8% in the manufacture industry, 13.5% in other sectors, such as education, health, and social work. And lastly, 10.3% in the business sector, namely, administrative, professional, and financial services. For further information on the survey, see Rebecca Zahn: Revision of the Posted Workers' Directive: a Europeanisation Perspective. *Cambridge Yearbook of European Legal Studies*, vol. 19., no. 1. (2017) 187–201.

2 We are referring to the following controversial jurisprudence: case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989; and case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323. These cases highlighted the prevalence of economic interests over social ones. With further developments, see Pedro Oliveira: Alguns problemas sobre a tutela dos direitos fundamentais na jurisprudência do Tribunal de Justiça da União Europeia: os casos Viking e Laval. *e-Pública*, vol. 7., no. 2. (2020) 305–327. < v7n2a14.pdf (e-publica.pt)>.

3 Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services OJ L18, 21.01.1997). For a more in-depth analysis of the posting of workers within the scope of Directive 96/71, see, among others, Alexandre Defossez: Workers Mobility. In: Edoardo Ales et al. (eds): *International and European Labour Law: A Commentary*. Baden-Baden, Nomos, 2018. 642–691.; Catherine Barnard: *EU Employment Law*. Oxford, Oxford University Press, [4]2012. 39–41.; Jan Cremers – John Dølvik – Gerard Bosch: Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU. *Industrial Relations Journal,* vol. 6., 2007. 524–541.; Stein Evju: Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast. In: *Cambridge Yearbook of European Legal Studies*. (Eds.: Catherine Barnard – Okeoghene Odudu) vol. 12. (2009–2010) 151–182.; Annette Van Hoek – Mijke Houwerzijl: Where do EU mobile workers belong, according to Rome I and the (E)PWD. In: Herwig Verschueren (ed.): *Residence, Employment and Social Rights of Mobile Persons: on how EU Law defines where they belong.* Cambridge, Intersentia, 2016. 215–253.; Marco Biaggi: The 'Posted Workers' EU Directive. In: Roger Blanpain (ed.): *Labour Law and Industrial Relations in the European Union*. *The Bulletin of Comparative Labour Relations in the European Union*. Alphen, Kluwer, 1997. 173–180.

4 As Evju op. cit. 152.; stresses, Directive 96/71 'is a real offspring of the EU Single Market and the conjoint Social Dimension'. Referring the stressed relation between those two orders, Daniel Carter: Equal Pay for Equal Work in the same Place? Assessing the Revision to the Posted Workers Directive. *Croatian Yearbook of European Law and Policy,* 2018. 33. <https://hrcak.srce.hr/file/317577> accessed 30 April 2021, makes the following interpellation: 'Does the obligation in Article 3 TEU to create an internal market based on a 'highly competitive social market economy, aiming at full employment and social progress' mean anything other than the establishment of a European free market economy? Or does it indicate a desire to create a strong social counterbalance to market considerations, and a commitment that any economic benefits should not be obtained by sacrificing social benefits and society?'

5 Concerning Article 45 of the Treaty on the Functioning of the European Union (TFEU), see Ales op. cit. 40–61.

considered to be (solely) exercising the freedom to provide services as requested by their employer (Article 56 of the TFEU).

Considering the complex and delicate problems raised by this matter, namely claims regarding social dumping,[6] the European Parliament and the Council have finally decided to review the legal regime concerning the posting of workers, by means of Directive 2018/957/EU.[7] This new instrument introduced significant amendments to the previous normative one, reflecting the mantra 'equal pay for equal work in the same place'. Such amendments seek to encourage fair competition among Member States on the one hand and, on the other, reinforce the legal-labour guarantees concerning posted workers.[8]

The following remarks serve to provide a critical description of the main changes resulting from Directive 2018/957/EU, compared with the previous normative document.

2. Normative framework prior to 2018

2.1 Directive 96/71

Imagine that a Portuguese company in the civil construction sector decides to post some of its employees to work on an undertaking on Gaul territory. The question that comes to mind is: are these workers subject to the rules laid down in the *Code du travail*? Will they be earning the same salary as that of their French colleagues?

