

# Portuguese Report on the Posting of Workers Regime

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SUMMARY: 1. Introduction. – 2. The Portuguese transposition of the EU Directives on posted workers. – 3. Scope of application of the Portuguese legal framework on posted workers implementing Directive 96/71. – 3.1. The notion of posted worker in the Portuguese Labour Code. – 3.2. The territorial scope of application of the Portuguese posted workers regime. – 4. Employment terms and conditions applicable to posted workers. – 4.1. Collective agreements with *erga omnes* effects in Portugal – 4.2. Principle of application of the most favourable law. – 4.3. Terms and conditions of employment applicable to posted workers according to the PLC – the problem of “remuneration”. – 4.4. The inclusion of provisions concerning “job security” among the terms and conditions applicable to posted workers – a Portuguese peculiarity. – 4.5. New terms and conditions mandatorily applicable to posted workers after Directive 2018/957. – 5. Long duration posting – implementation of new article 3(1a) of Directive 96/71. – 6. Temporary agency workers hired out by temporary work agencies as provided by new article 3(1b) of Directive 96/71. – 7. The transposition of Directive 2014/67/EU (after Directive 2018/957). – 8. Conclusion.

## 1. *Introduction*

More than a State of destination for workers posted by service providers from other States, Portugal has been typically a State of origin of workers posted abroad by Portuguese undertakings directing their provision of services to other States.<sup>1</sup> In effect, Portugal has been, for decades, a State with a

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<sup>1</sup> The circumstance that Portugal is not traditionally a country of destination of posted workers provides, at least in part, an explanation for the absence of Portuguese case-law concerning workers posted in Portugal by foreign undertakings. Differently, there are cases involving Portuguese workers posted abroad by their Portuguese employers. These cases, however, typically address the application of Portuguese Law governing the individual employment contract at hand and not the application of Directive 96/71 (or of the Portuguese legislation which implemented this Directive). See, for instance, Judgment of 22 January 2019 of the

traditionally large number of service providers directing their services to beneficiaries/clients located abroad. The Portuguese building industry is one good example. The European Union (EU) internal market, in particular, has always been regarded as offering a good opportunity for Portuguese undertakings to expand their economic activities by providing their services to clients in other Members States (MS). Such services are often provided with the use of employees which habitually perform their work in their employers' premises, in Portugal. Such employees have, therefore, their individual employment contracts subject to Portuguese law, according to article 8(1) and (2) of the Rome I Regulation, on the law applicable to contractual obligations. This will be so, even if the employer provides its services in another MS of the EU with temporary secondment (posting) of its employees in that MS.

It is well known, however, that the posting of workers poses significant challenges and difficulties, in particular as regards the finding of the provisions which, in the MS of destination, shall be mandatorily respected by foreign undertakings, irrespective of the law governing the individual employment contracts with the workers posted therein.

Such difficulties triggered the intervention of the EU legislator in the 90s and led to the adoption of Directive 96/71/EC, of the European Parliament and of the Council, of 16 December 1996, on the posting of workers in the framework of the provision of services (Directive 96/71).<sup>2</sup>

It is widely recognized that Directive 96/71 is not an instrument of substantive harmonization of MS labour law provisions applicable to posted workers.<sup>3</sup> It is an instrument of private international law that determines the mandatory provisions of the MS of destination of the posted workers which shall be applicable irrespective of the provisions of the MS of origin of such

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Tribunal da Relação de Lisboa (Court of Appeal of Lisbon) on case 20730/15.1T8SNT-E.L1-1, or Judgment of 22 May 2019 of the Tribunal da Relação do Porto (Court of Appeal of Porto), on case 4800/16.1T8MTS.P1 – even though this latter judgment dealt with the issue of application of the most favourable law to the posted worker, set forth in article 3(7) of Directive 96/71. To our knowledge, there are no published judgments of Portuguese Courts of Appeal or of the Portuguese Supreme Court involving Portugal as a State of destination of posted workers.

<sup>2</sup>For further developments, see A. FRADA DE SOUSA, *A Europeização do Direito Internacional Privado – Os novos rumos na regulamentação das situações privadas transnacionais na UE, Tese apresentada à Universidade Católica Portuguesa para obtenção do grau de doutor em Direito – Ciências Jurídicas*, Faculdade de Direito – Escola do Porto, Author's Edition, 2012, 782 ff.

<sup>3</sup>It contains, however, as we will see below, provisions, mainly of administrative nature, on duties to inform and setting forth MS' obligations to cooperate in the posting of workers. Such provisions were recently reinforced with the adoption of Directive 2018/957/EU.

posted workers governing their individual employment contract according to the choice of law rules of article 8 of the Rome I Regulation.<sup>4</sup>

The recognition of the existence of situations where certain undertakings have engaged in practices aimed at obtaining undue or fraudulent advantages from the free movement of service provisions of the Treaty on the Functioning of the European Union, namely due to the lack of conditions to ensure the proper enforcement of the provisions of the 96/71 Directive, triggered the subsequent intervention of the EU legislator. This led to the adoption, in particular, of Directive 2014/67/EU, of 15 May 2014, on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the

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<sup>4</sup> According to ORLANDINI, *La disciplina comunitaria del distacco dei lavoratori fra libera prestazione di servizi e tutela della concorrenza: incoerenze e contraddizioni nella direttiva n. 71 del 1996*, in *Arg. dir. lav.*, 1999, 465 ss., 479, the 96/71 Directive “è correttamente qualificabile come fonte di diritto internazionale privato”. See also CORTI, *Le decisioni ITP e Laval della Corte di Giustizia: un passo avanti e due indietro per l'Europa Sociale*, in *Riv. it. dir. lav.*, 2008, 27, 249 ss., 259, considering that the 96/71 Directive “funziona come un sofisticato strumento di diritto internazionale privato”. In the same line, M. FALLON, *Le détachement européen des travailleurs, à la croisée de deux logiques conflictualistes*, in *Revue Critique de Droit International Privé*, 2008, 97, 781 ff., especially 816, acknowledges that the 96/71 Directive does not adopt substantive provisions, merely establishing a common conflict of laws regulation for MS. The 96/71 Directive is, therefore, “an instrument of private international law that uses the technique of conflict of laws or conflicts’ rules”. Similarly, according to W. SCHRAMMEL, *Dienstleistungsfreiheit und Sozialdumping*, in *Europäische Zeitschrift für Arbeitsrecht (EuZA)*, 2009, 2, 36 ff., 44, the 96/71 Directive “is a special rule of conflicts which has precedence over the conflicts’ rules concerning individual employment contracts” (“ist eine besondere Kollisionsregel, die den Kollisionsnormen über Arbeitsverträge vorgeht”). In particular, it results from article 3(7) and (10) of the Directive that it contains a “Community law and definitive special conflict of laws regulation for work and employment conditions” (“gemeinschaftsrechtliche und abschließende kollisionsrechtliche Sonderregelung für Arbeits- und Beschäftigungsbedingungen”). For C.U. SCHMID, *From Effet Utile to Effet Neolibéral: A Critique of the New Methodological Expansionism of the European Court of Justice*, in *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Org. RAINER NICKEL), Antwerp, Intersentia, 2010, 295 ff., 309, “technically the Directive does not aim at harmonizing substantive law, limiting itself to adopt a private international law solution”. For Advocate-General P. MENDOZZI, in the Opinion delivered on 23 May 2007, in case C-341/05, *Laval un Partneri*, ECLI:EU:C:2007:291, paragraph 59, “the purpose of [Directive 96/71] is to coordinate MS’ conflict-of-laws rules in order to determine which national law should apply to the provision of cross-border services where workers are posted temporarily abroad within the Community, without harmonising either the substantive rules of the MS as regards employment law and the terms and conditions of employment relating, in particular, to rates of pay, or the right to resort to collective action”. Also according to Advocate-General V. TRSTENJAK, in the Opinion delivered in case C-319/06, *Commission v. Luxembourg*, ECLI:EU:C:2007:516, paragraph 36, Directive 96/71 “must be regarded primarily as a conflict-of-laws provision of Community employment law concerning the details and conditions of employment of posted workers”.

provision of services and amending Regulation (EU) no. 1024/2012 on administrative cooperation through the Internal Market Information System (“the IMI Regulation”) (“Directive 2014/67”)<sup>5</sup> and, more recently, of Directive 2018/957/EU, of 28 June 2018, amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Directive 2018/957 or Amending Directive).

