



# The revised Posted Workers Directive and its implications for employers in Hungary\*

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## Introduction

The revised EU Directive on the posting of workers, which was adopted by the European Council in the summer of 2018, introduced important changes to the original directive (96/71/EC) regarding the terms and conditions of employment of posted workers. The amended Directive (2018/957/EC), guided by the principle of equal treatment, seeks to bring the employment terms and conditions of posted workers, including posted agency workers, closer to those of locally employed workers while ensuring fair competition between posting and local undertakings in the provision of services across the EU.

**Keywords: posting of workers, revised Directive, Hungary, employers**

A key amendment relates to remuneration according to which posted workers are no longer subject to the minimum rates of pay set in the host country's legislation but are entitled to all elements of remuneration mandatory in that Member State. Thus, employers who send their employees to provide services temporarily in another EU Member State are required to apply the same rules of remuneration to their posted employees as for local workers, which, depending on the national laws and/or collective bargaining agreements (CBAs), may include additional salary elements, such as bonuses or seniority pay increases. Another revision concerns the extension of rules established by universally applicable CBAs for posted workers to all economic sectors. Finally, the revised Directive also introduced the concept of long-term posting for postings exceeding 12 months, for which an extended set of employment terms and conditions of the host Member State would become applicable (albeit, with some exceptions).

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\* The results presented here are based on the study by Eszter Zólyomi (2021) 'Bridging the gap between legislation and practice in the posting of workers: Hungary Country Report' conducted in the frame of the project 'Bridging the gap between legislation and practice in the posting of workers' (POW-BRIDGE), financed by the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020) (Agreement No. VS/2019/0396) (for reference: <https://www.euro.centre.org/projects/detail/3633>). The opinions expressed in this Policy Brief are those of the author and do not necessarily represent those of the funding organisation. This author is grateful for the comments received from Sonila Danaj and Leonard Geyer, and for Amália Solymosi for editing and layout.



**The revised EU Directive, which Member States had to implement into their domestic legislation, introduced new requirements for posting employers**

Although its effects are still to be seen (the new rules came into force in 2020), the revised Directive has important implications for employers. The new requirements are expected to increase the administrative burden for employers posting workers from Hungary, which is mainly a sending country, and will likely result in higher posting-related costs.

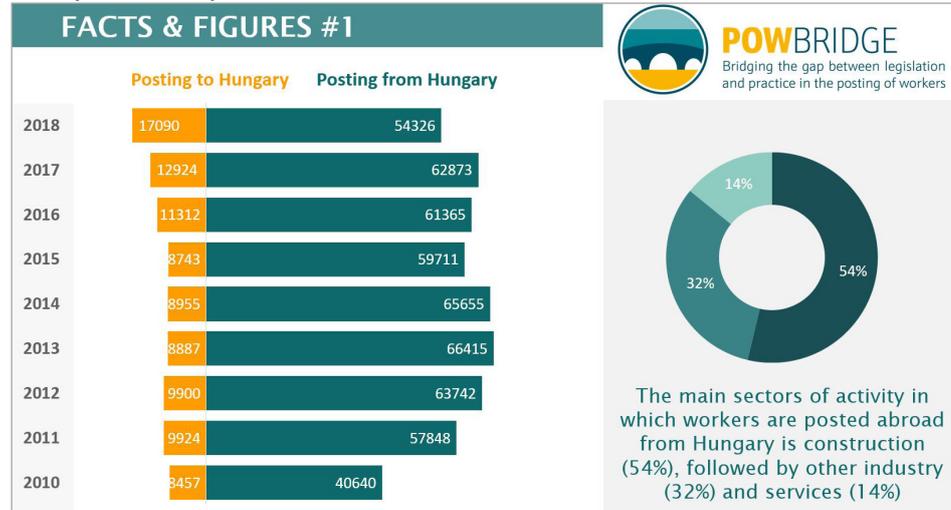
The aim of this policy brief is to examine the implications of the new provisions for employers in Hungary from a sending perspective. The policy brief incorporates findings from the Hungarian POW-BRIDGE country report (Zólyomi, 2021), including insights gained from interviews with national stakeholders, and discusses them in view of the new requirements introduced by the revised Directive. To provide some background to the topic under discussion in the national context, the policy brief starts with a short description of the phenomenon of posting in Hungary, and briefly presents the Hungarian government' and social partners' positions and reactions to the adopted revisions.

