



# **THE SIGNIFICANCE OF DIRECTIVE (EU) 2018/957 IN THE ENGINEERING CONTRACT**

Sonia De Carvalho<sup>1</sup>

**Abstract-** The engineering contract, whose origin may be found in Common law, is a product of the development of economic activity and technological evolution, whose outlines and evolution have been drawn by business practice and contractual freedom. As the engineering company often assumes the obligation to select personnel, which may involve the employment of employees of companies established in European Union countries in order to perform an activity in European Union, it may occur an intersection of this contract with the legal framework regarding the posting of workers in the EU.

In this paper, we intend to offer a brief description of the engineering contract in coordination with the analysis of the amendments introduced by the Directive (EU) 2018/957 to the Directive 96/71/EC concerning the posting of workers within the provision of service.

**Keywords:** engineering contract, Directive (EU) 2018/957, posting of workers

## **1. INTRODUCTION**

The engineering contract, as mentioned above, results from the development of economic activity and technological evolution, whose outlines and evolution have been drawn by business practice and contractual freedom.

Therefore, the complexity and diversity of activities performed through this contract explain s flexible and articulated contractual scheme whose obligations constitute a multilayered bundle.

## **2. THE ENGINEERING CONTRACT**

In very broad terms, the engineering contract can be defined as the” contract with which one party (normally a company) commits itself to the other to elaborate a project of an industrial, architectural, urbanistic nature, and eventually to carry it out or to carry out projects from other companies, also providing, if this is agreed upon, to ancillary technical assistance services receiving as compensation a sum of money, integrated (or replaced), possibly by royalties, interests or useful participations of the entrepreneurial activity started following the realization of the project ”.

This broad concept wants to include most of the types of engineering contracts in the context of services usually carried out by a company.

The complexity of the works carried out under the engineering contract, namely the construction of infrastructures such as communication lines, bridges, dams, as well as the construction of relevant industrial buildings, requires the provision of specialized services engineering, urbanism, which are supported by an entrepreneurial technical-administrative organizational structure.

This contract began to be developed in the 1930s in the Common Law through engineering companies.

The use of the corporate form to aggregate professionals from various sectors was justified by the multidisciplinary nature and complexity of the engineering contract usually orientated to construction industry.

For this reason, it may be considered a corporation contract.

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The wide-ranging nature of the services provided under the engineering contract will give rise to a contractual model characterized by a complex set of rights and obligations, which are articulated in a multiplicity of versions, with different contents, at national and international level, whose features, despite the fact that it may have an affinity with some typical contractual figures, such as employment contract, provision of services and know-how, cannot be re-assigned to a typical contractual figure.

The engineering contract is considered mainly a legally atypical contract, although the praxis reveals that it is a socially typical contract, whose cause, as a social economic function, gives it the necessary contractual autonomy.

Cavallo Borgia correctly excludes the renewal of the contract to a mixed contract, stating that the fact that it is characterized by a multiplicity of benefits does not mean that it pursues a plurality of causes in the sense of a social economic function

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<sup>1</sup>Assistant Professor at Portucalense Infante D. Henrique University, Department of Law, Researcher at IJP - Portucalense Institute for Legal ResearchPorto, Portugal

Despite the different operational declinations, the engineering contract retains its own features, which corresponds to 'functionality to the achievement of an objective of complexity and interdisciplinarity'.

The multiplicity of elements that the different emerging contractual models from commercial practice present does not exclude the processing of a broad notion of engineering contract, where intellectual activity of professionals enters the final result, achievable through the use of a technical-administrative organization, present in all categories.

As a legally atypical contract, its legal configuration is committed to the principle of contractual freedom and the private autonomy of the parties.

Under the Engineering Contract, three modalities are of particular relevance:

- Consulting Engineering, in which the engineering company assumes the design of the project to be built, although with the intervention of other professionals, if specific skills are required. In this contract, the provision of consultancy services, including know-how for the construction of engineering and architectural works, is essentially concerned.

- Commercial Engineering, where the company prepares not only the project but also the execution of the work, also carrying out administrative formalities, technical assistance and staff training.

Within the Commercial engineering, there is a wider modality, the Turnkey Engineering Contract, in which the engineering company, often resorting to third parties, assumes the obligation to deliver the work ready to work, assuming Engineering/Design, Procurement and the Construction.

The engineer does not carry out the project directly, although he supervises it from concept to commissioning, taking over the direction of the work and the selection of personnel.

Where the engineering company assents to hire the personnel, which may involve employees of companies established in other European Union countries in order to perform projects in EU, the engineering contract often comes across with the legal framework regarding the posting of workers in the EU.

### 3. THE DIRECTIVE (EU) 2018/957

The EU has been incapable of addressing the lack of harmonization of labour legislation in the Member States with regard to the mandatory rules of minimum protection, accepted as an objective of the social policy in art. 151 of the Treaty of Functioning of European Union (TFEU).