It is important to underline that the definition, by each MS, of the mandatory provisions to be applied to employees posted therein by services providers from other MS might have the significance of protectionist national measures. Such protectionist measures were sometimes adopted by MS with higher average wages and were aimed at dissuading foreign undertakings to access such MS’ markets to efficiently compete with domestic service providers. Protectionist measures adopted by MS of destination against competing foreign service providers may appear disguised as measures aimed at granting posted workers the highest level of protection.<sup>6</sup> Protectionism may wear many different masks, and one of such masks might be the protection of posted workers. Protectionist measures have sometimes burdened the cross-border operation of Portuguese service providers so heavily that directing services to some MS became virtually unbearable for Portuguese undertakings.<sup>7</sup> For Portuguese undertakings, this entailed not only the loss of market opportunities abroad, but also the loss of extra pay for employees – extra pay that they would typically earn while being posted abroad and would otherwise not receive while working in Portugal. These protectionist measures even led, in some cases, to the loss of jobs, due to the employers’ inability to provide their services abroad and, therefore, to expand their economic operations internationally.<sup>8</sup>

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<sup>5</sup> Recital 7 of Directive 2014/67/EU expressly alludes to the need to “prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU and/or of the application of Directive 96/71/EC”.

<sup>6</sup> P. DAVIES, *Case C-346/06, Rüffert v. Land Niedersachsen [2008] IRLR 467 (ECJ)*, in *Industrial Law Journal*, 2008, 37, 293 ff., 293, points out that arguing that Directive 96/71 must be interpreted as aiming to confer the highest level of protection to posted workers in the Member State of destination is a “very curious argument [...] the more the posted workers are brought up the levels of terms and conditions applying in the host state, the less likely they are to be employed there at all, which is a dubious way of protecting their interests”.

<sup>7</sup> Portuguese service providers have been often confronted, since Portugal joined the EEC, in 1986, with a vast number of national protectionist measures hindering their access to other MS’ markets. The case, C-113/89, *Rush Portuguesa*, decided by the CJEU in 1999, illustrates this reality and the typical problems with which Portuguese service providers have been confronted since 1986.

<sup>8</sup> Posted workers will only benefit from higher labour standards if their employers are able to keep access to contracts in the State of destination. See P. DAVIES, *Posted Workers: Single*

It is well known that, in a significant number of cases decided by the CJEU, such national measures adopted by MS of destination aimed at hindering the free provision of services, have been considered incompatible with the internal market, even though the measures at hand aimed precisely at levelling up the rights of posted workers. Renowned Judgments of the CJEU in cases such as *Laval un Partneri* (C-341/05), *Rüffert* (C-346/06) and *Commission v. Luxembourg* (C-319/06) illustrate what we have just said and were generally applauded in Portugal, considering its traditional condition as a MS of origin of posted workers. This contrasts sharply with the strong criticism that these judgments have triggered in MS traditionally of destination of posted workers.

## 2. The Portuguese transposition of the EU Directives on posted workers

Directive 96/71/EC was implemented in Portugal by Act no. 9/2000, of 15 June (Act 9/2000), and entered into force a month later,<sup>9</sup> with a delay of half a year, since the transposition should have occurred until December 1999. This legal regime was then included in the *Código do Trabalho* approved by Act no. 99/2003, of 27 August – the Portuguese Labour Code (PLC of 2003).<sup>10</sup> Currently, the provisions implementing Directive 96/71 are enshrined in the Portuguese Labour Code of 2009,<sup>11</sup> approved by Act no. 7/2009, of 12 February (PLC), particularly in articles 6, 7, and 8. Directive 2014/67 was implemented at national level by Act no. 29/2017, of 30 May, which entered into force on 31 May 2017 (Act 29/2017).<sup>12</sup>

More recently, Directive 2018/957, of 28 June, was transposed to the national legislation by Decree-Law no. 101-E/2020, of 7 December (Decree-Law 101-E/2020),<sup>13</sup> which republished Act no. 29/2017, with some

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*Market or Protection of National Labour Law Systems?*, in *Common Market Law Review*, 1997, 571 ff., 574.

<sup>9</sup> Available at <https://dre.pt/pesquisa/-/search/288375/details/maximized>.

<sup>10</sup> Available at <https://dre.pt/pesquisa/-/search/632906/details/normal?q=Lei+n.%C2%BA%2099%2F2003%2C%20de+27+de+agosto>.

<sup>11</sup> Available, in English, at <https://dre.pt/application/conteudo/123169278>, although without the latest modifications.

<sup>12</sup> Available at <https://dre.pt/pesquisa/-/search/107094724/details/maximized>. To our knowledge, there is no English translation of this diploma.

<sup>13</sup> Available at <https://dre.pt/dre/detalhe/lei/29-2017-150570705>. To our knowledge there is no English translation of this diploma.

amendments aimed, precisely, at ensuring the transposition of Directive 2018/957.<sup>14</sup>

Prior to the implementation of Directive 2018/957, the provisions which, in Portugal, implemented Directive 96/71 were to be found exclusively in the PLC. However, the implementation of Directive 2018/957 left such provisions set forth in the PLC, which transposed Directive 96/71, unchanged. In effect, the Portuguese legislator surprisingly opted to include the provisions transposing Directive 2018/957 not in the PLC, but in the legal Act which contains the provisions transposing Directive 2014/67 – Act no. 29/2017. This means, in other words, that although Directive 96/71 was transposed into Portuguese Law through provisions of the PLC, the provisions operating the transposition of Directive 2018/957 are to be found not in the Code, but in a different legal act – Act 29/2017 – devoted to the transposition of a different Directive. This dubious option of the Portuguese legislator is likely to cause confusion and be a source of trouble and conflicts, since the provisions contained in the PLC that transposed Directive 96/71 remain in force, with no consideration for the amendments introduced by Directive 2018/957 to Directive 96/71.

