



# STEP UP PROTECTION – STEPPING UP THE EUROPEAN COOPERATION AND COMMUNICATION AMONG PUBLIC & PRIVATE ORGANIZATIONS FOR THE PROTECTION OF POSTED WORKERS’ RIGHTS

**Mapeamento e análise de casos  
nos quais a legislação não é aplicada.  
(diretivas 96/71/CE; 2014/67/UE e 2018/957/UE)**

**1º ENCONTRO INTERCALAR  
5 DE FEVEREIRO DE 2021  
09:00 - 13:00**



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# Directive 2014/67 and its implementation at national level

## STEP UP Protection

Stepping up the European cooperation and communication among Public & Private organizations for the PROTECTION of posted workers' rights



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The information contained in this publication does not necessarily reflect the official position of the European Commission.

# General information (1)

- Directive 2014/67 intends to enforce Directive 96/71
- It was implemented at national level by Act no. 29/2017, of May 30<sup>th</sup>
  - There was a delay of approximately one year, since the period of transposition ended in June of 2016
- The prescriptions contained in this Act did not require any special amendment or accommodation vis a vis the rulings of the Court of Justice recently issued
- But that Act was amended by Act no. 101-E/2020, of Dezember 7<sup>th</sup>
  - This latter implemented at national level Directive no. 2018/957 (again with a delay: the period of transposition ended in July)

# General information (2)

- Act no. 29/2017
  - 27 articles (3 of them introduced by Act no. 101-E/2020)
  - In general terms, it follows the sequence of the Directive
  - Divided in 6 parts:
    - *General Dispositions* (articles 1-5);
    - *Administrative Cooperation* (articles 6-8);
    - *Supervision and Inspection* (articles 9-10);
    - *Protection of Posted Workers' Rights* (articles 11-12);
    - *Cross-border Enforcement of Financial Administrative Penalties and/or Fines* (articles 13-20; article 20 refers to IMI);
    - *Final Dispositions* (articles 21-24; this part includes the provision of the regime of breaches of the obligations prescribed in the diploma)

# General information (3)

- Statute no. 101-E/2020 introduced 3 new articles, in order to comply with obligations arising from Directive 2018/957: 3-A; 3-B and 3-C, prescriptions that shall be read together with article 7 of the Labour Code.
  - Article 3-A adds new items to the list of subjects in which posted workers shall benefit from a minimum level of protection – accommodation conditions, when provided by the employer; subsidies, allowances or reimbursements intended to cover travel, feeding and accommodation expenses
  - Article 3-B, on temporary posted workers' conditions, implements the amendments brought by Directive 2018/957 to Directive 96/71, intended to strengthen the protection given to those workers
  - Article 3-C relates to long term situations of postings of workers.
    - Directive 2018/957 establishes a higher level of protection for posted workers that last in that situation for periods longer than 12 months, by adding new paragraphs to article 3 (see article 1/2-b) of Directive 2018/957)

# Contents – brief notes (1)

- **Article 3** identifies the national authority entrusted with the obligations prescribed below, that is, the “competent authority” mentioned on article 2 of the Directive – *Autoridade para as Condições de Trabalho (ACT)*
  - The *ACT* is an administrative body that operates under the tutelage of the Ministry of Labour, Solidarity, and Social Security, and whose main function is to assess the compliance with the legal regulation of working conditions
- The *ACT* is also the entity responsible for requesting for assistance, information, notification, or recovery of a penalty and/or fine, as referred to in Chapter VI of Directive 2014/67
- Act no. 29/2017 does not specifically refer to any “liaison office”. However, that body (“*gabinete de ligação*”) exists in Portugal, in the sense that its functions, as defined in that article, are accomplished by the *ACT*

# Contents – brief notes (2)

- **Article 4 of Act no. 29/2017 (*Assessment of Situations of Posting of Workers*)**

- It corresponds to article 4 of the Directive
- National regulation uses apparently different criteria to determine whether an undertaking genuinely performs substantial activities that go beyond purely internal management and/or administrative activities
  - In addition to the elements listed in the Directive (article 4/2-a-e)), the national legislator added an additional criterion concerning the nature of the company's activity and the activities carried out by the worker (article 4/2-f), of Act. no. 29/2017).
  - On the other hand, national legislation did not transpose some aspects mentioned in the Directive, such as the relevance of a professional licence or registration within the chambers of commerce or professional bodies (article 4/2-a), *in fine*, of the Directive), nor did it attach importance to the law applicable to contracts concluded by the undertaking with its clients (article 4/2-c), *in fine*, of the Directive).
  - **In any case, we tend to consider that these differences do not correspond to a real breach of Directive, as the wording of the national legislation is exemplary, allowing such aspects to be equally valued.**
- Act no. 101-E/2020 introduced new evidences of posting situations and reinforced the tools to identify abuses or cases of circumvention

