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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

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1. **Introduction**

This detailed staff working document accompanies the report ([1]) from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation by the Member States of Directive (EU) 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services ([2]) (the Directive).

Article 2 of the Directive requires the Commission to review the application and implementation of the Directive and to submit a report to the European Parliament, the Council and the European Economic and Social Committee, as well as to propose, where appropriate, necessary amendments to the Directive and to Directive 96/71/EC ([3]). In particular, the report has to include an assessment of certain provisions of the Directive in order to determine whether further measures are required to ensure a level playing field and protect workers, notably in the case of subcontracting and on the measures mentioned in Article 2(2)(b) and Article 3(3) of the Directive regarding the road transport sector.

Both the implementation report and this accompanying staff working document are sector neutral. Article 2(2)(b) of Directive (EU) 2018/957 requires the Commission to include in the report reviewing the application and implementation of the Directive an assessment of whether further measures to ensure a level playing field and protect workers are necessary on the posting of drivers in the road transport sector. This provision was included in case of non-adoption of the specific legislation on the posting of drivers in that sector. Since Directive (EU) 2020/1057 ([4]) was adopted, it is no longer necessary to include a specific assessment on the road transport sector as this will be evaluated in the report on the implementation of Directive (EU) 2020/1057 ([5]).

This accompanying staff working document presents the results of the review of the application and implementation of the Directive in greater detail than in the report to the EU institutions, which focuses on the main trends. It provides a general overview of how Member States have implemented the Directive but does not present an exhaustive account of all national implementation measures. In particular, this staff working document does not prejudge the stance which the Commission may take in connection with any infringement procedure on the compatibility of such measures with EU law.

In addition to the specific assessment on subcontracting, the report as well as this accompanying staff working document also include an analysis of the situation of posted third-country national workers. This is due to the recent increase in the posting of third-country national workers and its expected expansion in the future as an important intra-EU mobility channel ([6]).

([1]) COM (2024) 320.

([2]) Directive 2018/957/EU of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ L 173, 9.7.2018, p. 16.

([3]) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

([4]) Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012, OJ L 249, 31.7.2020, p. 49.

([5]) Directive (EU) 2020/1057 requires the Commission to evaluate its implementation by 31 December 2025.

([6]) Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023. The report is accessible via this link: ela-report-posting-third-country-nationals.pdf (europa.eu)

This accompanying staff working document also looks at the application and implementation of other provisions of Directive 96/71/EC that the Directive did not amend. Insofar as the available information allows, the staff working document also considered the practical effectiveness of the measures taken by Member States.

The report and this accompanying staff working document are based on the information on the national measures transposing the Directive that Member States have communicated to the Commission. The Commission has also collected information on the implementation of the Directive by the Member States through a questionnaire distributed to the members of the MoveS network ([7]).

In addition, the Commission has used the work carried out by the subgroup for the transposition of the Directive within the Expert Committee on Posting of Workers (the ECPW) ([8]) and it has also collected the views of Member States and social partners through a questionnaire distributed by the European Labour Authority (ELA) (the questionnaire on the implementation of the Directive).

The Commission has also taken into account a study supporting the monitoring of the Posting of Workers Directive (EU) 2018/957 and of the Enforcement Directive 2014/67/EU ([9]), in particular to assess whether further measures are necessary in order to ensure a level playing field and protect workers in the case of subcontracting.

When analysing the situation of posted third-country nationals, the Commission has paid particular attention to the recent work of ELA on this matter ([10]).

The Commission has also considered the information brought to the attention of the Commission by members of the European Parliament, citizens' complaints and petitions and various stakeholders.

2. **Transposition process**

Article 3(1) of the Directive required the Member States to transpose it by 30 July 2020.

To assist Member States with the transposition, the Commission set up a subgroup on the transposition of the Directive within the ECPW. By the deadline of 30 July 2020, 12 Member States (Belgium, Germany, Estonia, France, Lithuania, Hungary, Malta, the Netherlands, Poland, Romania, Slovakia and Sweden) had notified the Commission that they had fully transposed the Directive. Italy notified the Commission that it had fully transposed the Directive after the deadline.

Seel also Employment and social developments in Europe (ESDE) 2023 - Publications Office of the EU (europa.eu)

([7]) The Network of Legal Experts (MoveS) is a network of independent experts in the field of intra-EU mobility. MoveS stands for Free Movement of Workers and Social Security Coordination. The network is funded by the European Commission. It covers the 27 EU Member States, as well as Iceland, Liechtenstein, Norway and Switzerland.

([8]) Report of the subgroup on the transposition of Directive (EU) 2018/957, Report to the Committee of Experts on Posting of Workers (ECPW). https://ec.europa.eu/social/BlobServlet?docId=22913&langId=en

([9]) Study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU. This study has been prepared for the European Commission. It reflects the views only of the authors, and the European Commission is not liable for any consequence stemming from the reuse of this publication. https://op.europa.eu/en/web/general-publications

([10]) See footnote (6).

On 8 October 2020, the Commission sent letters of formal notice to 14 Member States who had not notified their transposition measures or had done so only partially ([11]).

On 9 June 2021, the Commission sent reasoned opinions to Austria and Slovenia. The other Member States notified their transposition measures in the meantime.

By November 2021, all 27 Member States had notified the Commission that they had fully transposed the Directive. All Member States had passed new laws or administrative acts or had amended existing acts.

3. Detailed analysis of Member States application and implementation of the Directive

3.1. Article 1 of the Directive

Article 1 of the Directive contains the amendments to Directive 96/71/EC. The Article is divided into five paragraphs which are explained in the sections below.

3.1.1. Article 1 (1) of the Directive: amendments to Article 1 (scope) of Directive 96/71/EC

Paragraph 1 of Article 1 of the Directive amends Article 1 of Directive 96/71/EC, which sets out its scope. It includes three points: (a), (b) and (c).

3.1.1.1. Point (a) – subject matter and scope

Point (a) amends the title of Article 1 of Directive 96/71/EC to better reflect its content following the amendments made by the Directive. This is a declaratory provision which is intended to clarify the content of Article 1 of Directive 96/71/EC.

3.1.1.2. Point (b) – aim of the Directive and the Monti clause

Point (b) inserts two new subparagraphs into Article 1 of Directive 96/71/EC: subparagraphs -1 and -1a.

Subparagraph -1 makes explicit the aim of the Directive, which is the protection of posted workers during their posting in relation to the freedom to provide services. This provision does not create any rights or legal obligations, but Member States should ensure that the aim of the Directive referred to in this new subparagraph is reflected in the national law transposing the Directive ([12]). National legislation in all Member States reflects this aim.

Subparagraph -1a is known as the Monti clause. The objective of this clause is to ensure the free movement of services within the EU, while acknowledging the right and freedom to take strike action in accordance with the industrial relations systems prevailing in the Member States. Both economic freedoms and the right to strike are thus respected.

This clause has been in the EU legal order since the adoption of the Monti Regulation in 1998 ([13]). In the area of the freedom to provide services and posting, this clause is also included in

([11]) Bulgaria, Croatia, Czechia, Denmark, Ireland, Greece, Spain, Cyprus, Latvia, Luxembourg, Austria, Portugal, Slovenia and Finland,

([12]) See subpoint 3.1.1.2 of the report of the subgroup on the transposition of Directive (EU) 2018/957, Report to the Committee of Experts on Posting of Workers (ECPW).

([13]) Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ L 337, 12.12.1998, p. 8.

the Services Directive ([14]) and in Directive 2014/67/EU ([15]) (the Enforcement Directive). Directive 96/71/EC also reflects this clause in recital 22 ([16]).

In practice, fundamental rights recognised by Member states and at EU level including the right to strike and the right or freedom to take other actions in the area of industrial relations are not affected by the provisions of the Directive. Nevertheless, subparagraph -1a is intended to recall, while also ensuring the free movement of services within the EU, the right and freedom to take strike action in accordance with the industrial relations systems prevailing in the Member States.

11 Member States ([17]) have included provisions in their national legislation reflecting the Monti clause, in some cases literally.

3.1.1.3. Point (c) – double or chain posting

Point (c) introduces two amendments to Article 1(3) of Directive 96/71/EC. The first amendment is of a purely editorial nature ([18]).

The second amendment adds to Article 1(3) of Directive 96/71/EC two new subparagraphs that address the situation known as double or chain posting. This is a situation where a worker is recruited by a temporary employment undertaking or placement agency (temporary employment agency) and hired out to perform work for a user undertaking. A double or chain posting occurs when the user undertaking sends the worker to temporarily carry out activities in a Member State other than the Member State where the worker normally works for the temporary employment agency or for the user undertaking to yet another Member State ([19]).

This means, in essence, that a worker is posted from Member State A to Member State B and is then further re-posted to Member State C.

The temporary employment agency and the user undertaking can be established/operating in the same Member State or in two different Member States. The provision is applicable in both cases, provided that the user undertaking sends the worker to carry out activities in a Member State other than the Member State where the worker normally works for the temporary employment agency or for the user undertaking ([20]).

In these situations, the worker is considered as being posted by the temporary employment agency with which the worker has an employment relationship. This means that it is the temporary employment agency which bears the responsibility of complying with all the provisions of Directive 96/71/EC and the Enforcement Directive. This is the case even when the temporary employment agency and the user undertaking are established in the same Member State.

([14]) Article 1(7) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36.

([15]) Directive 2014/67/EU of the European Parliament and of 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 ('the IMI Regulation'), OJ L 159, 28.5.2014, p. 11.

([16]) "Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions".

([17]) Greece, France, Croatia, Cyprus, Luxembourg, Malta, Portugal, Romania, Slovakia, Sweden and Finland.

([18]) See subpoint 3.1.1.3 of the report of the subgroup on the transposition of Directive (EU) 2018/957, Report to the Committee of Experts on Posting of Workers (ECPW).

([19]) See footnote 18.

([20]) See footnote 18.

In addition, the user undertaking is obliged to inform the temporary employment agency in due time if it is planning to send the worker hired out by the temporary employment agency to carry out activities in another Member State. For instance, the user undertaking to which the temporary agency worker has been posted (in Member State B) must inform the temporary employment agency (in Member State A) in due time before the posted temporary agency worker starts carrying out tasks in a further Member State (Member State C).

On this basis, within the scope of the Directive, Member States might be concerned from three different perspectives:
- as a Member State of establishment of the temporary employment agency (home Member State);
- as a Member State of establishment (or operation) of the user undertaking (home or host Member State);
- as the Member State where the activities are carried out following the double or chain posting (host Member State) ([21]).