### 3. *Scope of application of the Portuguese legal framework on posted workers implementing Directive 96/71*

#### 3.1. *The notion of posted worker in the Portuguese Labour Code*

The PLC does not clearly define *posted worker*, and nowhere in articles 6 or 7 is it stated that the regime contained therein applies only to posted workers conducting their activity in the context of a *provision of services*. This is quite surprising, since Directive 96/71 expressly refers to the provision of ser-

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<sup>14</sup> The most relevant of such amendments will be described and assessed below. The consolidated version of Act no. 29/2017 is available, in Portuguese, at: <https://dre.pt/dre/legislacao-consolidada/lei/2017-150546996>. In Portugal, the implementation of Directive 2018/957 occurred following a Government's request to the Portuguese Parliament for authorization to proceed with such implementation (since Parliament holds exclusive constitutional competence to legislate on this matter). Parliament conceded such authorization, on 21 July 2020, for the Government to adopt legislation concerning the posting of workers in the context of provision of services, implementing Directive 2018/957/EU of the European Parliament and the Council, of 28 June 2018 (available at: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45132>). This authorization, enshrined in Act no. 61/2020, of 13 October, determined a 180 days deadline for the transposition of the Amending Directive. Directive 2018/957 was eventually implemented in the Portuguese legal system by Decree-Law 101-E/2020, of 7 December 2020. The period of transposition had ended on 30 July 2020.

vices, both in its title and when it defines its scope of application and the notion of post worker in article 1(3)(a).

Be as it may, the Code attempts to provide a definition of posted worker in the context of article 6, which circumscribes the scope of application of the posted workers regime to workers posted in Portuguese territory. Article 6(1), while not focusing on the substantial characteristics of these workers, lists the three situations which “are considered to be subject to the posting regime”.<sup>15</sup>

Such situations are the following three cases, “in which the employee, hired by an employer established in another State, provides his activity in Portuguese territory: (a) in performance of a contract between the employer and the beneficiary who carries out the activity, provided that the employee remains under the authority and direction of the employer; (b) in the establishment of the same employer, or company of another employer with which there is a corporate relation of reciprocal, do-main or group participation; (c) at the service of a user, at the disposal of which he was placed by a temporary employment agency or another company.

*First type of posted worker* – Article 6(1) considers the “posting regime” one “in which the employee, hired by an employer established in another State, provides his/her activity in Portuguese territory”. This can be, as referred, a situation “in performance of a contract between the employer and the beneficiary who carries out the activity, provided that the employee remains under the authority and direction of the employer”.

The reference to the requirement of existence of a contract between the employer and the beneficiary who carries out the activity opens the door to the inclusion, within the scope of application of the Portuguese regime on posted workers, of cases where the contract between the employer and the beneficiary is not aimed at the provision of services, or at least primarily at the provision of services.

Another feature of article 6(1)(a) is that it expressly requires that the employee “provides his activity in Portuguese territory”, “in performance of a contract between the employer and the *beneficiary who carries out the activity*”. This requirement is difficult to understand. It seems to imply that the foreign undertaking, posting its workers in Portugal, has entered into a sub-contractual relationship with the beneficiary, the latter carrying out, in Portugal, precisely the same activity developed by the foreign undertaking. This is a too narrow understanding of posting that would not be acceptable in the light of Directive 96/71. It would exclude from its scope situations where the foreign undertaking performs services in Portugal for clients which carry out an

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<sup>15</sup> Article 6(2) expressly provides that “the regime of posting in Portuguese territory does not apply to the navigating personnel of the merchant navy”, in consonance with article 1(2) of Directive 96/71.

activity other than the one performed by the foreign undertaking. Nevertheless, an interpretation of article 6(1)(a) in conformity with Article 1(3)(a) of Directive 96/71 shall suffice to ensure this provision is in consonance with Directive 96/71, even if a clarification of the text of the provision of the Labour Code would be highly advisable.

It is true, in any case, that article 2(b) of Act 29/2017 (implementing Directive 2014/67) circumscribes the scope of application of this Act, including, for this purpose, in the definition of posted worker, the reference to “the situations of posting of workers to another MS, by service providers established in Portugal, covered by articles 6 to 8 of the Labour Code”. Article 2(b) of Act 29/2017, refers, therefore, to the situations of posted workers in the context of a provision of services, but only in the case of workers posted in another MS of the EU by service providers established in Portugal.

Article 2(a) of Act 29/2017 provides that this Act is also applicable to “the situations of posting of workers in Portuguese territory”, but, unlike article 2(b), it does not expressly mention that such posting shall involve service providers established in another MS. However, a contextual and teleological interpretation of article 2(a) in light of article 2(b) would lead us to conclude that Act 29/2017 is only concerned with situations of posting of workers from Portugal to another MS and from another MS to Portugal.

In conclusion, the provisions contained in Act 29/2017 constitute a sort of *lex specialis* vis-à-vis articles 6 to 8 of the PLC: they shall only be applied to workers posted in another MS of the EU by service providers established in Portugal, as well as to workers posted in Portugal by service providers established in another MS, whereas articles 6 to 8 of the PLC shall apply, more broadly, to undertakings established in Portugal posting workers in third-countries and to undertakings established in third-countries posting workers to Portugal, even outside the context of provisions of services.

*Second type of posted worker* – Article 6(1)(b) provides that another situation of posting of workers occurs when the employee provides his/her activity for the employer, established in another State, in Portugal, “in the establishment of the same employer, or company of another employer with which there is a corporate relation of reciprocal, control or group participation”. A broad interpretation of the notion of establishment may allow us to conclude that in situations where a foreign undertaking performs, for a certain period of time, an activity in Portugal, for its own benefit – car tests, for example, or shooting scenes for a film – in premises, or in an infrastructure that such undertaking has, for that purpose, in Portugal, the legal regime for posting of workers is applicable. This appears in line with the idea that the regime for posted workers in Portugal may be applicable beyond the context of a provision of services.<sup>16</sup>

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<sup>16</sup> It is also reinforced by the circumstance that article 6(2) of the PLC provides, with no



*Third type of posted worker* – The last situation of posting of workers is, according to Article 6(1)(c), the one in which the employee provides his/her activity in Portugal, for an employer established in another State, “to the service of a user [in Portugal], at the disposal of which he/she was placed by a temporary employment agency or another company”. We shall consider this situation of temporary agency workers below, in more detail.

*More on the notion of posted worker in Portuguese Law* – Portuguese Law does not require the posted worker to have had a minimum period of time working for the undertaking in another MS intending to post him/her in Portugal prior to his/her posting in the country. The worker may, therefore, be hired by an undertaking of another MS with the purpose of being immediately posted in Portugal in the context of a provision of services. The employment relationship must logically exist before the posting and must continue – throughout the (temporary) duration of the posting and after the end of posting – in another State, different from Portugal, where the employee is supposed to habitually have to carry out his/her work in execution of the employment contract.<sup>17</sup>

Portuguese Law also does not require workers posted in Portugal by a foreign undertaking to obtain a work permit in Portugal to be considered and admitted as posted workers in Portugal.<sup>18</sup>

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reference, again, to a provision of services, that “such regime shall also apply to posting in situations referred to in subparagraphs [of article 6(1)(a) and 6(1)(b)] by a user established in another State under its national law, provided that the employment contract subsists during the secondment”.

<sup>17</sup> For a worker to be considered posted in Portugal, it is required, on the part of the worker, the existence of an “*animus revertendi*” to his/her State of origin after being posted in Portugal, and the existence of an “*animus retrahendi*”, on the part of the employer, when the posting reaches its end. In other words, as mentioned already, on the part of the employer, the employment relationship must also be regarded as subsisting in another State after the posting in Portugal has ended. Thus, the determination of a posting in Portugal depends on the existence of an understanding between the parties (employee and employer) as regards the location/State where the worker is supposed to carry out his/her activity habitually in performance of the employment contract after the temporary posting in Portugal has reached its end.