## **Facts and figures on posting from and to Hungary**

**As Hungary is a primarily sending country, the new rules are expected to have a significant impact on employers posting workers abroad**

Hungary, like other Eastern European EU member states, is a predominantly sending country in terms of posting of workers. In 2018, the number of postings from Hungary was more than three times the number of incoming posting (Figure 1). Posting to Hungary nevertheless shows a clear upward trend over the period 2015-2018. It is important to note that data on posted workers are based on the number of Portable Document A1 forms (PD A1) and because PD A1 forms can be issued for the same person multiple times during the year, these figures tend to overestimate the actual number of workers involved. In fact, there were 21,856 persons that were posted from Hungary in 2018 (De Wispelaere et al, 2019).

**Figure 1: Number of postings from and to Hungary during 2010-2018 and main sector of activity for workers posted abroad in 2018**

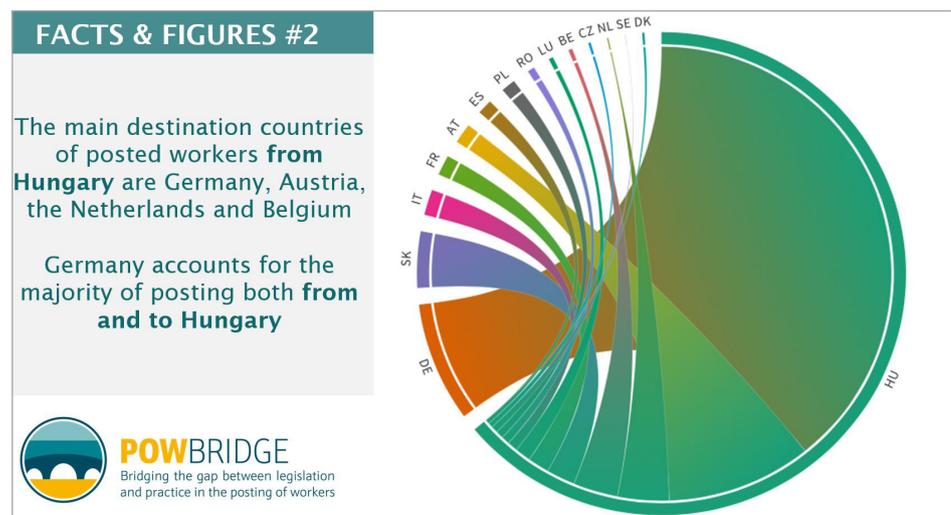


Source: Own illustration based on data from De Wispelaere et al (2019).

Notes: See Figure 1. The flows are shown only for EU countries where the volume of PD A1 forms issued and received by Hungary in 2018 reached at least 200.

A breakdown by sector of economic activity indicates that workers posted from Hungary provide services mainly in the construction sector, followed by other industry and services (De Wispelaere et al, 2019). Corresponding data from a receiving perspective reveal a relatively high share of postings in the services sector (40% in 2017), mainly in health and social care (De Wispelaere and Pacolet, 2018). Incoming posting in industry is generally concentrated on highly specialised jobs (e.g., engineers, specialised industry professionals) (Zólyomi, 2021).

**Figure 2: Flows in the posting of workers between Hungary and other EU countries, 2018**



Source: Own illustration based on data from De Wispelaere et al (2019).

Notes: See Figure 1. The flows are shown only for EU countries where the volume of PD A1 forms issued and received by Hungary in 2018 reached at least 200.



Figure 2 depicts flows in the posting of workers between Hungary and the main countries of destination and origin in 2018. Germany is by far the largest receiver of posted workers from Hungary (31,895 in 2018), followed by Austria, the Netherlands and Belgium. Germany is also the main country of origin for incoming posting along with Slovakia, and to a lesser extent, Italy, France and Austria.

## Reactions to the revised Directive in Hungary

**The revision of the Posting of Workers Directive generally met with discontent among employers' organisations in Hungary**

The revised Directive generated opposition from most employers' organisations, both at the wider EU level (Furåker and Larsson, 2020) and locally in Hungary. They viewed the new provisions as limiting the freedom of provision of services in the EU market and raised doubts about the applicability and enforceability of the new rules, particularly those pertaining to remuneration and the formal limit to the maximum duration of posting (12 months), after which the host country labour regulations would apply. Limited information is available on the position taken by Hungarian trade union organisations on the revised Directive. In 2017, only two Hungarian trade unions signed a joint statement issued by trade union organisations in the Visegrad group of countries (Czech Republic, Hungary, Poland and Slovakia) which expressed strong support for the revision of the Posted Workers Directive, especially welcoming the inclusion of the equal pay for equal work principle (Joint Statement, 2017). In another joint statement (2018), eight trade unions from the Visegrad group, two from Hungary, urged EU Member States to implement the revised Directive and voiced their disapproval of a complaint submitted by the Hungarian and Polish Governments to the European Court of Justice (ECJ) on the new amendments.