Almost all Member States have regulated the situation of posted temporary agency workers in a chain posting situation.

Some Member States (Hungary, Slovakia) do not allow user undertakings to assign temporary agency workers to another employer. Hungary does not allow chain posting when it is the Member State of establishment of the temporary employment agency. Slovakia only allows chain posting for the situations covered by Article 1(3)(a) (posting under a contract of services) and 1(3)(b) (intra-company posting) of Directive 96/71/EC.

A large majority of Member States identify temporary employment agencies as the undertaking that make the posting. National legislation does not always specify this explicitly, but it can be inferred from the national legislation.

For instance, legislation in France does not explicitly specify that temporary employment agencies are the undertakings making the posting. However, it can be indirectly inferred from Article L. 1262-2-1 of the Labour Code, which requires the user undertaking that is established outside the national territory and that, in order to carry out its activity on the national territory, has recourse to posted workers made available by a temporary employment agency which is also established outside the national territory to inform the temporary employment agency which employs the posted workers before their posting on the national territory of the rules applicable to these posted workers.

23 Member States ([22]) have made specific reference to the user undertaking's obligation to inform the temporary employment agency in the case of double or chain posting. The other four Member States (Ireland, Croatia, Hungary and Slovenia) have not included this provision of information requirement in their legislation.

Some Member States require this information to be provided before commencement of the work (Belgium, Germany, Lithuania, Luxembourg, Malta, the Netherlands, Austria and Portugal), within a reasonable time before the posting (Denmark, Estonia, Greece, France and Cyprus) or without delay (meaning immediately) (Italy).

([21]) See footnote 18.

([22]) Belgium, Bulgaria, Czechia, Denmark, Germany, Estonia, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovakia, Finland and Sweden.

'In due time' has been further specified in some Member States, such as Romania (at least 30 days before starting the activity), Poland (at least 15 working days before the posting), Bulgaria (5 days before the posting) or Sweden (no later than 10 days before the commencement of the work). In Czechia, Germany, Latvia and Portugal, there is an obligation to inform 'in due time', without specifying what is to be understood as 'due time'. Finland does not state a specific timeframe for the user undertaking to inform the temporary employment agency.

Most Member States replying to the questionnaire on the implementation of the Directive have not prescribed a specific format for the obligation to inform the temporary employment agency in case of chain or double posting. Some Member States (Greece, France and Portugal) state that this information may be sent by any means. Others have stated that it has to be in writing (digital or paper) (Italy), according to the format agreed between the parties (Latvia) or depending on the choice of the service provider (the Netherlands). In Belgium, a specific form is provided to comply with the information obligation.

Conclusion

Almost all Member States have included the Directive's provisions on temporary employment agencies in a double or chain posting situation in their national legislation. A large majority identify temporary employment agencies as the undertaking that make the posting in these situations, explicitly or implicitly. Most Member States explicitly refer to the user undertaking's obligation to inform the temporary employment agency in the case of a chain or double posting. In this context, the timeframe for the user undertaking to inform the temporary employment agency on the double or chain posting situation, as reflected in the concept of 'in due time', varies between Member States.

3.1.1.4. Article 1(2) of the Directive – terms and conditions of employment, long-term posting, temporary agency workers, posting allowances, collective agreements and other terms and conditions of employment

Article 1(2) of the Directive introduces amendments to Article 3 of Directive 96/71/EC. It is divided in the following points:

- point (a) replaces paragraph 1 on the terms and conditions of employment;
- point (b) inserts two paragraphs into paragraph 1 on the terms and conditions of employment:
    - paragraph 1a on long-term posting; and
    - paragraph 1b on the application to posted workers employed by temporary employment agencies of the terms and conditions of employment pursuant to Article 5 of Directive 2008/104/EC on temporary agency work ([23]);
- point (c) replaces paragraph 7 on posting allowances;
- point (d) replaces the second and third subparagraphs of paragraph 8 on collective agreements;
- point (e) replaces two paragraphs:
    - paragraph 9 with respect to other terms and conditions of employment applicable to posted workers employed by temporary employment agencies; and
    - paragraph 10 on other terms and conditions of employment in the case of public policy provisions.

([23]) Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9.

3.1.1.4.1. Point (a) – terms and conditions of employment

This point makes the following changes to Article 3(1) of Directive 96/71/EC:

- the application to all sectors of the terms and conditions of employment from universally applicable collective agreements or arbitration awards or which apply according to Article 3(8) of Directive 96/71/EC;
- the concept of 'remuneration' replaces the concept of 'minimum rates of pay';
- two new elements are added to the core terms and conditions of employment: conditions of workers' accommodation, where provided by the employers to workers away from their regular place of work, and allowances or reimbursement of expenditure to cover workers away from home for professional reasons;
- information obligations are reinforced.

3.1.1.4.2. Application of universally applicable collective agreements to all sectors

Member States must now ensure the application to posted workers in all sectors of the terms and conditions of employment stemming from collective agreements or arbitration awards universally applicable or which apply in accordance with Article 3(8) of Directive 96/71/EC.

18 Member States apply terms and conditions of employment that stem from universally applicable collective agreements in all sectors ([24]). Most of these Member States had already provided for the application of universally applicable collective agreements to all sectors before the transposition of the Directive, with a few exceptions. In Germany, for example, the application of universally applicable collective agreements was limited to the construction sector (with the possibility of extension).

The other nine Member States ([25]) do not have universally applicable collective agreements but do apply sectoral collective agreements and/or national collective agreements (including territorial collective agreement in the case of Italy).

Conclusion

Within the scope of the Directive, Member States have included in their national legislation the provisions of the Directive related to the application of universally applicable collective agreements or arbitration awards or which apply in accordance with Article 3(8) of Directive 96/71/EC to posted workers in all sectors.

3.1.1.4.3. Remuneration

Replacement of 'minimum rates of pay' with 'remuneration'

The Directive replaces the concept of 'minimum rates of pay' with 'remuneration'. Member States must therefore ensure that workers posted to their territory benefit from 'remuneration', which is defined as all the elements of remuneration rendered mandatory by national law or collective agreements which have been declared universally applicable or which apply according to Article 3(8) of Directive 96/71/EC. This is one of the main amendments of the Directive.

The concept of 'remuneration' includes but goes beyond the concept of 'minimum rates of pay'. As already provided in Directive 96/71/EC for the 'minimum rates of pay', the concept of

([24]) Belgium, Bulgaria, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Latvia, Luxembourg, Hungary, the Netherlands, Austria, Portugal, Romania, Slovenia and Finland.
([25]) Czechia, Denmark, Italy, Cyprus, Lithuania, Malta, Poland, Slovakia and Sweden.

‘remuneration’ is to be determined by the national law and/or practice of the Member State to whose territory the worker is posted. The Directive does not therefore define the concept of ‘remuneration’.

It is up to the Member States and social partners (as the case may be) to determine which constitutive elements are mandatory for the workers in Member States (with the exception of measures concerning occupational pension schemes). In this context, Member States are not obliged to use the term ‘remuneration’ for the purpose of transposing the Directive.

The concept of remuneration does not require a posted worker to receive exactly the same salary and benefits as his/her local peers (e.g., group insurance and hospitalisation insurance). It rather refers to the salary scales and specific allowances/benefits mandatorily required by national legislation and/or universally binding collective agreements.

As for the concrete changes from ‘minimum rates of pay’ to ‘remuneration’, one common feature that can be discerned is that 11 Member States ([26]) have opted for what can be considered as a general or broad definition of “remuneration”. For example, in Belgium, ‘remuneration’ is defined as the salaries, benefits and allowances due by virtue of legal and administrative provisions sanctioned by criminal law, as well as by conventional provisions that have been declared universally binding (excluding contributions to supplementary pension schemes).

Some Member States (e.g., Bulgaria, Czechia, Spain, France, Cyprus, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania and Slovenia) have opted for an enumeration of mandatory elements of remuneration.

Three Member States (Denmark, Slovakia, and Sweden) do not have a specific definition of the concept of ‘remuneration’ at the national level. However, they do refer to the elements of such remuneration (Slovakia) or to the applicable collective agreements (Denmark and Sweden). In Denmark and Sweden, the terms and conditions of remuneration stem from the applicable collective agreement.

Two Member States (Czechia and Slovenia) have exceptions in their national legislation to the application of the concept of ‘remuneration’ to posted workers. These exceptions originate from the implementation of Directive 96/71/EC and were already related to the implementation of ‘minimum rates of pay’.

In Czechia, the remuneration applies only if the employee is posted to Czechia for more than 30 days in a calendar year (unless it is a posted worker from a temporary employment agency or placement agency). In Slovenia, the remuneration applies to postings of more than one month.

Two Member States (Ireland and Portugal) have not replaced the concept of ‘minimum rates of pay’ with ‘remuneration’.

14 Member States that responded to the questionnaire on the implementation of the Directive considered that the situation of posted workers had improved following the change from ‘minimum rates of pay’ to ‘remuneration’. Of the other Member States, some did not yet have appropriate data to measure the improvement; and others already had national legislation referring to remuneration before the adoption of the amendment or collective agreements fully

([26]) Belgium, Germany, Estonia, Ireland, Croatia, Hungary, Italy, Malta, Austria, Poland and Finland.

or primarily regulated remuneration in their national systems.

With respect to social partners, an EU level trade union that responded to the same questionnaire considered that equality of treatment between posted workers and local workers with regard to remuneration is one of the most important elements in the Directive. However, social partners also mentioned challenges for its practical application related, for instance, to the calculation of the gross amount of remuneration (see subpoint 3.1.1.4.7 of this staff working document regarding Article 1(2)(c) of the Directive on posting allowances).

Some employers' organisations that responded to the questionnaire viewed the change from 'minimum rates of pay' to 'remuneration' positively, but others expressed some concerns regarding the complexity to calculate the remuneration in practice (for instance regarding the applicable collective agreement). Some employers' organisations also considered that the change had not had such an impact because this was already covered by universally applicable collective agreements in some Member States.

An EU-level trade union mentioned the importance of the change from 'minimum rates of pay' to 'remuneration' and emphasised the challenges in its implementation, regarding for instance on collective agreements.

Some stakeholders interviewed in the context of the study supporting the monitoring of the Directive and of the Enforcement Directive emphasised the complexity of collective agreements and the challenges for employers and temporary employment agencies to understanding which provisions apply in general to posted workers (particularly as regards remuneration) ([27]).