---

6 According to Mia Rönnmar: Labour and Equality Law. In: Catherine Barnard – Steve Peers (eds.): *European Union Law.* Oxford, Oxford University Press, 2014. 602.: 'the concept of social dumping refers to practices and behaviour aimed at providing a competitive advantage to companies due to lower labour standards, such as wages'. This practice has become significantly widespread in the European Union in recent decades: 'social dumping and worker's exploitation are widespread practices in the EU, where foreign workers are exploited as 'cheap labour' in order to increase profit margins of companies. Every year millions of migrant workers are employed in the construction and many other branches with no social protection, deplorable wages and inhuman living conditions. These workers are the 'slaves' of the 21st century. Every year millions of migrant workers are attracted to work abroad, with false promises made by 'gangmasters'. In reality they end up in a foreign country, where they are treated as second rank workers, working hard for pocket money. Due to their marginalization in a foreign country and the risk to be sanctioned by their employers, these workers have often no recourse to address their plight'. <Stop social dumping (efbww.eu)>.

7 Directive (EU) 2018/957 of the European Parliament and the Council of 28th June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 173 09.07.2018). The deadline to transpose the Directive to the national legislatures was 30th July 2020. With regard to the revised Directive, see Mijke Houwerzijl – Annette Verschueren: Free Movement of (Posted) Workers and Applicable Labour and Social Security Law. In: Teun Jaspers – Frans Pennings – Saskia Peters (eds.): *European Labour Law.* Cambridge, Intersentia, 2019. 44–131.; Idem: From Competing to Aligned Narratives on Posted and Other Mobile Workers within the EU? In: Conny Rijken – Tesseltge de Lange (eds.): *Towards a Decent Labour Market for Low Waged Migrant Workers*. Amsterdam, Amsterdam University Press, 2018. 81–108.; Zahn op. cit. 187–201.; Jean-Philippe Lhernould: Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. *Era Forum,* 2019. 249. https://link.springer.com/article/10.1007/s12027-019-00573-x; Aukjea Van Hoek: Re-embedding the transnational employment relationship: a tale about the limitations of EU law? *Common Market Law Review,* vol. 55. (2018) 449–488.; Piet Van Nuffel – Sofia Afanasjeva: The Posting of Workers Directive: Enhancing the Protection of Workers in the Cross-border Provision of Services. *European Papers*, vol. 3., no. 3. 1401–1427. <The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services | European Papers>.

8 As indicated in recital 4 of the revised desideratum, 'it is necessary to assess if Directive 96/71 […] 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. And recital 10 stipulates that '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'.

In fact, this question was raised in an emblematic judgement of the CJEU: the *Rush Portuguesa* case.[9] Let us briefly bring to mind the essential characteristics of the doctrine laid down by the said judgement as it would later serve as the legal basis of Directive 96/71.

The controversial matter concerned the unfavourable treatment of Portuguese workers compared with local workers. Shielded by the market access approach, the CJEU defended that the situation did not include the free circulation of workers (Article 45 TFEU) – which at the time did not apply to Portugal – as Portuguese workers would then return to their country of origin once they had finished their task, 'without entering the job market of the host Member State at any given time'.[10]

As understood by the CJEU, the litigation was questioning the '*temporary movement* of workers who are sent to another Member State to carry out construction work or public works as part of a provision of services by their employer'. Thus, the differentiating criteria of the status of posted workers in relation to other mobile workers was the (somewhat vague) criteria of the temporary nature of the work provided.

Note, however, that the decision of the CJEU concealed other major vulnerabilities: it not only raised concerns of a social nature (as it did not bring to the forefront the rightful interests of posted workers), but also made contracting workers from recent Member States much more attractive as labour costs and taxes regarding such workers were lower, with obvious disregard to other countries. And it would not be long before claims regarding social dumping and breach of intra-community competition laws were put in the spotlight.