Hungary, together with Poland, voted against the adoption of the amended Directive, which was nevertheless approved by the EU. Following its approval, the two countries filed a complaint at the ECJ in 2018 seeking the annulment of the Directive. The complaint claimed that the new provisions are contrary to the Treaty on the Functioning of the EU (TFEU) which prohibits limiting the freedom to provide services within the EU. It further argued that the new rules concerning the remuneration of posted workers are not only disproportionate, but also incompatible with the EU's obligation to facilitate the provision of cross-border services as stated in the TFEU. In the complaint, Hungary considered the amendment with respect to remuneration to be not in the interest of promoting fair competition, but "rather a direct interference in economic relationships and that it nullifies the lawful competitive advantage of certain easily identifiable Member States in which the level of pay is lower" (C-620/18, EU:C:2020:1001, paragraph 89).



**The Hungarian Government's challenge to the amended Directive was rejected by the ECJ**

In its judgment delivered in December 2020 (C-620/18, EU:C:2020:1001), the ECJ rejected the complaint and dismissed the action brought by Hungary. The legal challenge did not suspend the application of the new rules of posting, which were transposed into Hungarian legislation and are in effect as of 30 July 2020.

## Implications of the new provisions for Hungarian posting employers

The section discusses implications of the new provisions pertaining to remuneration, universally applicable collective labour agreements, and long-term posting (Figure 3), and highlights some of the challenges these may entail for posting employers with respect to access to information and administrative requirements.

**Figure 3: The revised Directive in a nutshell**

### THE REVISED POSTED WORKERS DIRECTIVE (2018/957/EC)

#### Key Amendments:

- Extending the principle of equal pay for posted workers beyond the minimum wage;
- The full application of the host country's mandatory labour law for postings longer than 12 months (extendable to 18 months) except for termination rules and supplementary occupational pension schemes;
- The application of universally applicable collective bargaining agreements to posted employees across all sectors.

Source: <https://eur-lex.europa.eu/eli/dir/2018/957/oj>

**The revised Directive introduced the concept of remuneration, replacing the concept of minimum rates of pay**

### Remuneration and universally binding collective agreements

As mentioned in the introduction, a key change in the amended Directive concerns the replacement of 'minimum rates of pay' with the wider concept of remuneration. The previously used concept of minimum rates of pay was considered problematic due to the different interpretations. Whereas in the EU case law, the term was interpreted broadly to include other pay elements in addition to the minimum wage<sup>1</sup>, in practice many posting undertakings paid their workers only the minimum wage that was provided in the national laws or collective agreements in the host Member State (EC, 2016).

<sup>1</sup> See for instance the Judgment of the Court of Justice of 12 February 2015 in *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna* (C-396/13, EU:C:2015:86).



The revised Directive provides no definition of remuneration and leaves it to the Member States to determine the different elements that are included based on their national laws and practice. It does, however, require Member States to make information about the new provisions, including the mandatory elements that constitute remuneration, available in a transparent way on their single national posting website. Table 1 gives the example of wage elements that are mandatory in Austria and the Netherlands, which are among the main receiving countries of posted workers from Hungary.

**Table 1: Elements of remuneration mandatory in Austria and the Netherlands**

Austria	Netherlands
<ul style="list-style-type: none"> <li>• base pay</li> <li>• special payments</li> <li>• overtime supplements</li> <li>• other supplements and allowances</li> <li>• bonuses</li> <li>• private use of a company vehicle</li> <li>• professional fees</li> <li>• daily allowances as stipulated by collective agreement, where such are not a reimbursement of expense but are intended to compensate for the inconvenience of being away from habitual surroundings</li> <li>• compensation for travel time as stipulated by collective agreement, where such is paid under the condition that the employee needs to commute more than one hour daily.</li> </ul>	<ul style="list-style-type: none"> <li>• the applicable periodic wage for the scale</li> <li>• the applicable reduction in working hours per week/month/year/period</li> <li>• bonuses for overtime, shifted and irregular working hours, including public holiday bonus and shift work bonus</li> <li>• interim wage increases</li> <li>• reimbursement of expenses: allowances for, or reimbursement of costs, necessary for carrying out the job, including travel, meal and accommodation costs for workers who for the purpose of work are away from home and not at their usual place of work in the Netherlands</li> <li>• increments</li> <li>• end-of-year bonuses</li> <li>• additional allowances related to holidays.</li> </ul>

Source: National website of Austria (<https://www.entsendeplattform.at>) and the Netherlands (<https://english.postedworkers.nl>)

Note: Information retrieved on 23 Nov 2021.

