

# Legal Alert

16 – 20 July 2018

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### **The posting of workers in the framework of the provision of services: Main amendments brought to Directive 96/71/EC**

Directive 96/71/EC on the posting of workers in the framework of the provision of services was amended by Directive 2018/957/EU, published on July 9, 2018, in order to ensure that a fair balance is struck between the freedom to provide services within the European Union, loyal competition, respectively the social protection of workers by promoting social justice.

One of the main amendments imposes on employers the obligation to grant/guarantee to posted workers the remuneration (and not only the minimum wage) regulated in the host Member State by means of both statutory and administrative provisions and, where applicable, by collective agreements or arbitration awards which have been declared universally applicable. In what follows, we will present the amendments brought to Directive 96/71/EC.

### **Companies may issue dividends quarterly**

Companies are granted the possibility of issuing dividends quarterly, as per law no. 163/2018 published in the Official Gazette on July 13, 2018. The new law entered into force on July 15, 2018.



## The posting of workers in the framework of the provision of services: Main amendments brought to Directive 96/71/EC

### The entry into force of Directive 2018/957/EU amending Directive 96/71/EC (the „Revision Directive“)

The Revision Directive was published in the Official Journal of the European Union L 173 of 9.07.2018. Member States have the obligation to transpose its provisions into national law until 30.06.2020, date by which Directive 96/71/EC remains applicable in the version prior to the amendments made by the Amending Directive.

At the same time, according to the settled case law of the Court of Justice of the European Union, Member States are required during the transposition period of the Revision Directive (i.e. 30.06.2020) to refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive.

**The main amendments** brought by the Revision Directive refer to:

- Establishing the rule according to which **posted workers must, during the posting period, benefit from the working and employment conditions laid down in the host Member State** by means of both statutory and administrative provisions **as well as, where applicable, by collective agreements or arbitration awards which have been declared universally applicable<sup>1</sup>**;
- Imposing employers the obligation to grant/ensure posted workers:
  - o The remuneration (and not only the minimum wage) regulated in the host Member State by means of both statutory and administrative provisions and, where applicable, by collective agreements or arbitration awards which have been declared universally applicable.

The concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and **means all the constituent elements of remuneration rendered mandatory** by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable

With respect to allowances specific to posting, according to provisions currently in force, they are considered to be part of the remuneration insofar as they are not granted with the purpose to reimburse expenditure incurred on account of the posting (e.g. expenditure on travel, board and lodging). In this respect, the Revision Directive states that if it is unclear from the manner of establishing the working conditions<sup>2</sup> which elements of the allowance are allocated to the reimbursement of expenditure incurred on account of the posting and which are part of the remuneration, the posting allowance shall be presumed to be granted as reimbursement of expenditure (and therefore cannot be taken into account when determining the remuneration).

- o The accommodation conditions, as regulated in the host Member State by statutory and administrative provisions and, where applicable, by

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<sup>1</sup> In the absence or in a addition to a collective agreement system or arbitration awards of general application, Member States may base themselves on either collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory.

<sup>2</sup> By normative acts, administrative acts, collective bargaining agreements, individual labor agreements / posting letters etc.

collective agreements or arbitration awards, which have been declared universally applicable.

- Establishing the rule according to which the level of reimbursement of expenditure to cover travel, board and lodging expenses, respectively of posting allowances for posted workers who are temporarily sent from their regular place of work in the host Member State to another place of work, will be the one set by the legislation of the host Member State;
- **Establishing the principle of equal treatment between temporary agency workers posted by a temporary employment agency and workers recruited directly by the user undertaking located in the territory of the host Member State.**

Thus, temporary agency workers must, during their posting, guarantee temporary posted workers the working conditions applicable in the territory of the host Member States in accordance with Article 5 of Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work (enshrining the principle of equal treatment between temporary agency workers and workers who are recruited directly by the user undertaking);

The aforementioned rules also apply where, in the context of the transnational provision of services, temporary workers made available to a user are sent to work temporarily in the territory of a Member State other than that in whose territory they usually perform their mission;

- Emphasizing the obligation for Member States to publish on the single national website the information on working and employment conditions applicable in their territory (including related to the elements of remuneration, without undue delay and in a transparent manner).