Employers interviewed in the context of the study repeatedly emphasised that it can be a burdensome task to accurately determine the remuneration applicable to posted workers ([28]). This is because, as explained above, the Directive does not actually define remuneration. Only the elements of remuneration mandatorily applicable to all workers in the geographical area or sector are to be considered as remuneration.

Consequently, according to the study, the remuneration to be paid to a posted worker differs between Member States as well as between sectors of activity. This can lead to underpayment, because it is first necessary to know the minimum level of the remuneration to be paid. Any amount below this threshold is considered as an underpayment.

Conclusion and suggestions for further actions

Almost all Member States have included the provision on remuneration as established by the Directive in their national legislation. There are some difficulties in determining the remuneration applicable to posted workers with all its mandatory elements. These difficulties are mainly related to the complexity of determining the remuneration in practice. ELA could work, in close cooperation with Member States and social partners, on a tool to facilitate the calculation of the remuneration of posted workers and increase its transparency. Such a tool, for which the general elements could be established by ELA, would be used and implemented at national level.

([27]) See point 8.1.3 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([28]) See point 6.2.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

3.1.1.4.4. New elements of the terms and conditions of employment of the host Member State

The Directive adds two new elements to the list of core terms and conditions of employment of the receiving Member State that are to be granted to a worker posted to that Member State: point (h) on the conditions of workers' accommodation, where provided by the employer to workers away from their regular place of work; and point (i) on allowances or reimbursement of expenditure to cover travel, board and lodging for workers' away from home for professional reasons.

Conditions of workers' accommodation where provided by the employer to workers away from their regular place of work

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

Most Member States' legislation contains provisions that are applicable to national workers and entitle them to at least some accommodation rights when they are away from their regular place of work. These national provisions vary considerably from one Member State to another.

12 Member States ([29]) have provisions on conditions of accommodation when workers are away from their regular place of work, and these provisions are applicable to posted workers. Slovenia applies these provisions only to local workers posted abroad, so they do not apply to workers posted to Slovenia.

12 Member States ([30]) do not have such conditions of accommodation when the workers are away from their regular place of work in their national legislation. However, such conditions can feature in collective agreements or in individual employment contracts, as provided for by the collective agreements, and would cover posted workers (posted temporary agency workers in the case of Poland), except in Belgium and Ireland.

In Estonia, Austria, and Romania there is no obligation to provide accommodation to workers. In any event, Austria and Romania have included provisions on conditions of accommodation of posted workers in the national legislation implementing the Directive.

Some Member States and social partners (mainly employer organisations) that replied to the questionnaire on the implementation of the Directive considered that the new terms of employment regarding the conditions of accommodation had improved the situation of workers. Other social partners have considered that they had not improved the situation of workers because there are not sufficient data to evaluate this matter or because the accommodation was already defined in the national legislation.

Four Member States that replied to the same questionnaire also identified the following shortcomings which could affect accommodation conditions of posted workers: unsuitability, small size, equipment defect and inadequate electrical installations and sanitary facilities. To inspect those accommodation conditions, two Member States declared that it is necessary to have the consent, trust and effective cooperation of the posted workers, so that they report possible conditions of degradation of their housing situation and allow inspectors to access the premises.

([29]) Bulgaria, Czechia, Denmark, Germany, Greece, Latvia, Lithuania, Luxembourg, Hungary, Portugal, Slovenia and Finland.

([30]) Belgium, Ireland, Spain, France, Croatia, Italy, Cyprus, Malta, the Netherlands, Slovakia, Poland and Sweden.

An EU level trade union has mentioned in the questionnaire that substandard accommodation is a persistent concern for posted workers, in terms of both qualitative and quantitative elements. It has also emphasised the importance of correctly transposing Article 1(2)(c) of the Directive on posting allowances (see subpoint 3.1.1.4.7 of this report) in order to ensure decent accommodation to posted workers in all situations.

The study supporting the monitoring of the Directive and of the Enforcement Directive highlights a range of occupational, safety and health (OSH) issues related to the accommodation of posted workers ([31]). It stresses the fact that accommodation provided by employers can be of poor quality and overcrowded, leading to issues such as lack of sleep, which in turn increases the risk of work-related accidents ([32]). The study also points out that posted workers may live on-site in collective accommodation, which makes them sometimes face economic vulnerability and an increased dependence on their employer ([33]).

Allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons

Point (i) provides that the terms and conditions of employment in the host Member State include allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

The first subparagraph of Article 1(2)(a) of the Directive makes it clear that point (i) does not concern any allowances or reimbursement due to the posting itself (from the home to the host Member State) but concerns only travel during the posting assignment for professional reasons. It therefore applies when the workers are required to travel to and from their regular place of work in the host Member State and where the workers are temporarily sent by their employer from that regular place of work to another place of work.

Most Member States have provisions entitling national workers to reimbursement or compensation of expenditure related to travel, board and lodging. Such national provisions vary from one Member State to another.

In 18 Member States ([34]) reimbursement of, or compensation for, expenditure related to travel, board and lodging for workers away from home for professional reasons exists and is applicable to posted workers.

7 Member States (Belgium, Croatia, Cyprus, Italy, Malta, France, Sweden) regulate allowances or reimbursement of expenditure to cover travel, board and lodging expenses in collective agreements which apply to posted workers.

Slovenia does not have specific provisions to cover the reimbursement of expenses for travel, board and lodging for posted workers away from home for professional reasons.

([31]) See point 6.6.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([32]) See subpoint 6.6.2.3 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([33]) Subpoint 6.6.2.5 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([34]) Bulgaria, Czechia, Denmark, Germany, Estonia, Greece, Spain, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Poland, Portugal, Romania, Slovakia and Finland.

Ireland does not have provisions related to reimbursement or compensation of expenditure related to travel, board and lodging for national workers.

Conclusion and suggestions for further actions

In the transposition of the Directive, the applicable provisions of the Directive on the two new elements explained above vary between Member States. Those provisions apply to posted workers in so far as they exist for national workers in the host Member State.

Some concerns remain relating to the conditions of accommodation which may affect posted workers. National inspection authorities and social partners (particularly trade unions) could, together with ELA, develop targeted awareness-raising campaigns to address issues such as the sub-standard conditions of accommodation that may affect posted workers, including more specific information on the right of posted workers to accommodation conditions in host Member States (where provided to national workers) and sanctions for not respecting that right.

3.1.1.4.5. Information obligations

The third subparagraph of Article 1(2)(a) of the Directive complements the provisions of Article 5 of the Enforcement Directive by requiring Member States to publish information – without undue delay and transparently – on the terms and conditions of employment applicable under Article 3(1) of Directive 96/71/EC, including the constituent elements of remuneration, as well as the terms and conditions of employment applicable to long-term posted workers.

According to the fourth and fifth subparagraphs of Article 1(2)(a) of the Directive, Member States must ensure that the information provided on the single official national website is accurate and up-to-date. Where the information on the single official national website (national website) does not indicate which terms and conditions of employment are to be applied, this fact must be taken into account, in accordance with national law and/or practice, when determining whether penalties in the event of infringements of the national provisions adopted pursuant to this Directive satisfy the principle of proportionality.

17 Member States (Bulgaria, Denmark, Germany, Greece, Spain, France, Croatia, Italy, Hungary, Lithuania, Luxembourg, Malta, Austria, Poland, Portugal, Romania and Sweden) have included in the national legislation a specific obligation to provide information on a national website.

The other Member States do not have an explicit legal obligation to provide information on a national website. However, as established in the implementation report of the Enforcement Directive ([35]), all Member States have set up national websites providing information on the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC.

Most Member States have adapted their national legislation to establish proportionality of sanctions if the information provided on those national websites is not accurate and up to date or this principle was already embedded in their internal legal system.

Ireland, Spain, France, Cyprus, Slovenia and Slovakia do not specifically establish such proportionality of sanctions. However, in some of these Member States, proportionality is

([35]) Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of 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) 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), COM/2019/426 final.

applied in practice through general provisions of labour law (France) or by labour inspectors (Slovakia).

Some employers' organisations pointed out in the questionnaire on the implementation of the Directive that it is sometimes difficult for foreign companies to determine which collective agreement is applicable and to understand its provisions (even if translated information on the applicable legislation is available on the relevant national website). In this context, one employers' association also pointed out that national websites often do not provide all the necessary information and are not regularly updated.

Overall, the national websites have been implemented positively in the Member States ([36]). In addition, most of the national websites are considered to be easily findable using the most common search engines when using key words such as 'posting of workers' or 'posted workers' in combination with the name of the Member State ([37]).

Some national websites either appear not to be up-to-date (e.g., Austria, Greece, Italy) or do not appear to include the latest information on collective agreements (Italy), an issue which also occurs in other Member States. Some websites appear to lack transparency and intuitiveness (e.g., Bulgaria, Spain, Finland, Croatia, Latvia, Portugal) due to the reliance on hyperlinks when referencing national law ([38]).

The study indicates that some national websites only provide part of the information needed by the posting undertaking, for instance there is no information available on social security law, tax law, or the applicable collective agreements. Some stakeholders report that the national websites might be useful for employers, consultants and social secretariats, but that (posted) employees themselves will rarely look for information through this channel ([39]).

According to the ELA Regulation ([40]), the ELA supports Member States in complying with the obligations on access to and dissemination of information relating to the free movement of workers and to the posting of workers as laid down in Article 5 of the Enforcement Directive. The ELA's work covers the information published by Member States on the national websites related to posting and supports capacity building in the Member States, through cross sectoral trainings, seminars, peer-to-peer reviews and group activities.

The ELA Working Group on Information ([41]) has held several thematic meetings on posting of workers, with 18 peer review sessions of national websites on posting and discussions on best practices. In this context, ELA has published a guidance to the presentation of universally

([36]) See point 4.3 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([37]) Lessons learnt for single national websites on the posting of workers, ELA booklet, May 2023. This document provides a peer review session of 18 different national posting websites. The document is accessible via this link: Lessons learnt from peer reviews of single national websites on the posting of workers: booklet available now! | European Labour Authority (europa.eu)

([38]) See point 4.3 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([39]) See point 6.2.4 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([40]) Article 6(c) of Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, OJ L 186, 11.7.2019, p. 21.

([41]) https://www.ela.europa.eu/en/what-we-do#bcl-inpage-item-745

applicable collective agreements on national websites ([42]) and it is working on a 'sample outline', giving guidance to Member States regarding the content to be presented on their websites. ELA has been also working on a practical guidance with the lessons learnt for those national websites ([43]).