Because posting entails additional costs for the employer in terms of workers travelling from the sending country to the host country where the services will be provided, uncertainties may arise whether these costs should count as part of the remuneration. The Directive makes this clarification by stating that the gross wages employers need to pay to their posted workers should exclude the amount paid by the employer concerning travel, meal and accommodation costs (i.e., allowances or reimbursement of costs that actually incurred in relation to the posting).



**Hungarian posting employers will need to consider what further elements of remuneration apply in host countries with universally applicable collective labour agreements**

In several Member States, such as Germany, Austria, Belgium or the Netherlands, additional terms and conditions of employment, including wages, are set out in collective labour agreements that apply to specific sectors. For instance, in Germany in the case of mainstream building industry, further elements of remuneration include allowances for night work, work on Sundays and holidays, work at height, special protective clothing, and work under difficult conditions, but exclude the 13<sup>th</sup> month salary<sup>2</sup>. According to the revised Directive, these collective agreements are to be applied to posted workers across all sectors. This revision will have no substantial impact on Hungarian employers posting workers to countries where this was already the case before (e.g., Belgium). In Germany and the Netherlands, this change applies due to the revised Directive. It will therefore be up to posting employers to consult the collective agreements of these countries in order to establish the correct remuneration for the posted employee.

**Long-term posting**

The average duration per posting from Hungary amounted to 244 days, or around 8 months, in 2019, which was well above the EU average (Table 2). It was also significantly more than the corresponding figures reported for other Eastern European Member States, such as the Czech Republic (155 days) Poland (124), Slovakia (107) or Slovenia (54) (De Wispelaere et al., 2020).

**Table 2: Average duration of posting from the sending perspective (in days), 2015-2019**

	2015	2016	2017	2018	2019
Hungary	198	306	222	211	244
EU	98	101	98	91	115

Source: De Wispelaere et al (2020, 2019); De Wispelaere & Pacolet (2018, 2017); Pacolet & De Wispelaere (2016)

Notes: Average duration per PD A1 issued according to Article 12 of the Basic Regulation. For the EU, data indicate the weighted average.

**When the posting duration exceeds 12 (or 18) months, the full mandatory labour law provisions of the host country become applicable**

While the average duration suggests that most postings from Hungary tend to be short-term (i.e., less than 12 months), employers will need to carefully check what other terms and conditions of employment apply in the receiving country should the expected posting period exceed the 12 months. For posting employers, the impact of these additional set of terms and conditions, also referred to as ‘the extended hard core’ terms of employment, will vary depending on the specific conditions in the national labour laws and universally binding collective labour agreements of the country where the services are carried out.

<sup>2</sup> Information provided on the national posting website of Germany.



For instance, in the case of Belgium, the impact of this new rule on Hungarian posting employers will likely be limited as almost all Belgian employment legislation applies already from the first day of posting. One additional layer concerns sickness insurance. In Belgium as well as in the Netherlands, after 12 months posted workers will be entitled to a guaranteed salary in the case of sickness.<sup>3</sup> In Germany, additional statutory provisions related, for example, to continued payment of wages on public holidays and to short-term absences from work (e.g., family caregiver leave) will have to be complied with by posting employers for postings with a duration longer than 12 months.<sup>4</sup> It is important to note here, however, that the revised Directive makes two exceptions from the rules applicable to long-term postings: termination rules and company pension schemes. The explicit exclusion of formalities and conditions regarding the conclusion and termination of employment contracts is significant considering that a number of Member States (e.g., Belgium, the Netherlands) have more restrictive rules in this regard compared to Hungary (OECD, 2020). Moreover, the social security of posted workers is not affected by the new provisions. Workers posted from Hungary will remain covered by the Hungarian social security scheme as long as the expected duration of the posting is not more than 24 months.