It was in this conflictive scenario (and following six years of intense debates) that the European Parliament and the Council adopted Directive 96/71 concerning the posting of workers within the provision of services framework. The preamble to the legal document proclaimed its intention: conciliate the freedom to provide cross-border services with fair competition and respect for the rights of the workers.[11] However, there were other elements that indicated a certain prevalence of economic interests.[12] i.e., these showed that the aim was to facilitate the provision of cross-border services (something which would, in fact, later be confirmed in the judicature of the Union).[13] In brief, on the

---

9 Case C-113/89 *Rush Portuguesa Ld*ª v Office national *d'immigration* [1990] ECR I-01417. In this context, see also case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221 and case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Awocati e Procuratori di Milano* [1995] I-4165.

10 Case C-113/89 *Rush Portuguesa Ld*ª v Office national *d'immigration* [1990] ECR I-01417, para 12. In the words of the CJEU: 'in response to the concern expressed in this connection by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means'. Note that the CJEU had already stated the importance of the freedom to provide services, including the possibility of extending national rules to workers temporarily posted, in the joined cases C-62/81 and C-63/81 *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieilesse et L'invalidité* [1982] ECR I-00223, para 31.

11 See recital 5 of Directive 96/71.

12 In this regard, Evju op. cit. 155., points out that 'it is safe to say that the economic has taken precedence over the social'. And also in that sense, see Carter op. cit. 45.

13 In this sense, see Carter op. cit. 39. In C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989, para 36, the CJEU stressed that the main objective of Directive 96/71 is the 'freedom to provide services, one of the fundamental principles enshrined in the Treaty'.

one hand the Directive did not express a harmonization measure of the social policy; on the other, the Directive was based solely on one of the economic principles of the community: the freedom to provide services (current Article 56 of the TFEU).[14]

Within the context of Directive 96/71, (often abbreviated as PWD - *Posting of Workers Directive*), Article 3 (1) stands out for its fundamental importance, as the regulator of imperative rules concerning labour and employment conditions of the host country that must be guaranteed to posted workers.[15]

The original document comprised seven matters: duration of working hours; holiday; minimum salary; conditions under which workers are outsourced by temporary work agencies; health, hygiene, and safety; protection measures for pregnant women, breastfeeding women, children and youths; gender equality and other measures regarding non-discrimination.[16] Although it is undeniable that some of the points listed were vital in protecting posted workers (*v. g.*, maximum working hours, minimum rest period, salary and annual holidays), it is also undeniable that the underlying costs of each of these (also) have an impact on competition. This is why determining the monthly or weekly salary, for example, based on the number of hours/weeks worked was taken into consideration to avoid creating an environment of unfair competition within the community conspectus.

The Directive does not deliver the substantial scope of these standards, referring them to the Member States, who should mediate them by means of the law or collective regulatory instruments of so-called general application. Also worthy of note, from a labour law perspective, the work contract of a posted worker falls under two different legal systems: that of the country where it was executed (affirming the labour relationship with the employer), and that of the territory to which the worker is posted (host country).

Particularly relevant to the implementation of the European document are the core concepts regarding posting and the posted worker. With regard to the first concept, Article 1 (3) encompasses the following hypotheses: posting as part of services outsourced; posting within the context of cross-

---

14 As expressed by Davies op. cit. 572., 'the Community has legislative competence to adopt harmonizing directives for the purpose of removing restrictions on the provision of cross-border services. Thus, the choice of legal base would suggest that the posted workers Directive has been adopted with the aim of facilitating the cross-border services'. Defossez op. cit. 645., adds that it 'is still controversial that posting of workers is solely a free movement of services, and not workers, issue'.

15 This is not the place to analyse in detail the relationship between Directive 96/71 and the rules of Private International Law. Nevertheless, we believe it is important to remember that the formulation of Article 3 (1) of the Directive translates that which has come into force as laid down in Article 9 (immediately enforced standards) of the Rome I Regulation. Furthermore, note that that Article 9\ must be enforced in conjunction with what is laid down in Article 8 of the said Regulation. In other words, the work contract is governed by the rules agreed upon by the interested parties, but, as well as the matters agreed upon, the Directive enforces a number of minimum standards for the protection of workers. The complementarity of Article 8 of the Regulation is also evident in Article 3 (7) of the Directive, which admits the adoption of more favourable standards than those established in the said document. For more information on this matter, see, among others, Houwerzijl–Verschueren op. cit. 103.; Evju op. cit. 155.; and Defossez op. cit. 663.