Conclusion and suggestions for further action

Member States have set up national websites on posting to comply with the Directive's reinforced information obligations.

However, the national websites still have some shortcomings in the content of the information as required by the Directive (difficulties in finding information on collective agreements and incomplete or outdated information). It is crucial that employers and workers have access to complete and up-to-date information on the terms and conditions of employment (particularly remuneration and all its mandatory elements) applicable to posted workers (including on collective agreements and on long-term posting situations).

Directive (EU) 2019/1152 ([44]) on transparent and predictable working conditions has introduced new information requirements for employers to ensure that posted workers are properly informed about the core working and employment conditions of their work assignment in the host Member State. Information on the national websites is available through the "Your Europe website" ([45]).

ELA could therefore continue and reinforce its work with Member States on making information on posting websites more transparent, comprehensive, up-to-date and easily accessible for posted workers and service providers.

3.1.1.4.6. Point b) – long-term posting and temporary agency workers

Point b) adds two new paragraphs to Article 3(1) of Directive 96/71/EC: paragraph 1a lays down the rules on long-term posting when the posting period exceeds 12 (or 18) months, and paragraph 1b concerns temporary agency workers.

3.1.1.4.6.1. Paragraph 1a – rules on long-term posting

According to the rules on long-term posting, the employer of a posted worker has to guarantee additional terms and conditions of employment once the period of posting exceeds 12 months or 18 months following a motivated notification submitted by the service provider ('long-term posting'). It also includes a provision on the replacement of the posted worker when performing the same task at the same place.

This amendment was, together with other amendments of the Directive (i.e., on remuneration), the object of two actions to annul the Directive. In particular, it was argued that the rules on long-term posting restricted the provision of services in the internal market. The Court of Justice of the European Union has dismissed both actions in their entirety ([46]).

([42]) Single national websites on posting, Approach to the presentation of information stemming from universally applicable collective agreements. The document is accessible via this link: ELA-Approach-to-presenting-collective-agreements.pdf (europa.eu)
([43]) Footnote 37.
([44]) Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186, 11.7.2019, p. 105.
([45]) Posting staff abroad: Guidelines & social security rules - Your Europe (europa.eu)
([46]) Judgement of the Court of Justice of 8 December 2020, Hungary v. European Parliament and Council of the European Union, case C-620/18, ECLI:EU:C:2020:1001.

With respect to long-term posting, the Court stated that the EU legislature did not commit any manifest error in holding that the consequence of a posting for a period in excess of 12 months should be that the personal situation of the posted workers concerned should to an appreciable degree more closely resemble that of workers employed by undertakings established in that host Member State.

Guarantee of all mandatory applicable terms and conditions of employment

In the case of a long-term posting, Member States have to ensure (in addition to the terms and conditions of employment referred to in Article 3(1) of the Directive) all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable. According to Article 3(7) of Directive 96/71/EC, this should not prevent the application of terms and conditions of employment which are more favourable to workers.

The obligation to provide the broader range of employment rights in the case of a long-term posting does not apply to procedures, formalities and conditions relating to the conclusion and termination of the employment contract, including non-competition clauses, as well as to provisions on supplementary occupational retirement pension schemes.

Almost all Member States guarantee to long-term posted workers all additional terms and conditions of employment applicable by law and/or by collective agreements or arbitration awards which have been declared universally applicable. In Ireland, the same terms and conditions apply to a posted worker regardless of the duration of the posting.

The specification of additional terms and conditions varies between Member States.

Bulgaria and the Netherlands have opted for a "closed" list of additional terms and conditions. It is unclear whether all the mandatorily applicable terms and conditions of employment are included. In Bulgaria, for instance, the posted worker has the right to the minimum working conditions established in the national legislation regarding compensation for the violation of worker's rights, free food and/or food additives, periodic medical examinations, free work clothes and uniforms; and social, welfare and cultural services.

Some Member States' legislation (Germany, Ireland, Hungary, Latvia, Malta and the Netherlands) does not provide for the application of the more favourable principle in the case of long-term postings. In Ireland, all employees are subject to the same national conditions.

In many Member States (Bulgaria, Denmark, Germany, Greece, Spain, France, Cyprus, Hungary, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Romania, Slovenia, Slovakia, and Sweden), procedures related to the termination of the employment contract and supplementary pension schemes are explicitly excluded from the applicable terms and conditions of employment for long-term postings. Czechia does not regulate supplementary occupational retirement schemes at national level and Lithuania does not have an active occupational pension fund ([47]).

Judgment of the Court of Justice of 8 December 2020, Poland v. European Parliament and Council of the European Union, case C-626/18, ECLI:EU:C:2020:1000.

([47]) According to the information available to the Commission, Lithuania adopted a special law on occupational pensions in 2006 but an active occupational pension fund has not yet been established in Lithuania.

The Member States replies to the questionnaire on the implementation of the Directive indicate that a large majority of Member States publish on a national website the terms and conditions of employment applicable to long-term posting. Subpoint 3.1.1.4.5 of this report provides more information on the publication of the information on the terms and conditions of employment.

Extension of a posting to 18-months with motivated notification

The 12-month period of posting can be extended by the submission of a motivated notification from the service provider. The Member State where the service is provided has to extend the period of 12 months to 18 months. This extension cannot be subject to an authorisation procedure, but Member States may require companies to comply with a formal procedure (e.g., deadlines, mandatory statements and provision of reasons for the extension).

All Member States, except Ireland, require a company to submit a motivated notification to extend a period of posting from 12 months to 18 months. Ireland does not do so because the same terms and conditions apply to a posted worker regardless of the duration of posting.

In some Member States (Cyprus, Hungary, Malta, Austria and Slovenia), there is no explicit timeframe foreseen in the law for the submission of the notification. However, the notification has to be made before the deadline is extended (Austria) or in due time and at the latest before the starting of the service provision (Hungary).

In many Member States (Belgium, Bulgaria, Czechia, Denmark, Germany, Estonia, Greece, Spain, France, Latvia, Lithuania, Luxembourg, Poland, Slovakia, Finland and Sweden) the time limit for the submission of motivated notification can be introduced within a wide timeframe, notably before the end of the 12th month of employment of the posted worker. Croatia and Portugal require the service provider to submit this notification at least 1 month before the end of the 12-month period.

According to the replies from Member States to the questionnaire on the implementation of the Directive, a large majority of them require the motivated notification to be submitted electronically (by email, specific portal and/or electronic procedure). In Spain, the notification has to be submitted electronically, but it is the Autonomous Community where the posting is taking place that regulates the specific procedure for doing so.

Some Member States (e.g., Czechia, Denmark, France, Italy, the Netherlands and Austria) allow service providers to submit the motivated notification together with the posting declaration.

Many Member States that responded to the questionnaire declared that they had not experienced any problems with motivated notifications. In this respect, two Member States reported that few motivated notifications for long-term postings have been submitted. One Member State considered that the scope of the motivated notification (and, more generally, the long-term posting status) remains poorly understood by companies and causes confusion with the rules on the right of residence or social security.

Regarding social partners, employers' organisations replying to the ELA questionnaire do not report problems with motivated notifications or do not have sufficient experience to report such problems.

Rules about the replacement of a posted worker

Where a company replaces a posted worker with another posted worker performing the same task at the same place, the overall duration of the posting to be taken into account for assessing the threshold of 12 (or 18) months consists of the cumulative duration of the posting periods of the individual posted workers concerned.

The concept of 'the same task at the same place' is determined by taking into consideration, inter alia, the nature of the service to be provided, the work to be performed and the address(es) of the workplace.

If the employer replaces one posted worker with another, the employment periods of each posted worker should be added together.

Most Member States (Belgium, Bulgaria, Czechia, Denmark, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Lithuania, Luxembourg, Hungary, Malta, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, and Sweden) have rules on the replacement of a posted worker and the accompanying 'the same task at the same place' concept.

Latvia, the Netherlands, Austria, and Sweden have not included provisions in their national legislation related to the 'the same task at the same place' concept.

19 Member States that replied to the questionnaire on the implementation of the Directive declared that they had not encountered any abuse or circumvention related to the replacement of a worker when applying the 'the same task at the same place' principle. However, one Member State reported that it had encountered abuse or circumvention because it is difficult to define the 'the same task' concept. Two Member States reported that they do not yet have available data to be able to draw solid conclusions on possible abuse or circumvention.

Regarding social partners, a trade union has reported in the questionnaire that the lack of available data means that it remains quite easy to continue the practice of having multiple postings for 'the same task at the same place' in a row. Another EU level trade union also stated that Member States should introduce specific control provisions and administrative measures to verify that the rules in this area are not circumvented by fraudulent service providers with respect to the cumulation of posting periods.

Conclusion and suggestions for further actions

Almost all Member States have included in their national legislation the provisions of the Directive related to long-term postings. Most Member States have rules on the replacement of a posted worker. Both the specification of the additional terms and conditions applicable to posted workers in a long-term posting situation and the timeframe to submit the motivated notification vary between Member States.

The Commission also notes that it is necessary to ensure that national websites include the information related to long-term postings, which has not always been the case so far. ELA could therefore continue working with Member States on improving the information included on national websites (as mentioned in subpoint 3.1.1.4.5 above).

3.1.1.4.6.2. Paragraph 1(b) – Equal treatment of posted temporary agency workers

This paragraph provides that the terms and conditions of employment of posted temporary agency workers are those which apply pursuant to Article 5 of Directive 2008/104/EC ([48]) to temporary agency workers hired-out by temporary employment agencies established in the Member State where the work is carried out. The same paragraph also provides that the user undertaking has to inform the temporary employment agency of the terms and conditions of employment that it applies to its workforce.

Terms and conditions of employment of posted temporary agency workers

The terms and conditions of employment applicable to posted temporary agency workers are not limited to those set by law or collective agreement within the meaning of Article 3(8) of Directive 96/71/EC, as amended. They could be set out by any type of collective agreement that binds on the user undertaking.

Article 5 of Directive 2008/104/EC concerns the 'basic' terms and conditions of employment as defined in Article 3(1)(f) of that Directive ([49]). The terms and conditions of employment provided for under Article 3(1) of Directive 96/71/EC and, if applicable, Article 3(1a) on long-term posting of Directive 96/71/EC, which are not part of the basic terms and conditions of employment, remain applicable to temporary agency workers.

Almost all Member States (except Ireland and Slovenia) have enacted an obligation to guarantee for posted workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC.