**In the case of long-term posting, Hungarian posting employers will face additional administrative requirements**

Long-term posting also entails additional administrative requirements for Hungarian posting employers. As stated in the revised Directive, the time limit of 12 months can be extended by an additional 6 months. This requires that employers submit a separate application to the respective authority in the host Member State before the end of the 12-month period. In calculating the 12-month period, employers need to be aware that when a posted worker is replaced with another posted worker to carry out the same work at the same place this is treated as a single posting. For example, if a worker is posted from Hungary for 6 months to another Member State and is then replaced by a new worker, this worker will be subject to the extended employment terms and conditions after 6 months. The exact requirements and procedures for the extension may differ significantly from one country to another and employers should not expect that it will be granted automatically. The Directive itself only states that “the period should be extended where the service provider submits a motivated notification” (2018/957/EC, paragraph 9). This implies that employers will have to provide reasons for the extension in their notification.

**Access to information and administrative requirements**

Access to information about wage and employment conditions in host Member States has been identified as one of the main challenges for posting employers

<sup>3</sup> Information provided on the national posting website of Belgium and the Netherlands.

<sup>4</sup> Information provided on the national posting website of Germany.



**Access to information about wage and employment conditions and often highly complex national rules in host Member States present a particular challenge for Hungarian posting employers**

(Danaj et al., 2021). Hungarian posting companies often face difficulties in this regard (Zólyomi, 2021). Even though, Member States are required to make information available on posting rules and regulations applicable in their national context, there is great diversity in the extent that such information is provided. Information on the national websites is not always sufficient or clear enough for employers to ascertain the exact terms and conditions they would need to comply with. While many foreign authorities try to improve access by making information available in more languages (the Austrian website is one good example), not speaking the language of the host country remains an important barrier to information access.

The complexity of national posting rules and the range of applicable collective labour agreements (e.g., national, regional, local, at the level of the undertaking) adopted by Member States adds a further layer of challenge for posting employers. This affects particularly smaller companies and companies who provide cross-border services only occasionally and lack the know-how and resources to acquire the necessary information and support for instance through specialised service providers (e.g., lawyers, accounting, or consultancy firms).

Lack of familiarity with posting-related administrative procedures, such as notifications, and other administrative requirements in the host Member State pose additional difficulties for some posting employers. Notification informing the competent authority in the host Member State about the posting can be made through the online notification system that has been put in place in most EU countries. Information on the specific procedure and the content to be provided should be available on the national websites on posting, but as mentioned before this is often accessible only in few languages (mainly in the national language and in English).

**Improving access to information is necessary to ensure compliance with the new provisions by all posting employers**

Since information on national rules on posting is key to ensuring that posted workers' rights to basic employment and working conditions are protected, and for posting employers to apply these rules correctly and consistently, it will be crucial that the new requirements on remuneration and long-term posting are made available in a transparent and accessible format in each Member State. This specifically concerns the single national websites on posting, which are the primary source of information for posting employers.

## **Concluding remarks**

The revision of the posting directive amplifies the existing challenges for posting employers with regards to bureaucracy and administrative requirements. The



new rules on remuneration and long-term posting are expected to increase the administrative burden and impose additional costs for posting employers. In addition, implementation of the new provisions will in some of the main receiving countries lead to higher wage costs for employers posting workers from Hungary.

The principle of equal pay for the same work at the same place introduced in the revised Posted Workers Directive is an important step towards ensuring greater protection for posted workers and to safeguard the freedom to provide services on a fair basis. It remains to be seen how this will be realised in practice when it comes to implementation and enforcement of the new provisions.

The principle of equal pay (and equal treatment) also raises questions when considering the wider European labour market context where not only posted workers, but also workers from third countries form part of a pool of flexible and often underpaid labour. Third-country labour migrants (TCN) from non-EU countries that are posted across the EU are among the fastest growing category of posted workers, for example. An increasing number of construction companies provide services through posting of TCNs, which in several cases appears to have become a business model for profit maximisation (Cukut Krilić et al., 2020). While these workers are found to be especially vulnerable to exploitation, the revised Directive makes no specific provisions on the mobility of TCN workers.

Issues of social dumping and cost-competition featured heavily in the political debates in relation to the posting revisions. The issue of labour shortages, a common problem faced by EU countries, received relatively little attention (Marx et al., 2021). These shortages are not restricted to lower-skilled sectors or professions (e.g., truck drivers, meat processors, welders) which posting is oftentimes associated with, but include high-skilled labour, such as engineering or health and social care (Brzozowska et al., 2021; Zólyomi, 2021). In the case of Hungary, most incoming postings are concentrated in these sectors. The extent to which the revisions such as the formal time limit of 12 months and the resulting administrative requirements will affect these high-skilled postings is still to be seen.



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