16 Also, workers posted by temporary work agencies have further protection (Article 3 (9). A rather controversial matter related to the nature of the standard established in Article 3 (1). We could say it bears a minimum standard of protection, considering that the Directive (Article 3 (7) authorises the adoption of national rules that are more beneficial to posted workers. In the expression used in the doctrine, this represents a «floor of rights» (Defossez op. cit. 650.). However, the CJEU's decisions on the aforementioned controversial *Laval* and *Rüffert* cases would lead us to conclude that such standard is more of a «rigid grid». Hence, Oliveira op. cit. 321.

border business groups; posting by temporary work agencies.[17] Also worthy of note is the fact that, to fall under Article 1 (1), postings must also substantiate a transnational provision of services, performed by the posted worker, as per Article 56 of the TFEU. Here, as in so many other places,[18] the difficulties encountered at the core of the defining concept of establishment are also present.[19]

In turn, the definition of 'posted worker' is laid down in Article 2 (1): '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'. As we can see, when drafting a standard, two specific requirements must be cumulatively verified: that work is in actual fact being provided in the worker's country of origin, and, in this way, situations in which a worker is contracted solely for posting purposes are then excluded; and also, the temporality of the posting period.

The question that thus comes to mind is: what exactly is temporary? Until 2018, neither jurisprudence nor the Union's legislature could define it unequivocally and systematically.[20] It is, therefore, not surprising that such undefinition gave way to abusive practices with consequences in terms of labour and competition – including social dumping.[21]

Another questionable matter that led to undue conduct over decades by service providers, was that it was not required that national legislatures envisaged monitoring and the enforcement of the guarantees conferred to posted workers. Although the Directive listed a number of guidelines.[22] the Member States were free to (in line with internal legal frameworks) establish the terms of the information, the monitoring, and enforcement of such guarantees. In practice, the national labour rights standard was published on government webpages, but the truth was that such information was not always complete, and the websites were not always accessible to service providers and their employees. Also, administrative cooperation between countries was basically non-existent, which provided even more fertile grounds for non-compliance with the legal framework.[23]

---

17 This example seems to be the most challenging. On this matter, see Defossez op. cit. 646.

18 As we are aware, the definition of establishment or part of establishment has echoed in other legal fields within the European Union, namely with regard to the transfer of undertakings. Concerning this matter, and with other references, see Pedro Oliveira: Transmissão de empresas no direito laboral da União Europeia: novos desafios na delimitação conceptual de unidade económica. *Revista da Ordem dos Advogados*, no. 2. (2020) 333–352.

19 Article 1 (1), simply states that the Directive 'shall apply to undertakings established in a Member State'. The question is: what does 'established' mean? The Directive does not explain and this omission has led to abusive behaviour. In case C-246/89 *Commission v United Kingdom,* para 21, the CJEU stated that the concept of *establishment* 'involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'. However, as Defossez op. cit. 645., points out 'from a practical point of view, being 'established in a Member State is not a huge threshold. It is well known that the creation of a company in some Member States only requires a mere registration'. One of the consequences of such conceptual inaccuracy is acts of fraud against the social security standards, as is the case, for example, of letterbox companies (note 23 *infra*).

20 In case C-113/89 *Rush Portuguesa Ld*ª v Office national *d'immigration* [1990] ECR I-01417, para 17, the CJEU simply stated that a service provider may travel 'with his own labour force from Portugal while the job is being carried out' (emphasis added).

21 As stressed by Claire Kilpatrick: British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law. *Working Paper LSE,* No. 16. (2009) 27., 'socially, it is not difficult to imagine that long-stretches of life in a 'typically more expensive' host-state on a minimum skeleton of a host-state labour standards can seem exploitative to posted workers and host-state inhabitants alike.'