If Member States fail to comply with the above obligation, account will be taken of this when establishing the sanctions applicable to infringements of acts adopted by the Member States for the purpose of transposing Directive 96/71/EC, as amended and supplemented;

- The establishment, in order to ensure the freedom to provide services within the territory of a Member State, of the fact that **Member States may**, subject to the principle of equal treatment, **impose working and employment conditions on matters other than those covered by Directive 96/71/EC, only insofar as it concerns public policy provisions;**
- Impose on employers the obligation to observe, in relation with posted workers, the working and employment conditions applicable in the host Member State where the posting exceeds 12 months (18 months by way of exception), except for the provisions concerning (i) the procedures, formalities and conditions for the conclusion and termination of employment agreements, including non-compete clauses, respectively (ii) supplementary occupational retirement pension schemes;
- Establishing the rule according to which, where a Member State finds<sup>3</sup> that an undertaking is improperly or fraudulently creating the impression that a worker is covered by the provisions of Directive 96/71/CE, the concerned Member State will take all necessary measures to ensure that the worker will benefit from the relevant law and practices.

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<sup>3</sup> By applying the criteria regulated under 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')

For further questions regarding the aspects mentioned in this alert, please contact us.



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## **Law published in the Official Gazette: Companies may issue dividends quarterly**

The law contains the same provisions as the bill no. 265/2017, adopted by the Romanian Parliament, provisions analysed by us in a previous alert (<https://goo.gl/by9t4d>).

Please find below the main amendments.

The law significantly amends the Companies' Law no. 31/1990, by providing the possibility to issue dividends throughout the year, quarterly. As such:

- The company can issue dividends, as an option, quarterly, based on the interim financial statements, and annually, after the regularization carried out based on the annual financial statements.
- The dividends distributed quarterly will be paid in the term mentioned by the general assembly of the shareholders or, if the case, in special laws.
- The regularization of the differences resulted from interim dividends distribution (either through payment by the company to its shareholders or the other way around) will be performed within 60 days as of the approval of the annual financial statements, under the sanction of paying default interest determined as per the applicable legislation, unless a higher interest is established through the articles of incorporation or a resolution of the general assembly of shareholders.
- The annual financial statements will reflect the partially distributed dividends and will regulate the resulted differences.
- The dividends paid without the observance of the above principles will be restored, to the extent the company may prove that the shareholders had or should have had knowledge of the irregularity of the distribution.
- In case of joint stock companies, the situation regarding the partially distributed dividends during the fiscal year will be made available at the registered office of the company, at the date of summoning of the general assembly for the approval of the annual financial statements.
- Article 271<sup>1</sup> letter b) that incriminates the distribution of fictitious dividends or of dividends that cannot be distributed was amended so as to reflect the above.

In order align the amendments to the Companies' Law the new law also amends the Accounting Law no. 82/1991. The Accounting Law clarify the following:

- The allocation of the quarterly profit can be performed in the limit of the quarterly net accounting profit plus reported profits and the amounts withdrawn from the reserves available for this purpose (after deducting any reported losses and legal and statutory reserves).
- For the scope of distributing the profit, the interim financial statements must be prepared and approved by the general assembly of shareholders and either audited (if the company has the statutory obligation to audit its annual financial statements or opted in this sense) or controlled by the censors (if the annual financial statements are, according to law, verified by the censors).

The law regarding the organization and functioning of the cooperation was also amended in order to include the right of the cooperation's members to receive the dividends from the quarterly fit.

### **Tax implications**

From a tax perspective, the taxpayers should analyse the potential implications that might appear at year-end on the occasion of the regularization of the amounts distributed as dividends during the year, e.g., recovery of the withholding tax paid for dividends, fiscal treatment of the penalty interest at the level of the Romanian shareholders, legal entities, if the dividends are not returned in due time.

For the complete text of the adopted law, please access the following link:  
<http://www.monitoruloficial.ro/emonitornew/emonviewmof.php?fid=MS43NzcnNTU4OTA1NjE5RSszMA==>

For further questions regarding the aspects mentioned in this alert, please contact us.



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