<sup>18</sup> This shall be so even if that worker is an employee of foreign placement agencies, or temporary employment undertakings, and is hired-out in Portugal, as posted worker, to a user undertaking established in Portugal. According to article 30-A of Decree-Law no. 260/2009, on the legal regime for the exercise and licensing of private placement agencies and temporary employment undertakings, the principle of mutual recognition shall be respected. There may be no duplication of conditions required for the fulfilment of the proceedings set forth in that Decree-Law for placement agencies and temporary employment undertakings established in Portugal, as regards placement agencies and temporary employment undertaking lawfully established and operating in other MS. As long as the requirements and controls to which such agencies and undertakings have been subject in their respective MS of origin have been ful-

The list of elements to be taken into account to identify workers posted in Portuguese territory was enlarged by Act 101-E/2020, which added new segments (*h* and *i*) to article 4(1) of Act 29/2017. However, it is doubtful that this amendment actually impacts on the definition of posted worker, leading to a larger number of workers in Portugal to be considered posted workers and thus subject to the pertinent legal regime applicable. In effect, that list of elements in article 4(1) is not exhaustive and, as provided both in article 4(4) of Directive 2014/67 and in article 4(3) of Act 29/2017, the failure to satisfy one or more of those factual elements shall not automatically preclude a situation from being identified as a situation of posting. Among that (long) list of elements, we now find, added to that list by Act 101-E/2020, “the existence of conditions of accommodation [in Portugal] when provided by the employer” and the “remuneration, allowances and benefits, inherent to the posting, being presumed that these allowances and benefits are paid as reimbursement of expenditures with travel, board and lodging when such elements paid as remuneration are not ascertained”. In any case, this amendment does not necessarily affect the number of workers in Portugal that shall be considered as falling within the scope of the definition of posted worker under article 6 of the PLC.

With relevance for the understanding of the notion of posted worker in Portuguese Law, it is noteworthy that another amendment has been made to article 4 of Act 29/2017, namely by Decree-Law 101-E/2020, with the addition of article 4(4), providing that “if [the *Autoridade para as Condições de Trabalho (ACT)*] finds out that an undertaking, abusively or fraudulently, has created the impression that the situation of a worker might be considered as a posting, that undertaking shall ensure that such worker may not, in any case, be subject to working conditions less favourable than those applicable to posted workers”. This last amendment implements article 5(4) and (5) of Directive 2018/957, complementing the provisions of Act 29/2017, transposing article 4 of Directive 2014/67. It is complementary, in particular, as regards the criteria set forth in article 4(2)(a) to (f) of Act 29/2017 to determine whether an undertaking genuinely performs substantial activities that go beyond purely internal management and/or administrative activities. Article 4(4), now added, apparently sets forth the legal effect ensuing from the finding of a situation where, according to article 4(2), a foreign undertaking *posting* workers in Portugal, or a Portuguese undertaking *posting* workers abroad, is considered not to be performing substantial activities in the State of establishment and, therefore, is acting abusively or fraudulently to create the impression that it is posting workers.

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filled and are equivalent or comparable to those applicable in Portugal, requirements or controls enshrined in Portuguese law shall not be demanded.

### 3.2. *The territorial scope of application of the Portuguese posted workers regime*

The Portuguese legal regime on posted workers has the peculiar feature, according to article 8 of the PLC, of being expressly applicable to Portuguese undertakings posting workers abroad.

While article 7(1) of the PLC, concerning employment conditions of workers posted in Portugal, provides that such posted workers have the right to the working conditions provided for by law and collective labour regulations of general efficacy [in Portugal], which respect to a set of subjects indicated therein, in line with Directive 96/71, article 8(1), concerning specifically the posting of workers by Portuguese undertakings to another State, sets forth that “[a] worker hired by a company established in Portugal and working in the territory of another State in a situation referred to in article 6 is entitled to the working conditions provided for in the previous article [article 7]”. The provisions applicable to workers posted in Portugal by foreign undertakings are therefore applied equally to workers posted abroad by undertakings established in Portugal. The provisions are exactly the same as those set forth in article 7(1) of the PLC.<sup>19</sup>

Another peculiar feature of the Portuguese regime on posted workers is, as already alluded, that it is indistinctly applicable to workers posted in Portugal by undertakings established in an EU MS (or, as we have mentioned, to workers posted in another MS by Portuguese undertakings), as well as to workers posted in Portugal by undertakings established in a non-EU State (third country), and to workers posted in third countries by Portuguese undertakings.

### 4. *Employment terms and conditions applicable to posted workers*

Article 7(1) of the PLC implements article 3(1) of Directive 96/71, keeping the wording previous to Directive 2018/957, as alluded above. This article provides that “notwithstanding a more favourable regime established by law or employment contract, the posted worker has the right [in Portugal] to the working conditions provided for by law and collective labour regulations of general efficacy, which respect to: [...] b) maximum duration of working time; c) minimum rest periods; d) holidays; e) minimum remuneration and payment

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<sup>19</sup> On the Portuguese legislator’s option to extend the scope of application of Portuguese legal provisions on posted workers to workers posted abroad by Portuguese undertakings, see L. DE LIMA PINHEIRO, *Direito Internacional Privado, Volume II, Direito de Conflitos – Parte Especial*, Almedina, 3<sup>rd</sup> edition, 2009, 301-302.

of additional work; *f*) assignment of employees by a temporary employment agency; *g*) occasional hiring of employees; *h*) work safety and health; *i*) protection in parenthood; *j*) protection of minors' work; *l*) equality of treatment and non-discrimination”.

The reference, in Article 7(1) of the PLC, to the circumstance that the provisions of Portuguese labour law and collective labour regulations with general efficacy shall be applied to workers posted in Portugal, “notwithstanding a more favourable regime established by law or employment contract”, leaves no doubt that such national provisions shall be applied irrespective of the law governing the individual employment contract and the provisions of the contract itself. This will be so, of course, unless the law governing the individual employment contract of the posted worker, or the contractual provisions themselves, are more favourable to the posted workers than Portuguese Law provisions on the matters listed in article 7(1).

#### 4.1 *Collective agreements with erga omnes effects in Portugal*

Even though article 7(1) of the PLC expressly refers “working conditions provided for by law and collective labour regulations of general efficacy”,<sup>20</sup> we must point out that, in Portugal, collective agreements (and, of course, arbitration awards) do not, in themselves, have *erga omnes* effects, in the sense of having general efficacy for all the workers in Portuguese territory in a certain sector of activity/industry, comparable to the efficacy of provisions set forth by the legislator.<sup>21</sup>

Even if that provision must be interpreted as referring to collective agreements whose effects have been administratively extended to all undertakings in a particular sector, or sectors, of activity in Portugal, according to the recent case law of the Portuguese Supreme Court, uncontradicted by the courts of appeal, such extension shall not include employees who are affiliated to trade unions other than those that entered into the extended collective agreement.<sup>22</sup>

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<sup>20</sup> Portuguese collective agreements are published in *Boletim do Trabalho e Emprego*, available at <http://bte.gep.msess.gov.pt/>.