Duty of the user undertaking to inform the temporary employment agency of the terms and conditions of employment

The obligation of the user undertaking to inform the temporary employment agency of the terms and conditions which apply to temporary agency workers has been introduced to ensure that the temporary employment agency is aware of the terms and conditions of employment prevailing in the user undertaking.

In Estonia, the information obligation only applies to long-term posting and chain posting, while Malta imposes this information obligation only for posting periods exceeding 4 consecutive weeks. Sweden imposes the information obligation only when the temporary agency asks for it.

Croatia has introduced an additional information requirement. It requires the temporary employment agency to confirm in writing that it has been informed of the terms and conditions of employment.

Some Member States (Belgium, Latvia, Hungary and Romania) explicitly refer to the means by which the information should be given to the temporary employment undertaking (e.g., in writing or electronically).

([48]) Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9.

([49]) According to Article 3(1)f of Directive 2008/104/EC, "basic working and employment conditions" means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:
(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
(ii) pay.

Explicit applicability of terms and conditions of employment in the case of chain or double posting

The temporary employment agency has to guarantee to posted temporary agency workers the terms and conditions of employment that would apply if they had been recruited directly by the user undertaking to occupy the same job. The question here is whether the Member States also make these terms and conditions explicitly applicable in the case of chain or double posting, where the worker posted to the user undertaking is sent to work in another Member State by that undertaking (see subpoint 3.1.1.3 on double or chain posting).

When a worker posted by a temporary employment agency to a user undertaking is sent by the user undertaking to another Member State, the worker is considered as being posted by the temporary employment agency with which the worker has the employment relationship, as regards the terms and conditions of employment. This means that it is the temporary employment agency that is responsible, not only for the administrative requirements (e.g., making the declaration before the posting), but also for complying with the right terms and conditions of employment.

15 Member States ([50]) make these terms and conditions explicitly applicable in the case of chain or double posting.

In some Member States (Belgium, Cyprus, Austria) the legislation does not explicitly make the terms and condition of employment also applicable in case of chain or double posting, but it can be considered that it does so implicitly.

The legislation of seven Member States (Denmark, Ireland, Croatia, Latvia, Hungary, the Netherlands and Slovenia) does not make the terms and conditions of employment either explicitly or implicitly also applicable in the case of chain or double posting.

According to the study on the monitoring of the Directive and of the Enforcement Directive, the recent nature of the Directive makes it difficult to estimate its impact ([51]). However, the study points out that there is a real risk that the new provisions on posted temporary agency work are not applied in practice ([52]).

The role of temporary employment agencies (and other labour market intermediaries) is a matter of concern in cross-border work contexts ([53]). Certain practices may result in situations where the least favourable rights are applied to posted workers. This outcome may be driven by the actual intention to circumvent the rules, but it may also be triggered by the limited awareness of the temporary employment agencies and the user undertaking(s) about the relevant rules that apply in different countries, particularly in situations where sectoral and/or regional collective agreements are also applicable ([54]).

Organisations representing employers and temporary employment agencies emphasise the point that the complexity of the legal system regulating temporary cross-border work (e.g., posting)

([50]) Bulgaria, Czechia, Germany, Estonia, Greece, Spain, France, Italy, Luxembourg, Malta, Poland, Portugal, Romania, Finland and Sweden.
([51]) Subpoint 6.1.3.1 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.
([52]) Point 6.1.1 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.
([53]) Point 6.1.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.
([54]) See footnote 53.

may lead to inadvertent non-compliance. This is particularly the case for smaller companies and temporary employment agencies that do not have branches in more than one Member State and therefore cannot access legal information on other countries' legislation internally, as would be the case with larger multinational companies or agencies ([55]).

Conclusion and suggestions for further action

Almost all Member States have included in their national legislation the provisions of the Directive related to posted temporary agency workers. Some Member States either oblige the user undertaking to inform the temporary employment agency only in specific situations; or introduce additional information requirements.

In addition, there are some strong concerns that the practical application of the provisions of the Directive related to posted temporary agency workers may result in situations where less favourable conditions may be applied to such workers. ELA could address those concerns, in close cooperation with Member States, through more effective and extensive cross-border cooperation and enforcement efforts targeting temporary agency work. Social partners could consider supporting the work of labour inspectorates.

Furthermore, Member State could carry out reviews of existing legislation and its implementation at the national level and/or set up, with the support of ELA, assistance services for temporary employment agencies and user undertakings on the application of the posting rules.

3.1.1.4.7. Point (c) on the terms and conditions of employment more favourable to workers and posting allowances

The first paragraph of Article 1(2)(c) of the Directive states that the terms and conditions of employment provided for under Articles 3(1) to 3(6) of Directive 96/71/EC do not prevent the application of more favourable conditions to posted workers.

The second paragraph of Article 1(2)(c) states that allowances specific to the posting are to be considered as part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting (e.g., expenditure on travel, board and lodging).

For the reimbursement of the posted worker for travel, board and lodging expenditure, the last sentence of the second paragraph of Article 1(2)(c) of the Directive provides that the employer must reimburse the posted worker in accordance with the national law and/or practice applicable to the employment relationship. This is to be understood as the national law and /or practice of the home Member State, unless otherwise determined in accordance with EU rules on private international law.

The third paragraph of Article 1(2)(c) of the Directive states that "where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid by way of reimbursement of expenditure actually incurred on account of the posting or which are to be considered as an element of the remuneration package of the posted worker, then the entire allowance is to be considered as paid as reimbursement of expenditure".

First paragraph of Article 1(2)(c) of the Directive - Application of more favourable terms and conditions of employment to workers

([55]) See footnote 51.

This provision was already included in Directive 96/71/EC. Almost all Member States apply, explicitly or implicitly, terms and conditions of employment which are more favourable to posted workers. In Denmark the more favourable treatment applies to posted workers only after 12 months.

In Estonia, health and safety conditions apply to a posted employee in accordance with the Estonian law, even when they are less favourable to the posted employee.

Second paragraph of Article 1(2)(c) of the Directive - Allowances specific to the posting and the reimbursement obligation

Many Member States ([56]) specify which parts of the allowances specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting, and which are part of the remuneration. Some Member States (Belgium, Spain, Croatia, Slovakia) regulate the reimbursement of travel, board and lodging expenditure through collective agreements. For instance, in Belgium and Croatia, this is generally regulated at industry level when those Member States are home countries.

Some Member States (Czechia, Denmark, Hungary, Austria, Slovenia and Sweden) have not included in their national legislation a specific provision that posting allowances are part of remuneration unless they are paid in reimbursement of expenditure actually incurred on account of the posting.

The national legislation of some Member States (Belgium, Czechia, Germany, Ireland, Spain, Luxembourg, Hungary, Latvia, Malta, the Netherlands, Austria, Portugal, Poland and Slovenia) does not include or does not clearly specify that the reimbursement of travel, board and lodging expenditure for the posted worker is done in accordance with the national law and/or practice of the home Member State.

In Denmark, the reimbursement of travel, board and lodging expenditure for the posted worker is carried out in accordance with the rules of Denmark (as host Member State) rather than on the basis of the rules of the home Member State. In Finland, the rules of the home Member State do not apply when the reimbursement of expenditure is lower that the allowances in Finland. For the latter, the Finnish universally collective agreement applies.

In its response to the questionnaire on the implementation of the Directive, an EU level trade union emphasised the point that the reimbursement of expenditure incurred on account of the posting (such as expenditure on travel, board and lodging) is an important improvement for posted workers and that its correct transposition is of utmost importance.

According to the study supporting the monitoring of the Directive and of the Enforcement Directive, housing costs may be high in the host Member States, and posted workers are likely to lack knowledge of the local housing market. The study stresses that posted workers are more vulnerable to practices such as the deduction of accommodation costs from their salaries ([57]). This expenditure should not be deducted from the posted workers' salaries but should be reimbursed to the posted workers on the basis of the national law and/or practice applicable to the employment relationship.

([56]) Belgium, Bulgaria, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia and Finland.

([57]) Subpoint 6.6.2.3 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

Third paragraph of Article 1(2)(c) of the Directive - determination of the elements of the allowance specific to the posting

According to the third paragraph of Article 1(2)(c) of the Directive, if it does not clearly appear which elements of the posting allowance are paid in reimbursement of expenditure actually incurred because of the posting, then the entire allowance is considered to be paid in reimbursement of expenditure, not remuneration.

A large majority of Member States ([58]) have included this rule into their national legislation. Seven Member States (Bulgaria, Czechia, Hungary, Austria, Romania, Slovenia and Slovakia) have not specifically included this rule.

Conclusion and suggestions for further action

Almost all Member States have included in their national legislation a provision requiring the application of terms and conditions of employment which are more favourable to posted workers.

Some Member States have not included in their national legislation a specific provision on posting allowances being part of remuneration unless they are paid in reimbursement of expenditure actually incurred on account of a posting. In addition, the national legislation of some Member States does not include or does not clearly specify that the reimbursement of travel, board and lodging expenditure for the posted worker is done in accordance with the national law and/or practice of the home Member State.

In this context, ELA could facilitate the transparency of information regarding posting allowances and reimbursement of posting related costs in Member States.

3.1.1.4.8. Point (d) on collective agreements

This point extends the option of applying to posted workers, collective agreements not made universally applicable in Member States that already have a system for declaring collective agreements universally applicable. The purpose of this provision is to reflect the diverse nature of Member States' collective agreements and to give Member States the possibility of extending the scope of the Directive by applying it to a broader range of collective agreements.

Of the 18 Member States who apply universally applicable collective agreements, at least 4 Member States (Greece, Hungary, the Netherlands, Finland) have used the option provided by the Directive to also apply to posted workers collective agreements which are not universally applicable.

Regarding the specific scope of applicable collective agreements, 18 Member States (Belgium, Bulgaria, Estonia, Germany, Greece, France, Croatia, Italy, Latvia, Lithuania ([59]), Luxembourg, Malta, the Netherlands, Austria, Portugal, Romania, Slovenia and Finland) exclude procedures related to the termination of the employment contract and provisions on supplementary occupational pension schemes, regardless of whether the terms and conditions of employment stem from the law or from collective agreements.

([58]) Belgium, Cyprus, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Finland and Sweden.

([59]) This is only the case for Lithuania as regards the procedures of the termination of the employment contract and the non-competence agreements. Lithuania does not have any active occupational pension fund.

In Denmark, some applicable collective agreements include, under certain conditions, provisions on employer-paid occupational pensions.