22 See Articles 4, 5 and 6 of the Directive.

23 'Letterbox companies' or 'shell companies' are a well-known example of such practices. European Union Law (including the tax field, does not have a definition for this business 'segment'. In the words of Ales op. cit. 90, 'letterbox companies' are 'undertakings

2.2. Enforcement Directive 2014/67

The urgent need to fight the fraudulent posting of workers called for a concrete legislative measure, but not to the point that the regulation needed to be reviewed. Thus, the European Parliament and the Council approved an enforcement Directive (2014/67/EU)[24] aimed precisely at improving and reinforcing the transposition, implementation and enforcement of Directive 96/71.

Among other important aspects, the Directive indicates a number of factual elements that the local authorities must take into account when identifying a real case of posted workers and in preventing abuse and fraud (Article 4); it establishes rules regarding the improvement of information found on the local authorities' webpages (Article 5), as well as the administrative cooperation among Member States (Article 6).

However, the objectives laid down in this legal instrument depended on a supervisory political effort, something which was financially onerous for many countries. On the other hand, national inspection authorities would be confined to their territory as they would not have the right to travel to another Member State for inspection purposes.

For this reason, even before the end of the deadline for the transposition of Directive 2014/67, the Commission drafted a new Directive aimed at reinforcing the rights of posted workers, as well as the rules of competition.

3. Directive 2018/957

As was the case with the legal procedure that took place prior to the original desideratum on the posting of workers, the discussion concerning the proposed new Directive was marked by dissenting voices. Not without surprise, ten national parliaments opposed the new legislative proposal based on the principle of subsidiarity: they invoked the exclusion of the European Union's jurisdiction to legislate on matters regarding pay (Article 153 (5) of the TFEU), and the fact that the 'equal pay for equal work in the same place' principle, together with the salary concept, undermine its competitive

that do not really operate in the country in which they claim to be established, and in which they only have a postal address, while offering permanent services in another Member State'. There were several underlying advantages to this expedient within the posting of workers across borders context, particularly from the 'new' to the 'old' countries of the community. As posted workers are subjected to the set of rules laid down in Article 3 (1) of Directive 96/71), they would receive the minimum salary, that is, less than what the local workers in the same area of business earned. On the other hand, with regard to social security taxes, posted workers remain bound to the rules of the Member State in which they usually work (Article 12 (1) of the EC 883/2004 Regulation) – *in casu* the country where the letterbox company is located – which means reduced costs compared to those of the host country (10 to 30 percent less). It is worth noting that reduced labour costs and taxes equal a much cheaper workforce. And the lack of cooperation or exchange of information between Member States would inhibit the host country from verifying whether the company in its country of origin was in fact a letterbox company or not.

[24] Directive 2014/67/EU of the European Parliament and 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 OJ L159, 28.05.2014. Concerning this Directive, see Defossez op. cit. 677.

advantages. In response to such opinions, the Commission defended that the proposal complied with the principle referred, and Directive 2018/957 was adopted.[25]

The new posting framework went through changes in three main fields: standards regarding temporary work companies; remuneration of posted workers (by incorporating the principle 'equal pay for equal work in the same place'); and rules applicable to long-term posting of workers.

Starting with what seems to have been the fundamental change to the framework, expressing European legislators' concern in fighting social dumping practices, the development of the remuneration definition thus addressed a decade-old appeal. We have seen that under the previous regulatory example, posted workers were entitled to the minimum salary of the host country. In other words, posted workers from Member States with low labour costs (usually those who entered the Community later), to countries such as France, Belgium or Germany, were often paid a considerably lower salary to that paid to local workers for the job provided. The logic was simple and the regulatory wording made it so: the local worker received a salary compatible with his professional category – an amount often much higher than the minimum salary – whereas a colleague posted from abroad would only earn the amount corresponding to the minimum wage. Also, the lack of a defining rule regarding salaries exacerbated the dilution of expenses inherent to posted workers' salaries, which meant that a minimum amount was more 'readily' reached.