<sup>21</sup> See, for example, J. LEITE, *Subsídios para uma leitura constitucional da convenção colectiva*, in *Estudos de Direito do Trabalho em Homenagem ao Professor Manuel Alonso Olea*, Almedina, 2004, 397 ff., or J. GOMES, *Algumas questões sobre o âmbito pessoal de aplicação da convenção colectiva à luz do Código do Trabalho*, in *Revista de Direito e de Estudos Sociais*, 2016, 1-4, 37 ff.

<sup>22</sup> Judgment of the Portuguese Supreme Court (STJ) of 20 June 2018, available at <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/8d92715a3e668f43802582b40030351c?OpenDocument>. On this point, with several references, see A.T. RIBEIRO, *Os desafios atuais à*

In this light, the possibility that workers in a particular sector in Portugal are not subjected to a collective agreement administratively extended to that sector through an Extension Ordinance may pose challenges to the application of the working conditions provided in such collective agreements to workers posted in Portugal. In effect, if collective agreements, even when administratively extended to a certain sector in Portugal, may not be applicable to all employees in that sector working in Portugal, imposing their contents to companies posting workers in Portugal may be regarded as deviating from the idea of ensuring posted workers the conditions of work provided for by law, or by collective agreements universally applicable, on the basis of equal treatment between Portuguese employees working in Portugal and (foreign) workers posted in Portugal.<sup>23</sup>

At a more general level, we would add that, in our view, the absence of a clear provision, in Directive 96/71, regarding the identification of the collective agreements that, in States deprived of a system for declaring collective agreements of universal application, might have to be respected by foreign undertakings posting workers in such States, is capable of giving rise to doubts and litigation.

The amendment introduced by Directive 2018/957 to article 3(8), paragraph 2, of Directive 96/71 – which now reads “[i]n the absence of, *or in addition to*, a system for declaring collective agreements or arbitration awards to be of universal application [emphasis added]” – has brought some change. However, the practical impact that this amendment may have in the MS is difficult to foresee at this moment. This amendment may lead to situations

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*contratação coletiva – tese apresentada à Universidade Católica Portuguesa para obtenção do grau de Doutor em Ciências Jurídicas*, Author’s Edition, Porto, 2019, 291.

<sup>23</sup> The Judgment of the Court of Justice in case C-626/18, *Poland v. Parliament and Council*, ECLI:EU:C:2020:1000, confirms the view that equality of treatment as regards terms and conditions of employment of posted workers and workers employed by undertakings established in the host MS continues to be one of the main tenets of Directive 96/71. The Judgment of the Court of Justice in case C-346/06, *Rüffert*, ECLI:EU:C:2008:189, was not contradicted by the Court of Justice in its Judgment in case *Poland v. Parliament and Council*. See paragraphs 57 ff. and, in particular, paragraph 60, pointing out that “Article 1(2)(a) of the contested directive makes changes to Article 3(1) of Directive 96/71, referring to equality of treatment as the basis for the guarantee that must be given to posted workers in relation to terms and conditions of employment [...] extend[ing] the list of matters affected by that guarantee to [a number of other conditions in other matters, such as] conditions of workers’ accommodation”. See also paragraph 106 stating that the 96/71 Directive “has in no way the effect of eliminating all competition based on costs. The directive provides that posted workers are to be entitled to a set of terms and conditions of employment in the host Member State, including the constituent elements of remuneration *rendered mandatory in that Member State*. That directive does not, therefore, have any effect on the other cost components of the undertakings which post such workers” [emphasis added].

where the principle of equality of treatment between national workers (and their employer undertakings) and foreign undertakings and their (posted) workers is not respected. In effect, there is a risk that, in some MS, this amendment may be interpreted as allowing them to impose on foreign undertakings posting workers therein the obligation to respect conditions of employment set forth in collective agreements deprived of *erga omnes* effects in situations where not all workers are effectively subject to those collective agreements. This is likely to originate protectionist effects vis-à-vis service providers from other MS.

#### 4.2. Principle of application of the most favourable law

The principle of application of the most favourable law to the posted worker, established in article 3(7) of Directive 96/71, is implemented in Portugal through article 7(1) of the PLC, which determines that, notwithstanding a more favourable regime established by law or employment contract, a worker posted in Portugal has the right to the working conditions provided for by Portuguese law, which we shall address below.<sup>24</sup>

In essence, for each of the matters listed in article 7(1), a case-by-case comparison has to be made between the provisions of the law governing the individual employment contract (according to article 8 of Rome I Regulation, or article 6 of the Rome Convention), the provisions set forth by the parties in the individual employment contract itself, and the provisions of Portuguese Law with *erga omnes* effects. The provision granting the most favourable result to the posted worker in the case at hand shall be the provision applicable. The assessment of what is the most favourable result for the posted worker in each case may not be an easy task, especially since Portuguese Law does not grant the posted worker the possibility to decide which result is the most favourable to him/her.

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<sup>24</sup> With the sole exception of the Judgment of 22 May 2019 of the Tribunal da Relação do Porto (Court of Appeal of Porto) on case 4800/16.1T8MTS.P1, mentioned above, there is an absence of relevant case law in Portugal, concerning the application of the principle of the most favourable law provided by article 7(1) of the PLC. There is also limited analytical development in Portuguese literature devoted to the interpretation of this provision. See, in this regard, addressing, however, the principle of the application of the most favorable law as provided in article 7(3) of Directive 96/71, A. FRADA DE SOUSA, *A Europeização do Direito Internacional Privado ...*, cit., 822 ff., *maxime* 830 ff. See also, in Portuguese literature, E. GALVÃO TELES, *Sobre o critério da “lei mais favorável” nas normas de conflitos*, in J. MIRANDA, L. DE LIMA PINHEIRO, D. MOURA VICENTE (org.), *Estudos em Memória do Professor Doutor António Marques dos Santos*, Almedina, 2005, 193 ff.

#### 4.3. *Terms and conditions of employment applicable to posted workers according to the PLC – the problem of “remuneration”*

As alluded, article 7(1)(e) of the PLC sets forth that workers posted in Portugal have the right to benefit from the legal regime concerning “minimum remuneration and payment of additional work”. It is surprising that, in Portugal, this provision remained unchanged after the transposition of Directive 2018/957, which no longer refers to “minimum rates of pay, including overtime rates”, as the original Directive 96/71 did, but to “remuneration, including overtime rates” instead.

It is in article 4(1)(i) and article 5(3)(e)(ii) of Act 29/2017 that we now find references to “remuneration”, instead of “minimum remuneration”. The first of these two provisions states that “[i]n order to verify the status of a worker temporarily posted in Portuguese territory, providing his/her activity in the conditions set forth in article 6(1) and (2) of the PLC, the competent authority [ACT] shall consider the following elements, which characterize the situation of the employer: [...] remuneration, the subsidies and benefits inherent to posting, assuming that these are paid as reimbursement of expenses for travel, food and lodging, when it is not possible to determine the elements paid as remuneration”. The second provision states that “access shall be provided, gratuitously, to detailed information concerning the working conditions applicable to workers posted in Portugal, namely in matters concerning: [...] (ii) remuneration, including its constituent elements, according to the law or applicable collective labour regulation of general efficacy”. However, Article 4 concerns the ascertaining of a situation of posting by the ACT, while Article 5 relates to the duty to provide access to information on the working conditions applicable to posted workers in Portugal by the ACT. It is, therefore, quite farfetched to argue that article 5 of Act 29/2017 (on the *Access to information*) and, especially, article 4 (on the *Assessment of a situation of posting*) may constitute a legal basis for imposing an obligation on service providers from other MS posting workers in Portugal to respect all legal provisions and collective labour regulations of general efficacy concerning remuneration and its constituent elements, and not only “minimum remuneration” provisions.