3.1.1.4.9. Point (e) on additional terms and conditions of employment that apply to temporary agency workers

According to Article 1(2)(e)(9) of the Directive, Member States may require that, in addition to the provisions of Article 5 of Directive 2008/104/EC on temporary agency work, posted temporary agency workers benefit from any more favourable terms and conditions that apply to temporary agency workers at national level.

14 Member States ([60]) had already transposed an equivalent provision before the adoption of the Directive ([61]).

Of the other 13 remaining Member States which had not transposed this provision by then, Greece, Austria, Poland, Portugal and Slovakia have since used the possibility provided by this Article. In Austria, for instance, the following provisions apply to temporary agency workers posted there, regardless of the legislation applicable: entitlement to payments in case of sickness, other personal reasons or termination of the labour contract, notice periods and special protection against termination of the labour contract and compensation for the termination of the labour contract.

In addition, temporary agency workers who are employed by a user undertaking for a period longer than 4 years are entitled to be included into the supplementary pension scheme of the user undertaking.

Of the Member States which had already transposed this provision before the adoption of the Directive, Germany, Malta and the Netherlands have adopted additional provisions.

3.1.1.4.10. Point (e) on application of additional terms and conditions of employment based on equality of treatment

Article 1(2)(e)(10) of the Directive provides that the host Member State may, in compliance with the Treaty, and on a basis of equal treatment, also require the application of terms and conditions of employment on matters other than the terms and conditions established under Article 3(1) of Directive 96/71/EC (i.e. maximum working periods and minimum rest periods, remuneration, health, safety and hygiene at work, etc.) on the grounds of public policy.

The concept of public policy provisions must be interpreted strictly. It can only apply to national provisions where compliance with those national provisions has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned that compliance with them is required of all persons present on the national territory of that Member State and all legal relationships within that state.

Six Member States (Belgium, Czechia, France, Luxembourg, Finland and Sweden) require the application of terms and conditions of employment on matters other than the terms and

([60]) Belgium, Bulgaria, Czechia, Denmark, Germany, Spain, France, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Romania and Sweden. Point 2.4.2 of the impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016)52 final.

([61]) Article 3(9) read as follows in the previous version of Directive 96/71/EC: "Member States may provide that the undertakings referred to in Article 1(1) must guarantee workers referred to in Article 1(3)(c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out".

conditions of employment established under Article 3(1) of Directive 96/71/EC on the grounds of public policy.

3.1.1.5. Article 1(3) on cooperation between Member States

The first sentence of Article 1(3) of the Directive requires Member States to provide for cooperation between the authorities or bodies competent to monitor the terms and conditions of employment mentioned in Article 3 of Directive 96/71/EC. All Member States have included provisions on such cooperation in their national legal systems.

The second sentence of Article 1(3) of the Directive further stipulates that "such cooperation shall in particular consist in replying to reasoned requests from those authorities or bodies for information on the transnational hiring-out of workers, and in tackling manifest abuses or possible cases of unlawful activities, such as transnational cases of undeclared work and bogus self-employment linked to the posting of workers".

All Member States have established an authority or body that is competent to ensure cooperation with their counterparts in other Member States and to handle requests for information on the hiring-out of workers and/or the tackling of manifest abuses or possible cases of unlawful activities (e.g., transnational cases of undeclared work and bogus self-employment linked to posted workers). All Member States include undeclared work and bogus self-employment linked to the posting of workers, either explicitly or implicitly.

The third sentence of Article 1(3) of the Directive further provides that the authority or body competent for cooperation with its counterparts in other Member States also has the task or duty of obtaining necessary information from other authorities or bodies within their national system. All Member States have covered this provision.

More information on administrative cooperation between Member States may be found in the implementation report of the Enforcement Directive ([62]).

An EU level trade union has pointed out, when replying to the questionnaire on the implementation of the Directive, that the correct application of the Directive (particularly when it comes to the rules on applicable collective agreements and their effective enforcement) requires sincere and open dialogue between Member States and social partners.

In this context, ELA carries out several activities to support cooperation between Member States in the area of posting workers. These activities include the development of a mutual learning and understanding programme for the national liaison offices in the area of posting of workers; the training programme for representatives of national authorities on the basis of EU labour mobility law; and cooperation with National Training Centres for labour inspectors.

ELA has also established a forum called Posting 360'. The Posting 360 forum allows experts from ELA, the Commission, the Member States and the social partners to come together to discuss challenges in the application of EU and national rules on the posting of workers in a holistic manner, and to explore potential hands-on solutions which could be implemented by the Member States (with the ELA's assistance).

Conclusion

([62]) See footnote 35.

All Member States have included the provisions of the Directive related to cooperation between the Member States' national competent authorities.

3.1.1.6. Article 1(4) on monitoring, control and enforcement

Article 1(4) of the Directive replaces Article 5 of Directive 96/71/EC on monitoring, control and enforcement. In this respect, the host and home Member States are both responsible for the monitoring, control and enforcement of the obligations laid down in the Directive and in the Enforcement Directive.

Member States have to adopt rules on penalties applicable to infringements of national provisions adopted pursuant to the Directive and ensure its implementation. These penalties have to be effective, proportionate and dissuasive. Member States also have to ensure adequate procedures for workers and/or workers' representatives to enforce the obligations under the Directive.

In addition, if an undertaking is improperly or fraudulently creating the impression that the situation of a worker falls within the scope of the Directive, the Member State concerned has to ensure that the worker benefits from relevant law and practice. Member States have to ensure that this measure does not lead to the worker concerned being subject to less favourable conditions than those applicable to posted workers.

Measures taken by Member States in the event of failure to comply with the Directive

In all Member States, labour inspectorates or comparable bodies play a central role in the monitoring, checking of and/or enforcing compliance with the Directive.

For this purpose, such inspectorates or bodies are generally empowered to enter the premises of the employer and carry out inspections; and in the case of non-compliance with the terms of the Directive, to issue warnings and, if these are not followed, to take certain coercive measures (notably including the imposition of administrative sanctions/penalties and criminal sanctions). In addition, the standard tools of EU law for the (judicial) enforcement of EU law (e.g., direct effect) are available to those who wish to enforce the rights guaranteed by the Directives on posting.

Upon the request of one or more Member States, ELA coordinates and supports concerted or joint inspections in the areas within its competence ([63]). For instance, the ELA Working Group on Inspections consists of Member States and social partners and play an important role in the work on tools and procedures for inspections carried out ([64]). ELA held 35 joint inspections in 2022.

Penalties applicable to infringements of national provisions adopted pursuant to the Directive

The second paragraph of Article 1(4) of the Directive stipulates that infringements of national provisions implementing the Directive are to be sanctioned by administrative fines. The wording of this paragraph on penalties is the same as in Article 20 of the Enforcement Directive.

([63]) Article 9 of Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland), OJ L 186, 11.7.2019, p. 21.

([64]) https://www.ela.europa.eu/en/concerted-and-joint-inspections#ecl-inpage-217

In almost all Member States (except Ireland) infringements of national provisions implementing the Directive are sanctioned with administrative fines. Criminal fines are (also) imposed in six Member States (Belgium, Denmark, Estonia, Greece, France, Cyprus).

Some Member States do not include specific sanctions for some posting-related offences, for instance for not fulfilling the information obligation regarding chain posting (Czechia, Denmark, Estonia, Greece, Hungary, Finland, Croatia, the Netherlands, Slovenia).

In the case of temporary employment agencies, some Member States impose fines on the agencies and/or the undertakings to which the workers are posted. For instance, Croatia imposes fines on both temporary employment agencies and user undertakings. Czechia and Spain impose fines on temporary employment agencies. Romania imposes fines on user undertakings.

Spain has introduced specific sanctions for very serious infringements in case of fraudulent posting in relation to letterbox companies.

Sanctions may also include warnings (Belgium and Bulgaria), suspension or prohibition of services (Spain, France, Luxembourg and Austria), suspension of payments to the posting undertaking or temporary employment agency (Austria), a prohibition on exercising a profession or being active as a company (Belgium, Luxembourg and Hungary), closure of a company (Belgium) or exclusion from the award of public contracts (Germany).

The amount of the fines differs significantly between Member States; varies for the various breaches/infringements of the posting rules; and can be made dependent on the frequency of violations, the size of the undertakings and/or the number of posted workers involved in the breach. Overall, fines can range from a maximum amount of EUR 1 100 in Latvia to EUR 400 000 in Austria and EUR 500 000 in Germany.

It may be too early to assess whether the provisions are effective, proportionate and dissuasive in line with the Directive. In any event, the sanctions are often (largely) the same as the ones applicable to cases lacking a cross-border element (Belgium, Bulgaria, Czechia, Ireland, Greece, Spain, France, Croatia, Cyprus, Lithuania, Luxembourg, the Netherlands, Poland, Portugal and Slovakia).

In two Member States (Cyprus ([65]) and Hungary), fines are high when compared with the national equivalent fines. In Latvia and Estonia, sanctions appear to be rather low, with the maximum amount being EUR 1 100 for Latvia (although this is the same as national equivalent fines) and EUR 3 200 for Estonia (at least for legal persons).

According to the study supporting the monitoring of the Directive and the Enforcement Directive ([66]), an appropriate level of sanctions and enhanced labour inspection activities can effectively incentivise compliance and deter illicit behaviour. The study mentions some significant barriers to understanding whether the existing sanctions in the law are sufficient to deter unlawful practices.

These barriers include the low share of labour inspections conducted to control compliance with posting regulations as a proportion of the total inspections carried out; and, in the case of

([65]) In Cyprus, fines seem to be up to four times higher than the equivalent to national ones (at least for temporary employment agencies).

([66]) See subpoint 6.1.3.1 of of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

temporary employment agencies, the often-volatile functioning of (smaller) agencies, which can be set up, dismantled and then set up again elsewhere relatively easily.

Procedures available to workers and/or workers' representatives for the enforcement of obligations

The third paragraph of Article 1(4) of the Directive requires Member States to ensure adequate procedures to workers and/or workers' representatives regarding the enforcement of obligations under the Directive.

In all Member States workers have the possibility to access national courts to enforce the rights granted by the Directive. This may be due to general civil law, labour law procedures or arbitration.

Workers may also approach trade unions and comparable representative bodies (Belgium, Bulgaria, Czechia, Denmark, Germany, Greece, France, Croatia, Cyprus, Luxembourg, Latvia, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia and Finland) which can as a rule take action on behalf of workers. Workers can also approach labour inspectorates (Czechia, Estonia, Spain, Latvia, Lithuania, Poland, Romania, Slovenia and Slovakia).