Therefore, Directive 96/71/ EC was justified by the real menace of leading to social dumping in the host Member State, resulting from the less favourable working conditions of the sending Member State, also covering workers employed by undertakings established in a non-member State, as results from the prohibition laid down in Article 1, para 1, that those undertakings must not be given more favourable treatment than undertakings established in a Member State.

Accordingly, Directive 96/71/ EC required, before the amendments introduced by Directive (EU) 2018/957, that, regardless of nationality, the undertaking must guarantee workers posted the legal framework of the Member State where the work is carried out in matters such as (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination.

These working conditions shall be laid down by law, regulation or administrative provision or, in the case of the activities referred to in the annex concerning construction, repair, upkeep, alteration or demolition of buildings, in collective agreements or arbitration awards declared to be of general application within the meaning of paragraph 8 .

The Directive consequently aimed at promoting a set of mandatory rules concerning the minimum protection in the hosting country by employers that send the employee to perform his activity on a temporary basis in the territory of the Member State in which the services are provided.

The enforcement, within the framework of the construction sector, of collective agreements or arbitration awards declared to be of general application in accordance with paragraph 8 is of particular significance.

This is the sector in which the posting of workers is more common and where working conditions more unfavourable to workers in the sending country are more likely to be applied, as this is an activity usually carried out in the poorer countries of the European Union, which thus offer workers lower conditions, enabling the distortion of competition rules.

In spite of the legal framework established in Directive 96/71/ EC, the growth of the internal market and the economic crisis have accentuated the pay gap, fostering the promotion of social dumping through the posting of workers from countries with lower wage levels.

Hence, the Commission announced in March 2016 a specific revision of the Directive 96/71/CE, whose main purposes oriented Directive (EU) 2018/957.

One of the main criticisms was that undertakings are only obliged to apply minimum wage in force in the host country, producing wage differences that lead to distortions of competition between undertakings, compromising the proper functioning of the single market.

The Directive (EU) 2018/957 provides in article 3 to apply the same rules on pay in force in the host Member State as are laid down by law or by collective agreements of general application, so that posted workers receive the same remuneration as

local workers, which will include other remuneration benefits such as bonuses or allowances (Christmas allowance or Weather subsidy) or salary increases based on length of service, as well allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

The Directive (EU) 2018/957 also states that without prejudice to Article 5 of Directive 2014/67/EU, Member States shall publish the information on the terms and conditions of employment, in accordance with national law and/or practice, without undue delay and in a transparent manner, on the single official national website referred to in that Article, including the constituent elements of remuneration as referred to in the third subparagraph of this paragraph and all the terms and conditions of employment in accordance with paragraph 1a of this Article.

The article 3 has been amended to make clear that rules laid down by collective agreements of general application become mandatory for posted workers in all economic sectors and are not restricted to the construction sector provided for in the Annex to Directive 96/71/EC.

The Directive (EU) 2018/957 also amended the article 3 in order to provide that, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment covering the following matters 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 or otherwise apply in accordance with paragraph 8:(a)maximum work periods and minimum rest periods;(b)minimum paid annual leave;(c)remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;(d)the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;(e)health, safety and hygiene at work;(f)protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;(g)equality of treatment between men and women and other provisions on non-discrimination;(h)the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;(i)allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

The Directive (EU) 2018/957 inserted the 1a in article 3 in order to provide that where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, 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 or otherwise apply in accordance with paragraph 8.

The Directive excludes from first subparagraph of this paragraph the following matters:(a)procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses;(b)supplementary occupational retirement pension schemes.

Pursuant to the principle that the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job enshrined in Directive 2008/104/EC of the European Parliament and of the Council, the Directive added 1b requiring that Member States shall provide that the undertakings referred to in point (c) of Article 1 paragraph 3 guarantee posted workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC of the European Parliament and of the Council to temporary agency workers hired-out by temporary-work agencies established in the Member State where the work is carried out. The user undertaking shall inform the undertakings referred to in point (c) of Article 1, paragraph 3 of the terms and conditions of employment that it applies regarding the working conditions and remuneration to the extent covered by the first subparagraph of this paragraph.

The Directive also safeguards the possibility for workers to benefit from different conditions of work and remuneration provided that these conditions are more favourable than those laid down in the legislation of the host Member State.

#### 4. CONCLUSION

Notwithstanding the good intents of the Commission, as reflected in the various amendments to Directive 96/71/EC which we have now examined, we believe that the Directive 96/71/CE, after the amendments of Directive 2018/957, may have a harmful effect on the freedom to provide services.

As matter of fact, without solving the lack of harmonization of labour legislation in the Member States with regard to the mandatory rules of minimum protection, accepted as an objective of the social policy in art. 151 of the TFEU, the Directive 96/71/CE after the amendments of Directive 2018/957 may deter undertakings from providing services in other Member States and European Union, choosing not to post or hire European workers.

The engineering company hiring staff within the contract, which may involve employees of companies established in other European Union countries in order to perform projects in EU, must bear in mind this demanding and complex legal framework regarding the posting of workers in the EU.

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