This, in our view, constitutes an incorrect transposition of Article 3(1)(c) of Directive 96/71, as amended by Directive 2018/957.

Moreover, Portuguese law does not provide significant concretization of the notion of minimum remuneration when it sets forth, in article 7(1)(e), that posted workers have the right to benefit from the application of the provisions of Portuguese law concerning “minimum remuneration and payment of additional work”. This provision includes the mandatory “payment of additional work” within the scope of the remuneration to which the worker posted in Portugal shall be entitled to, unless the foreign law governing the individual

employment contract provides a more favourable regime. The express inclusion of the payment of additional work, by Portuguese Law, as a mandatory benefit for posted workers obviously represents a form of concretization of the notion of remuneration.

Moreover, according to Article 7(2)(a) of the PLC, “[t]he minimum remuneration includes the allowances or benefits allocated to the worker on account of the posting that do not represent reimbursement of expenses incurred, namely travel, accommodation and meals”. This latter densification of the concept of remuneration constitutes an almost literal transposition of article 3(7) of Directive 96/71 (prior to the changes introduced by Directive 2018/957, when that provision set forth (in its original version) that “[a]llowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging”).

Another point to consider is that article 7(2)(b) of the PLC establishes that “minimum remuneration and additional work pay shall not apply to the secondment of a qualified worker by an undertaking supplying the goods in order to carry out the initial assembly or installation necessary for its operation, provided that it is integrated in the supply contract and its duration does not exceed eight days in a period of one year”.<sup>25</sup> Again, this provision almost literally transposes article 3(2) of Directive 96/71 in its original version.<sup>26</sup>

#### 4.4. *The inclusion of provisions concerning “job security” among the terms and conditions applicable to posted workers – a Portuguese peculiarity*

With respect to the working conditions mandatorily applicable to posted workers – either workers posted in Portugal by foreign undertakings or workers posted abroad by Portuguese undertakings – listed in Article 7(1) of the PLC, such list diverges from the list in Article 3(1) of the 96/71 Directive in one significant way, in addition to the already alluded divergence

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<sup>25</sup> The same regime applies to “minimum paid annual holidays”, according to Article 7(1)(d) of the PLC, implementing Article 3(1)(b) of Directive 96/71, which now refers, as amended by Directive 2018/957, to “minimum paid annual leave”.

<sup>26</sup> Article 7(3) adds, in any case, that this exclusion of application enshrined in article 7(2)(b) “does not include the secondment in construction activities that aim at the realization, repair, maintenance, alteration or elimination of constructions, namely excavations, embankments, construction, assembly and disassembly of prefabricated elements, installation of equipment, transformation, renovation, repair, maintenance or maintenance, namely painting and cleaning, dismantling, demolition and sanitation”.



concerning “remuneration” matters. In effect, article 7(1)(a) includes “job security” among the conditions to which a worker posted in Portugal by a foreign undertaking is entitled to benefit from.<sup>27</sup>

This inclusion results from the fact that the Portuguese Constitution, in its article 53, provides that “workers shall be guaranteed job security, and dismissal without fair cause or for political or ideological reasons shall be prohibited”.

Some Portuguese commentators argue that this provision is a mandatory overriding statute that shall be applied irrespective of the fact that the law applicable to the employment contract is a foreign law (by application of the choice of law rules which grant competence, in principle, to the law of State where the worker’s activity habitually takes place). According to that literature, if the employee has been dismissed without a fair case, as understood by Portuguese law, the immediate and autonomous application of Article 53 of the Portuguese Constitution shall occur, as long as the employee is a Portuguese national or habitually resides in Portugal and the employer is Portuguese.<sup>28</sup>

The Portuguese legislator considered that when a worker is posted in Portugal, even if the law governing his/her individual employment contract is a foreign one, such worker shall benefit, while posted in Portugal, from the protection granted to all Portuguese workers, in Portugal, and to Portuguese workers working abroad for a Portuguese undertaking, unless the law govern-

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<sup>27</sup> Article 7(1)(i) of the PLC evidences another difference worth mentioning to the extent that it includes, in general, “protection in parenthood” among the conditions mandatorily applicable to posted workers in Portugal, whereas article 3(1)(f) refers, more narrowly, to “protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth”. The reference to mandatory measures concerning the protection in parenthood reflect a concern of the Portuguese legislator in ensuring a higher level of equality of treatment between men and women, since such mandatory measures also include measures applicable to men who are either going to be, or have recently become fathers.

<sup>28</sup> See, for all, RUI MOURA RAMOS, *Da lei aplicável ao contrato de trabalho internacional*, Almedina, 1991, 791-792, who was the first author to propose, in Portugal, such characterization of article 53 of the Portuguese Constitution as an overriding mandatory provision. In this sense, in a transnational individual employment contract, even if governed by a foreign law, as long as there is a strong connection with Portugal, employees that have been dismissed without fair cause may claim the protection of article 53 of the Portuguese Constitution and of the legal provisions on workers’ dismissal of the PLC, which densify the prohibition enshrined in article 53 of the Portuguese Constitution. This understanding of Article 53 of the Portuguese Constitution as an overriding mandatory provision with a peculiar scope of application vis-a-vis the applicable law according to the rules of relevant choice of law has been followed in several judgements of Portuguese Courts. See Tribunal da Relação do Porto (Court of Appeal of Porto), judgment of 25 November 1991, *Coletânea de Jurisprudência V*, 232-234, *STJ*, judgment of 30 September 1998 (Proc. 98S131); Tribunal da Relação de Lisboa (Court of Appeal of Lisbon), judgment of 5 July 2000 (Proc. 0079374).

ing the contract or the provisions of the contract themselves are more favourable to the worker than Portuguese provisions on this matter.

#### *4.5. New terms and conditions mandatorily applicable to posted workers after Directive 2018/957*

Article 3-A(1)(a) of Act 29/2017 was added by Decree-Law no. 101-E/2020. As alluded, it provides that posted workers in Portugal shall be entitled to the “conditions of workers’ accommodation, where provided by the employer”. Consequently, undertakings established in other MS posting workers to Portugal shall defray, as set forth by Article 194(4) of the PLC, “the expenses of the worker as a result of the increase of the costs of accommodation [...], in case of temporary transfer”. When accommodation is not provided by the employer, the posted worker, according to Portuguese law, shall be entitled – as it would happen in the case of temporary transfer of the place of work of any employee within the Portuguese territory – to receive an amount to cover the expenditures resulting from the additional costs related with accommodation as a consequence of his/her posting to Portugal. It must be noted, however, that the right to such amount “may be excluded by a collective labour regulation instrument”, as provided by Article 194(5) of the PLC.

The posted worker shall benefit, in any case, from the regime which is more favourable to him/her in this matter, resulting either from the law governing the individual employment contract concluded between the worker and the undertaking posting him/her in Portugal, or from the provisions of such individual employment contract.

The worker hired by an undertaking established in Portugal performing his/her activity in the territory of another State has the right to the conditions we just described as well.