Workers and their representatives are often able and even obliged to bring grievances anonymously to the attention of labour inspectorates (Spain), or to the entities responsible for the resolution of labour disputes before commencing judicial proceedings (Estonia, Ireland, Spain, Latvia, Lithuania, Poland, Romania and Slovakia).

Application of relevant law and practice in the case of a worker fraudulently qualified as a posted worker

The fourth paragraph of Article 1(4) of the Directive concerns the situation of workers who have been found to be not genuinely posted because the undertaking has improperly or fraudulently created the impression that the situation of those workers would fall within the scope of the Directive.

The Directive now provides that Member States must ensure that such workers benefit from relevant law and practice and that this does not lead to the application of less favourable conditions than those applicable to posted workers. This provision is to be read in conjunction with Article 11(3) of the Enforcement Directive.

A large majority of Member States have included specific provisions in their national legislation allowing workers who have been improperly or fraudulently qualified as 'posted' to benefit from national law and practice. Czechia, Ireland, Latvia, Austria and Slovenia do not have any specific provision on this matter.

Most Member States provide assurances that workers benefitting from law and practice will not have less favourable conditions. Ireland, Latvia, Luxembourg, Austria and Slovenia have not included this specific provision in their national legislation. Some Member States (Spain, Italy and Lithuania) grant workers even more favourable conditions.

Conclusion

In all Member States (except Ireland) infringements of national provisions implementing the Directive are sanctioned by administrative fines. Six Member States include criminal fines ([67]). The penalties vary between Member States and it may be too early to assess whether they are effective, proportionate and dissuasive in line with the Directive. For instance, the level of fines ranges from a maximum amount of EUR 1 100 in Latvia to EUR 400 000 in Austria and EUR 500 000 in Germany.

3.1.1.7. Article 1(5) on the introductory wording of the Annex

Article 1(5) of the Directive replaces the introductory wording of the Annex to Directive 96/71/EC in order to adapt it to the Articles of that Directive. It does not need to be examined in the context of this staff working document and related report.

4. Subcontracting and the posting of workers

Article 2(2) of the Directive requires the Commission to submit a report on the application and implementation of the Directive. This report should include an assessment of whether further measures are required to ensure a level playing field and protect workers in the case of subcontracting.

The sections below describe the applicable legal framework of subcontracting liability in the context of the posting of workers, identify the main challenges related to subcontracting and propose some good practices to address those challenges.

4.1. Applicable legal framework

Subcontracting is not directly regulated in the Directive, but the Enforcement Directive recognises subcontracting as a matter of particular concern ([68]). In this context, some social partners are calling to limit subcontracting practices, particularly in the context of the posting of workers ([69]).

Subcontracting is not a harmful practice itself. It can be useful when a specific project needs several capabilities which cannot be provided by a single contractor ([70]). Subcontracting may also be used to address labour shortages and to increase efficiency and flexibility. Competition in some sectors is based on labour costs and materials. Subcontracting in those sectors has therefore become the strategy to increase profits by lowering costs ([71]). Long complex subcontracting chains ([72]) may be set up and may include subcontracted undertakings which are posting workers.

Article 12 of the Enforcement Directive sets out a liability mechanism according to which the contractor to which the employer is a direct subcontractor, in addition to or in place of the employer, can be held liable by a posted worker with respect to any outstanding net

([67]) Belgium, Denmark, Estonia, Greece, France and Cyprus.
([68]) Recital 36 and Article 12 of Enforcement Directive.
([69]) See, for instance, the report of the European Trade Union Confederation (ETUC) "Subcontracting and social liability", available in this link: Subcontracting and social liability EN.pdf (etuc.org). See also the "who's the boss" campaign of the European Federation of Building and Woodworkers (EFBWW): WHO'S THE BOSS? STOP EXPLOITATION IN SUBCONTRACTING CHAINS! (efbww.eu)
([70]) See point 6.7.1 of the study supporting the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.
([71]) See footnote 70.
([72]) Subcontracting chains involve a client, or a principal contractor, externalising single specialities or tasks to other companies or self-employed workers. See points 2.2 and 6.7.1 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

remuneration or contributions to common funds or institutions of social partners insofar as they are covered by Article 3 of Directive 96/71/EC.

Member States are required to introduce such subcontracting liability on a non-discriminatory and proportionate basis in the construction sector, and also may provide for it in other sectors. They may also take more stringent liability rules with regard to the scope (i.e., cover more companies involved in the subcontracting chain, than only the direct contractor) and the range (i.e., cover more working conditions covered by Article 3 of Directive 96/71/EC) on a non-discriminatory and proportionate basis.

Member States may also apply other enforcement measures provided that these are justified and proportionate in accordance with EU law.

The implementation report ([73]) on the Enforcement Directive provided an overview on the application of those provisions in the Member States. In this context, several Member States indicated that the introduction of those provisions increased the effective protection of workers' rights in subcontracting chains.

Most Member States limit the subcontracting liability provided for under the Enforcement Directive to the direct contractor. 10 Member States also provide for the possibility to claim unmet payments from parties that are not in a direct contractual relationship with the posting employer ([74]).

All Member States ([75]) have adopted national provisions on subcontracting liability within the construction sector. Since the adoption of the implementation report on the Enforcement Directive, 10 Member States have extended those provisions to all sectors([76]) (i.e., they have adopted a sector neutral subcontracting liability) or to other sectors ([77]).

In addition to the implementation of the specific provisions of the Enforcement Directive regarding subcontracting liability, some Member States (Belgium, Spain, France and Italy) have introduced further measures, such as a ceiling on the number of subcontracting levels within subcontracting chains (in a specific sector or in several sectors) ([78]). For instance, Spain has adopted legislation setting a maximum of four subcontracting levels in the construction sector. Belgium, France and Italy have set a maximum number of subcontracting levels in relation to public contracts. Moreover, 10 Member States ([79]) have introduced a full chain liability (i.e., a subcontracting liability that is not limited to one link up the chain) ([80]).

4.2. Main challenges identified related to subcontracting chains

([73]) See footnote 35.
([74]) See point 3.9.2 of the implementation report on the Enforcement Directive.
([75]) Denmark, Finland and Sweden have taken "other appropriate enforcement measures" according to Article 12(6) of the Enforcement Directive.
([76]) Bulgaria, Germany, Spain, France, Italy, Luxembourg, Hungary, the Netherlands, Portugal and Slovakia. See subpoint 4.2.2.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.
([77]) Belgium.
([78]) See subpoint 4.2.2.1 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.
([79]) Belgium, Bulgaria, Spain, France, Italy, Lithuania, Luxembourg, the Netherlands, Austria and Poland.
([80]) Subpoint 4.2.2.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

The following main challenges could be identified, taking into account the legal framework applicable to subcontracting in the context of posted workers as well as the information collected and analysed by the Commission.

First, companies at the top of long and complex subcontracting chains may have a limited control over the lower chain levels. These companies may also try to push business risks downward in the subcontracting chain ([81]). The liability mechanism analysed in the previous section only partly addresses this situation. Most Member States limit the liability to the direct contractor but do not extend it to other parties in the subcontracting chain.

Second, the lack of transparency and accountability in long subcontracting chains may make enforcement of the applicable rules very difficult due to problems in identifying the liable company. The direct responsibility and liability of the contractor may therefore be considerably reduced because of the long subcontracting chain. This may also affect the recovery of unpaid wages ([82]).

Third, in some Member States, the application of collective agreements may provide a different protection to posted workers in subcontracting chains ([83]). In addition, flexibility in the application of some collective agreements may be used to pay workers in subcontracting chains according to less favourable agreements ([84]).

Fourth, some companies in subcontracting chains can turn out to be letterbox companies. These companies do not perform any economic activity but are only set up to lower labour costs or create fiscal optimisation strategies. The letterbox company posts workers abroad but it does not carry out any significant economic activity in its home Member State and takes advantage of the lower social security contributions and taxes ([85]). Letterbox companies are specifically designed to stay hidden, so it becomes difficult to identify them, especially within long and complex subcontracting chains ([86]).

Finally, fierce intra-firm competition in subcontracting chains may result in lower attention to OSH issues, so subcontracted workers can be less well-informed about significant and relevant OSH policies and procedures ([87]).

4.3. Good practices for addressing the identified challenges

The Enforcement Directive sets out a minimum legal framework with respect to subcontracting. Member States are free to apply more stringent rules under national law or to go further under national law on a non-discriminatory and proportionate basis.

Against this background and based on the identified challenges presented in section 4.2 above, adopting good practices would help Member States and/or social partners to address those challenges and increase transparency and liability in subcontracting chains.

([81]) See point 6.7.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([82]) See footnote 81.

([83]) See point 4.2.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([84]) See point 5.3.4 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([85]) See point 6.7.1 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([86]) See footnote 81.

([87]) Subpoint 6.6.2.1 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU

These good practices include:

- limiting the number of levels in subcontracting chains and/or extending the subcontracting liability to the full chain, as currently applied in 10 Member States, on a proportionate and non-discriminatory basis;

- imposing "social clauses" in public procurement contracts published by Member States ([88]);

- allowing workers to take a specific claim directly to the top of the subcontracting chain, without the need to go through each level of the chain ([89]);

- enhancing cooperation between Member States in order to facilitate inspections and tackle the abusive practices of letterbox companies, including on a cross-border basis, and by exchanging information;

- enhancing the possibility for trade unions to access workplaces at national level with the aim of protecting workers and providing information on their rights.

- designating a coordinator with an overview of all the different entities in a subcontracting chain (following the example of the project supervisor under Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites) ([90]);

- including provisions in collective agreements stating that before works start, companies are obliged to communicate to the national competent authorities the complete list of companies involved in contracts and subcontracts (including cross-border service providers) ([91]).

These good practices could be developed by ELA under the ELA Posting 360 programme. The Commission therefore does not see the need to amend the Directive at this stage regarding subcontracting specifically.

5. Posting of third-country nationals

This section and the related section of the implementation report presents the main challenges affecting the working conditions of posted third-country nationals as well as some good practices to address those challenges. It does not provide an account of the legal framework applicable to the entry and stay of third-country nationals in a host Member State.

The posting of third-country nationals has been increasing in recent years and is expected to increase still even further in the future as an important intra-EU mobility channel, driven by how labour and skills shortages manifest in all Member States ([92]).

In several Member States, more than one in five of incoming posted workers are third-country nationals (Belgium, Bulgaria, France, Luxembourg, the Netherlands Austria and Poland).