In contrast, the 2018 Directive not only dismissed the reference to minimum pay, replacing it with remuneration [Article 3 (1)(c)], but also developed the concept of remuneration itself, in the following terms: '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'.

Such provision now refer not only to laws and collective agreements, but also to the practices of Member States. As such, the regulatory gap that allowed disparities in terms of wage obligations existing for domestic and foreign service providers (and even changes in the applicable law) that arose from the Laval judgment will be closed.[26] Moreover, its paragraph 8 constitutes an important change in relation to the applicable collective agreements, where remuneration is defined by non-generally binding agreements. In light of that norm, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, Member States may base themselves on: collective agreements or arbitration awards which are generally applicable to similar undertakings in the profession or industry concerned; collective agreements which have been concluded by the representative employers' and labour organisations at national level and which are throughout national

25 For further developments on this process, see Carter op. cit. 56., and Defossez op. cit. 649.

26 Carter op. cit. 64.

territory. This provision will also mitigate some of the damages caused by the aforementioned "Laval quartet".

Equally important within this context, the revised Directive, under recital 18, determines that 'when comparing the remuneration paid to a posted worker and the remuneration due in accordance with the national law and/or practice of the host Member State, the gross amount of remuneration should be taken into account. 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'.

Another (long called for) concern was regarding the already mentioned uncertain criterium in relation to the posting period.[27] Indeed, the new Directive extended the rights of workers posted for a duration of over twelve months, guaranteeing that, as well as the set of minimum rules laid down in Article 3 (1), the work and employment conditions enforced in the Member State where the work is carried out will also be applicable.[28] However, it is worth noting that such period may be extended to a maximum of eighteen months, whereby the service provider must submit a motivated notification. Should this be the case, posted workers will only be entitled to such equal treatment following the said period. This provision clearly moves away from the market access approach invoked by the CJEU, inasmuch as posted workers now enter the host country's labour market following a certain period of time.

The 2018 Directive gave further impetus to the fundamental work and employment conditions of posted workers. Two other points were added to Article 3 (1): (*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.[29]

---

27 As recital 9) of the revised Directive infers: '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'.

28 Article 3 (1) first 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.

29 The rule adds 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'.

Furthermore, temporary work companies and placement agencies are now obliged to comply with the applicable legal provisions where workers are posted to another Member State, considering that the worker has been posted by the undertaking or by the agency, as appropriate.[30]

4. Conclusion

Considering the regulatory development regarding the transnational posting of workers in the European Union, it is safe to conclude that the framework now in force steps up its social dimension and allows for more effective protection of posted workers when carrying out their activity in a Member State other than the one where they usually work[31]. The development of the remuneration concept is likely to mean that these workers' wages will be paid in a fair and balanced manner. And, in the case of longer periods abroad, it will guarantee almost bona fide equal treatment. In any case, it seems that the scope of these new measures will depend on their interpretation by the Luxemburg aeropagus.[32]

30 Article 1 (3)(c) of the Directive.

31 It is worth noting, however, that not everyone seems to have the same opinion. For instance, Poland and Hungary brought actions before the Court of Justice of the European Union seeking the annulment of the Revised Directive, but both actions were dismissed by the CJEU in December 2020. See case C-626/18 *Poland v European Parliament and Council* [2020], not yet published; and case C-620/18 *Hungary v European Parliament and Council* [2020], not yet published.

32 Carter op. cit. 31., argues that 'the Revised Directive will likely mitigate the more damaging consequences arising from the Court's acquis, although given the more fundamental challenges that exist this may be limited'. In effect, the CJEU has recently delivered some important judgments regarding the definition of posting which illustrates the legal problems around the subject. On this jurisprudence, see Marta Lasek-Markey: FNV v Van den Bosch, or the thin line between the free movement of services and 'social dumping' in the never-ending story of posted workers. *European Law Blog*, December 2020. <https://europeanlawblog.eu/2020/12/08/fnv-v-van-den-bosch-or-the-thin-line-between-the-free-movement-of-services-and-social-dumping-in-the-never-ending-story-of-posted-workers/>