Also article 3-A(1)(b) of Act 29/2017 was added, providing that workers posted in Portugal by undertakings of other MS shall be entitled to the “grants, allowances or reimbursements purporting to cover exclusively the expenditures with travel, board and lodging incurred by posted workers where they are required to travel to and from their regular place of work in the MS 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”.

Again, the posted worker shall benefit from the regime which is more favourable to him/her.

Similarly, and still with the exception that a more favourable regime is applicable, a worker hired by an undertaking established in Portugal and performing his/her activity in the territory of another State also has the right to

the conditions just described concerning grants, allowances or reimbursements purporting to cover exclusively the expenditures with travel, board, and lodging.

##### *5. Long duration posting – implementation of new article 3(1a) of Directive 96/71*

The new Article 3-C(1) of Act 29/2017, as amended by Decree-Law 101-E/2020, transposes almost literally article 3(1a) of Directive 96/71, as amended by Directive 2018/957, which provides that “[w]here the effective duration of a posting exceeds 12 months, MS 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 [...] all the applicable terms and conditions of employment which are laid down in the MS 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 Portuguese legislator made a copy-paste transposition of the subsequent section of article 3(1a) (2<sup>nd</sup> subparagraph) of Directive 96/71, which provides that such general application of all the terms and conditions of employment of the State of destination, after the 12-month period, shall not apply, *inter alia*, to “procedures, formalities, and conditions of the conclusion and *termination* of the employment contract” [emphasis added].

The Portuguese legislator evidently forgot that, as mentioned above, among the working conditions mandatorily applicable to workers posted in Portugal by foreign undertakings, listed in Article 7 of the PLC, we find “job security”. It must be stressed that the Portuguese legislator included job security as a mandatory condition applicable to workers posted in Portugal, under the public policy provisions referred by article 3(10) of Directive 96/71, although that matter is not included in the list of Article 3(1) of Directive 96/71. This oversight from the Portuguese legislator is rather unfortunate, since it excludes the application of national provisions concerning the conditions of termination of the employment contract following the 12-month period, when such provisions, as expression of the principle of protection of job security, were already applicable to the contract before the termination of such period.

Lastly, the new sections (3), (4) and (5) of article 3-C of Act 29/2017 adequately transpose the remaining paragraphs of Article 3(1a) of Directive 96/71. Section (3) determines that “where a motivated notification is submitted to the *ACT* indicating the reasons that explain the extension of the duration of the

posting [after 12 months], the conditions mentioned in Article 3-C(1) are applicable after 18 months of effective duration of the posting”. According to section (4), “in those cases where the anticipated duration of the posting is inferior to 12 months, the already alluded motivated justification shall be submitted with the minimum anticipation of 30 days regarding the end of that period of anticipated duration of the posting”.

Finally, subparagraph 5 of article 3-C provides that “where a posted worker is replaced by another posted worker, the duration of the posting shall correspond to the accumulated duration of the posting periods of all those workers, as long as they have been posted to perform the same task, at the same place, taking into consideration the nature of the service to be provided, the work to be performed, and the address(es) of the workplace”.

#### *6. Temporary agency workers hired out by temporary work agencies as provided by new article 3(1b) of Directive 96/71*

Article 3-B(1) of Act 29/2017 provides that “[n]otwithstanding a more favourable regime established by law or employment contract, or what is provided in article 7 of the Labour Code [and the relevant provisions of Act 29/2017], the posted worker has the right to all the labour conditions applicable to temporary workers hired out by temporary employment agencies established in Portugal”. This provision implements article 3(1)(b), paragraph 1, of Directive 96/71 in Portugal with the wording given by the Amending Directive.

It must be pointed out that article 3-B(1) of Act 29/2017 refers to cases of posting of workers in Portugal by temporary employment agencies of other MS. However, the Portuguese legislator, in consonance with what is provided by article 8 of the Labour Code, extends the application of the provisions applicable in Portugal to temporary employment agencies established in Portugal posting workers to other MS.

In essence, the labour conditions applied to temporary workers posted in Portugal cover all the provisions of the PLC that either set conditions or limit the use of temporary workers by user undertakings (articles 175 and 176), as well as all the other provisions that govern the contracts for the use of temporary work and, in some way, constitute an expression of the constitutional principle of job security in Portugal (for instance, articles 177 to 179). The labour conditions applied to temporary workers posted in Portugal shall also include those provisions of the PLC that regulate the regime for the provision of temporary work (articles 185 to 192).

Article 3-B(2) adds that “the user undertaking shall inform the temporary

employment undertakings of the labour conditions that it applies, including remuneration”. This provision implements article 3(1b) (2<sup>nd</sup> paragraph) of Directive 96/71 quite literally in Portugal. Similarly, to implement article 1(3) (c) (2<sup>nd</sup> paragraph) of Directive 96/71 with the wording given by the Amending Directive, a new provision was added to Act 29/2017 by Decree-Law 101-E/2020. We refer to paragraph 4 of the new article 3-B. This provision sets forth that, when a worker hired out by a temporary employment undertaking to a user undertaking is to carry out work in the framework of the transnational provision of services in the territory of a MS other than the State where the worker is posted (working for the temporary employment undertaking or for the user undertaking), the user undertaking shall, before the beginning of the work activity [i.e. “in due time”, as literally set forth in article 1(3)(c)(2<sup>nd</sup> paragraph) of the Directive], inform the temporary employment undertaking which hired out that worker of that fact.

Article 3-B(5) further provides that, in the case of an illegal hiring out of the worker, in violation of the aforementioned article 3-B(4), the worker shall be considered to be posted by the temporary employment undertaking with whom the worker is in an employment relationship in the territory of the State where he/she carries out the work.

This provision does not correctly implement Article 1(3)(c) (1<sup>st</sup> paragraph) of Directive 96/71 (after the Amending Directive). In effect, that article provides, very clearly, that “[w]here a worker who has been hired out by a temporary employment undertaking [...] to a user undertaking [...] is to carry out work in the framework of the transnational provision of services [...] by the user undertaking in the territory of a MS other than where the worker normally works for the temporary employment undertaking [...], or for the user undertaking, the worker shall be considered to be posted to the territory of that MS by the temporary employment undertaking or placement agency with which the worker is in an employment relationship”. It adds, only subsequently, (in the 2<sup>nd</sup> paragraph, as mentioned above), that “[t]he user undertaking shall inform the temporary employment undertaking or placement agency which hired out the worker in due time before commencement of the work”.

According to the Directive, the absence of provision of such information by the user undertaking is, quite obviously, not the triggering event the worker to be considered posted by the temporary employment undertaking in the territory of the State where he/she is effectively carrying out work for the user undertaking. However, that is precisely what the provision of Portuguese law – article 3-B(5) of Act 29/2017, with the wording given by Decree-Law 101-E//2020 – sets forth. This provision creates a perverse incentive for user undertakings in Portugal – an incentive to remain silent and not inform the temporary employment undertaking that the posted temporary worker is going to

carry out his/her work in a different MS. If the Portuguese user undertaking wants to avoid having a worker considered as its posted worker, all it has to do is say nothing to the foreign temporary employment undertaking.

In other words, the infringement, by the Portuguese user undertaking, of the duty to inform the temporary employment undertaking that the worker is to carry out the work in a different State is what triggers the worker to be considered posted to the territory of that different State by the temporary employment undertaking. This constitutes an incorrect implementation of the Amending Directive, and it is not easy to tackle this incorrect transposition through consistent interpretation of Portuguese Law in the light of EU law.