# Contents – brief notes (3)

- **Article 5: means by which information concerning working conditions for workers posted in Portuguese territory shall be disclosed**
  - The *ACT* provides this information via its website, which is kept up to date by a working group specialised in the posting of workers' issues, launched in 2013
  - There is also a guide bulletin which provides information on the posting of workers' regime to undertakings, employment inspectors, social partners, etc.
  - The *ACT* also discloses simple and concise information both on the posting of Portuguese workers to other countries and on the posting of foreign workers to Portugal, by means of leaflets
  - The information is given both in Portuguese and in other languages: English and French

# Contents – brief notes (4)

- **Articles 6-8: administrative cooperation between Member-States, and according to information disclosed by the ACT**
  - In order to comply with rules on protection of personal data, article 7/3 of Act no. 29/2017 states that the information exchanged between the competent authority and equivalent competent authorities of other Member States, must be used exclusively for the purpose, or purposes for which they were requested
  - Article 7 provides time limits within which information requested by other Member-State shall be provided: a) up to two working days from the date of reception of the request, in urgent cases, duly substantiated, which require consultation of records; b) up to 25 working days from the date of reception of the request, in relation to all other requests for information, except when a shorter period is mutually agreed
    - A new paragraph has been introduced on article 7, by Statute no. 101-E/2020, that provides the measures to be taken by the ACT in case of persistent unjustified delay
  - The ACT has concluded bilateral agreements, in the terms of article 21 of the Directive, with several Member-States: Spain; Netherlands; Poland, Romania, Moldavia, Belgium, Luxemburg, France and Ireland
  - The ACT considers that, despite its advantages, the IMI does not solve entirely the difficulties inherent to the cross-border application of the rules concerning posting of workers, namely those stemming from the diversity of languages
  - Between 2016 and 2019, the ACT received 824 requests filed through the IMI



# Contents – brief notes (5)

- **Article 9 (1-c))** sets up a period for the documents mentioned in article 9/1-b) of the Directive to be delivered: 1 year
- Article 11 transposes almost literally article 11/3 of the Directive; it states that associations, organisations, and other legal entities “may engage, on behalf or in support of the posted workers or their employer, and with their approval, in any judicial or administrative proceedings”
  - But it demands *express* authorization, which is not in accordance with article 5 of the Portuguese Labour Procedure Code (the authorization may be presumed)

# Contents – brief notes (6)

- Article 12: 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 the amendments brought by Statute 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. However, the new wording of that article 12, in force since Statute 101-E/2020, clarifies that the situations of posting to foreign countries are also included in that provision of joint liability
  - 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
  - It also did not take advantage of the possibility to limit contractors’ liability when due diligence obligations were undertaken (Article 12/5, of the Directive)
  - While under article 12, no. 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

# Contents – brief notes (7)

- Enforcement of financial administrative penalties and/or fines: posted workers may file a lawsuit against employers; they may also submit an administrative complaint to the ACT
- Penalties for breaches of the obligations arising from Directive 2014/67 provided under Portuguese law have an administrative nature; they are punished with administrative penalties, the amount varying on the severity of the offense and the degree of culpability (negligence or wilful misconduct) and being higher in case of recidivism; an accessory penalty (the public registration of the penalty or the temporary interdiction from exploring the economic activity in cause) may be applied in cases of repeated infringements
- Article 18, in accordance with Directive 2014/18, establishes the suspension of the procedure if any interested part files an appeal against the administrative decision
  - It shall be noted that, in the Portuguese case, this possibility of suspension is not provided under the general regime on administrative sanctions

# Conclusions:

- Apparently, the transposition is correct;
- There are cases of conflict between some of the prescriptions of Act no. 19/2017 and other general national prescriptions;
- The transposition of the Directive 2018/957 was made by Act no. 101-E/2020, which amends Act no. 29/2017 (this one concerned only the subjects of Directive 2014/67, not the Directive 96/71), but some of its modifications should have been introduced in the Labour Code; *ratione materiae*, that option would have been better in what concerns subjects related to Directive 96/71, because it is the Labour Code that transposes this latter

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