([88]) Point 6.7.5 of of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.
([89]) See footnote 88.
([90]) See footnote 88.
([91]) See footnote 88.
([92]) See footnote 6.

Employers of posted third-country nationals are mostly established in Lithuania, Poland and Slovenia ([93]).

Posted third-country nationals often come from a country that borders or has strong historical ties with the Member States. They often have the Belarusian, Bosnian or Ukrainian nationality. Member States such as Belgium, France and Austria, are hosting an increasing number of posted third-country nationals ([94]).

The posting of workers directives apply equally to posted workers who are EU and those who are third-country nationals. They do not distinguish on the grounds of the posted workers' nationality. However, recital 20 of Directive 96/71/EC makes it clear that the rules of the Directive are without prejudice to national laws relating to the entry, residence and access to employment of third-country nationals.

In most Member States, the same general rules on posting, which transpose the relevant EU legislation, apply to posted third-country nationals. Three Member States ([95]) have introduced specific provisions on posting of third-country nationals into their national legal framework. Croatia and the Netherlands explicitly state that a person legally employed in a Member State where their employer is established does not require a work permit. Similarly, the Latvian Labour Law requires an employer to declare that a worker is legally employed in the sending Member State ([96]).

The sections below identify the main challenges related to the posting of third-country nationals and propose some good practices to address those challenges.

5.1. Main challenges related to the posting of third-country nationals

First, posted third-country national workers present a higher degree of vulnerability than EU posted workers due to their potential dependency on the employer for the renewal of the work and/or residence permits ([97]). They may therefore be less inclined to seek help, report their employers and submit complaints regarding breaches of their rights ([98]).

Second, posted third-country national workers are generally more exposed to abusive practices, such as fraudulent posting, labour rights violations, precarious working conditions or irregular payment or non-payment of social contributions ([99]). Posted third-country nationals are also

([93]) Point 3.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([94]) See footnote 93.

([95]) Croatia, Latvia, and the Netherlands.

([96]) See point 2.2.1 of the report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

([97]) See point 3.1 of the report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

([98]) It appears that there is a low number of complaints brought by posted third-country nationals before the competent national authorities. In addition to linguistic difficulties, this may be also due to cultural differences and different standards of acceptability, fear of being fined, isolation or economic problems. For more information, see section 3.4.2 of the report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

([99]) See point 6.5.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU as well as section 3.1 of the report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

likely to accept a remuneration below what should be paid ([100]). Risks related to precarious living and working conditions also seem to be higher for posted third-country nationals ([101]).

Third, posted third-country national workers may not be aware of their rights in the context of posting. This could mainly stem from language barriers in accessing the relevant information, as in the case of posting working conditions are regulated under different national legal frameworks ([102]). Lack of awareness may also be due to the duration of the posting, especially in short-term postings ([103]).

Fourth, employers of posted third-country national workers may also face difficulties in accessing the relevant information on the applicable rules on posting of those workers in a host Member State ([104]).

Fifth, there may be a lack of comprehensive and comparable data across the EU on posted third-country national workers. This may make it more difficult for national competent authorities to understand certain sectors, adopt evidence-based policy and cooperate with national competent authorities from other Member States ([105]).

5.2. Good practices for addressing the identified challenges

According to the replies to the questionnaire on the implementation of the Directive, some Member States do not consider it necessary to adopt specific measures related to the posting of third-country nationals, but other Member States consider that these measures are necessary (particularly in subcontracting chains).

Regarding social partners, most trade unions (at both EU and national level) consider that specific measures are necessary. Employers' associations generally take the view that the current rules on the posting of workers already provide an effective framework for the protection of third-country nationals.

ELA has recently published a report on cooperation practices, possibilities and challenges between Member States (specifically in relation to the posting of third-country nationals). This report identifies the employment conditions and rights of posted third country nationals as one of the main focuses for inspections ([106]).

Considering the challenges identified in the previous section, adopting good practices would help Member States and social partners to address those challenges:

([100]) See point 6.5.2 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([101]) See point 8.5 of the study supporting the monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.

([102]) See, for instance, point 5.4.1 of report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

([103]) See point 3.1 of the report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

([104]) See footnote 103.

([105]) See point 5.4 of the report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

([106]) See footnote 6.

- providing a better access to information on labour rights specifically focused on posted third-country national workers: this should not be limited to the information presented in the single official national websites on posting but may include other initiatives which have already been developed by some Member States ([107]) (for instance, distributing information flyers in multiple languages to posted workers, creating helplines for third-country nationals that provide legal advice on employment in different languages or providing forms to submit complaints in several languages);

- promoting a regular exchange of information between Member States on the relevant competent authorities in the context of posting of third-country nationals. This should include information on the immigration authorities where these need to be involved. Such information should cover both information on the scope of their powers as well as the relevant contact information ([108]);

- creating and funding networks, through social partners or NGOs, to facilitate that posted third-country national workers claim their rights, in particular regarding the wages and working conditions;

- reinforcing the enforcement of the posting rules at national level in specific sectors with a high number of posted third-country nationals (for instance, by compiling a list of national rules and procedures relating to the posting of third country nationals and distributing to the relevant authorities). In addition, ELA's Posting 360 mutual learning and understanding multi-annual programme could pay particular attention to the posting of third-country nationals ([109]);

- further encouraging the exchange of information and good practices between Member States (particularly those with significant outbound/inbound flows) notably by promoting exchange activities on posting of third-country nationals. This measure could also be carried out by ELA under the Posting 360 Programme.

6. Main conclusions

The transposition of the Directive by all Member States has improved the working conditions of posted workers.

Member States' legislation substantially complies with the Directive's requirements. The sections below describe the main conclusions derived from the information collected and analysed by the Commission.

6.1. Double or chain posting

Almost all Member States have included the provisions of the Directive on double or chain posting in their national legislation. The timeframe for the user undertaking to inform the temporary work agency on the double or chain posting situation (as reflected in the concept 'in due time') varies between Member States.

([107]) See, in particular, point 3.4.2 of the report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

([108]) Section 5.2 of the report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals, Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2 February 2023.

([109]) Enhancing cross-border cooperation in the area of posting of workers: ELA launches the Posting 360 Programme | European Labour Authority (europa.eu)

6.2. Terms and conditions of employment

6.2.1. Remuneration

Almost all Member States have included the Directive's provision on remuneration in their national legislation. The change from 'minimum rates of pay' to 'remuneration' has improved the rights of posted workers. Some difficulties were identified in determining the remuneration applicable to posted workers with all its mandatory elements.

6.2.2. New elements of the terms and conditions of employment

The applicable provisions of Member States on the two new elements of the terms and conditions of employment (conditions of accommodation and allowances or reimbursement of expenditure related to travel, board and lodging) established by the Directive vary between Member States. Those provisions apply to posted workers in so far as they exist for national workers in the host Member State. There are nevertheless persistent concerns related to the conditions of accommodation which may affect posted workers, notably the incidence of substandard accommodation conditions.

6.2.3. Information obligations

Member States have established national websites on posting to comply with the information obligations provided for in the Directive. The national websites still have some shortcomings with respect to the content of the information required by the Directive (difficulties to find information on collective agreements and incomplete or outdated information). Complete and up-to-date information on the terms and conditions of employment applicable to posted workers is crucial for both employers and workers, particularly on remuneration and all its mandatory elements, and including on collective agreements and long-term posting situations.

ELA is already working with Member States on making such information more transparent, comprehensive, up-to-date and easily accessible for posted workers and service providers.

6.3. Long-term posting

Almost all Member States have included the provisions of the Directive related to long-term postings in their national legislation. Most Member States provide rules on the replacement of a posted worker. The additional terms and conditions applicable to posted workers in long-term posting situation as well as the timeframe to submit the motivated notification vary between Member States. The Commission further notes that not all the national websites include the information related to long-term postings.

6.4. Temporary agency workers

Almost all Member States have included the provisions of the Directive related to posted temporary agency workers in their national legislation. Some Member States oblige the user undertaking to inform the temporary employment agency only in specific situations or introduce additional information requirements.

In addition, the Commission notes some strong concerns in relation to the practical application of the provisions of the Directive related to posted temporary agency workers. ELA, in close cooperation with Member States, could provide more effective and extensive cross-border cooperation and enforcement efforts targeting temporary agency work.

Enforcement of the posting rules, including on the rules related to posted temporary agency workers, is in the competence of the Member States. Enforcement is significantly influenced by the awareness of the temporary employment agencies and the user undertaking(s) about the relevant rules that apply in different countries, particularly in situations where sectoral and/or regional collective agreements are also applicable.

In addition, social partners could also consider supporting the work of labour inspectorates.

6.5. Posting allowances

Some Member States have not included in their national legislation a specific provision on posting allowances being part of remuneration unless they are paid in reimbursement of expenditure actually incurred on account of a posting. In addition, the national legislation of some Member States does not include or does not clearly specify that the reimbursement of travel, board and lodging expenditure for a posted worker must be done in accordance with the national law and/or practice of the home Member State. In this context, ELA could facilitate the transparency of information regarding posting allowances and reimbursement of posting related costs in Member States.

6.6. Cooperation between the competent national authorities and bodies

All Member States have included the provisions of the Directive on cooperation between the national authorities and bodies in their national legislation. ELA could continue working with the Member States to support such cooperation.

6.7. Monitoring, control and enforcement

A large majority of Member States have included provisions on the monitoring, control and enforcement of obligations in their national legislation. The penalties vary between Member States, and it may be too early to assess whether they are effective, proportionate and dissuasive.

6.8. Subcontracting

The report identifies some challenges with respect to posted workers in subcontracting chains. These challenges mainly relate to the need to increase transparency and liability in those subcontracting chains. Further analysis is needed to consider mapping the current situation in Member States regarding the coverage of subcontracting liability (i.e., the sectors, levels and working conditions covered). This would include providing guidance on applying more stringent rules at national level with regard to the scope of subcontracting liability (i.e., imposing full chain liability, or extending liability to other terms and conditions of employment) on a non-discriminatory and proportionate basis.

6.9. Third-country nationals

The report observes that posted third-country national workers may be more exposed to abusive practices and recommends several measures to address this situation. These measures include providing a better access to information on labour rights focused on posted third-country national workers as well as promoting a regular exchange of information between Member States on the relevant competent authorities in the context of posting of third-country national workers or reinforcing the enforcement of posting rules in sectors with a high number of posted third-country nationals. ELA continues to play a key role in facilitating access to information and supporting Member States by enhancing transnational cooperation between national enforcement bodies.