### *7. The transposition of Directive 2014/67/EU (after Directive 2018/957)*

As explained above, Directive 2014/67/EU was implemented at national level through Act 29/2017. As the transposition period had ended on 18 June 2016, there was a delay of approximately one year.

The transposition was made correctly. Indeed, in general terms, the diploma reflects the sequence of subject matters followed in the Directive.

Despite the recent rulings of the CJEU in cases C-33/17, *Čepelnik*, and C-645/18, *Bezirkshauptmannschaft Hartberg Fürstenfeld*, Act 29/2017 requires no amendments, since it contains no prescriptions similar to those under analysis.

Furthermore, the national regime implementing Directive 2014/67 has remained almost unchanged after Decree-Law 101-E/2020, which transposed Directive 2018/957. As already said, although this diploma republished Act 29/2017, the main amendments therein contained did not affect the rules of transposition of Directive 2014/67. In fact, if we analyse the Amending Directive, we conclude that it addresses the *material* regime of the protection of posted workers set forth by Directive 96/71/EC, at European level, and originally by the PLC, at national level.

However, some minor amendments have been introduced to the *enforcement* regime, to keep it in line with the material modifications brought by the Decree-Law. Even if not imposed by Directive 2018/957, those few changes are suggested in its Preamble and they result from the concerns expressed therein, such as the reinforcement of the tools to identify situations of posting or the improvement of the information given to posted workers. The following paragraphs provide a brief overview of those amendments.

Firstly, regarding administrative cooperation between MS, Act 29/2017 provides time limits for information requested by other MS to be provided: ar-

article 7(1) sets forth that the competent national authority shall provide the information requested by other MS or the European Commission, electronically, within the following deadlines: a) up to two working days from the date of reception of the request, in urgent cases, duly substantiated, that require consultation of records; b) up to 25 working days from the date of reception of the request, for all other requests for information, except when a shorter period is mutually agreed. A new paragraph has been introduced to article 7, by Decree-Law no. 101-E/2020, which provides the measures to be taken by the ACT in case of persistent unjustified delay (measures that have also been reinforced in accordance with the new wording of article 6(3), amended on the same occasion).

Secondly, Decree-Law 101-E/2020 amended article 8 of Act 29/2017 by adding a new subject – possible cases of unlawful activities, such as transnational cases of undeclared work and bogus self-employment linked to the posting of workers – to the list of information on service providers or services provided by them that shall be disclosed by the ACT in the context of administrative cooperation.

It is also worth mentioning article 12 of Act 29/2017, which refers to liability in cases of subcontracting. According to this article, the contractor to whom the service is provided is jointly responsible for the payment of the wages due by the service provider to the posted worker, although that responsibility only refers to the rights acquired within the context of the contractual relationship between the contractor and the service provider as a direct subcontractor. Before Decree-Law 101-E/2020, the regime of article 12 was merely applicable when posting to Portugal, excluding postings to foreign countries, a situation that, according to some literature, might constitute unjustified discrimination.<sup>29</sup> However, the new wording of article 12, in force since Decree-Law 101-E/2020, clarifies that the situations of posting to foreign countries are also included in that provision of joint liability.<sup>30</sup>

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<sup>29</sup> D. CARVALHO MARTINS, *Mobilidade de trabalhadores no âmbito da UE: lei aplicável, destacamento e competência internacional*, Documentación Laboral, Ejemplar dedicado a: *La recepción del Derecho de la Unión Europea en los ordenamientos laborales de España y Portugal*, 2018, 113, 104.

<sup>30</sup> The national legislator did not use the optional provisions of the Directive (article 12(1) *in fine*) to allow joint or alternative liability for the payment of “contributions due to common funds or institutions of social partners”, determining such liability only in the field of wage payment. He also did not take advantage of the possibility to limit contractors’ liability when due diligence obligations were undertaken (Article 12/5, of the Directive). Furthermore, while under article 12(2) of the Directive it is possible to circumscribe the contractor’s liability regime to the construction sector, the Portuguese legislator has extended it to all sectors of activity. See KÁTIA COSTA E SILVA, *Mobilidade transnacional de trabalhadores e empresas: algumas considerações práticas sobre o destacamento de trabalhadores*, 328.

## 8. Conclusion

Overall, the legal framework adopted in Portugal for the implementation of Directive 2018/957 can be considered adequate, although the transposition of the Directive was made, in general, in a literal way and, from a formal and systematic point of view, the model of transposition adopted is unfortunate.

In fact, the transposition of Directive 96/71 was made through provisions of the PLC, whereas Act 29/2017 was the piece of legislation that implemented Directive 2014/67, which was not amended by Directive 2018/857. Still, the transposition of the provisions of Directive 2018/857 was made through the amendment of Act 29/2017 by Decree-law 101-E/2020.

The provisions of the Portuguese Labour Code on the posting of workers were surprisingly left unchanged, with no consideration for the amendments introduced by the Amending Directive. This questionable option of the Portuguese legislator is likely to be a source of trouble and uncertainty, giving rise to contradictory interpretations of the legal provisions contained in the PLC and the now diverging legal provisions contained in Act 29/2019, as amended by Decree-Law 101-E/2020, which implemented the Enforcement Directive and now also implements the Amending Directive.

We identified, as described above, two instances of incorrect transposition of Directive 2018/957 – the transposition of Article 3(1b) of Directive 96/71, as amended, dealing with temporary employment undertakings in the context of chain posting, and the transposition of the Article 3(1)(c) of the 96/71 Directive, as amended, which now refers to “remuneration” and not, as in the original 96/71 Directive, to “the minimum rates of pay”.

The absence of transposition, in Portugal, of Article 3(1)(c) of Directive 96/71, as amended by Directive 2018/957, must, in our view, be tackled by the Portuguese legislator as soon as possible, since it can hinder the effective application of the European legal framework on posted workers in the country with respect to one central provision of that framework.

We also identified the unfortunate transposition of the new article 3(1a) of Directive 96/71, concerning the long duration posting of workers. Although not infringing Directive 2018/957, the transposition of said article does not contribute to increase the effective application of the European legal framework on posted workers in Portugal either. In effect, it introduces an accrued level of uncertainty concerning the application of the Portuguese legal provisions on job security, particularly (but not only) in cases of long duration postings, to workers posted in Portugal.

In what concerns the legal provisions that transposed Directive 2014/67/EU, it is doubtful that Directive 2018/957 and, obviously, Decree-Law 101-E/2020 have addressed all the problems. For example, the *ACT* considers that, despite



its advantages, the IMI does not entirely solve the difficulties inherent to the cross-border application of the rules concerning the posting of workers, namely those stemming from the diversity of languages: many official documents are uploaded in the original language and the translation is, in some cases, very burdensome. Directive 2018/957 and Decree-Law no. 101-E/2020 did not provide any measure to help solve these difficulties.

On the other hand, one may wonder if the Portuguese regime should be adjusted to situations of very short-term posting, as permitted, at least to some extent, by article 3(3) to (5) of the 96/71 Directive: according to Portuguese law, even in cases of very short-term posting, the service provider has to accomplish several obligations, namely the declaration referred to in article 9(1) of Directive 2014/67 and also in article 9(1) of Act 29/2017. Realistically, though, it is not easy to conceive inspection actions to take place in such cases (*e.g.*, workers posted for periods of 3 or 4 days).