Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors

Annexes

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BELGIUM

I. BACKGROUND INFORMATION

Q1: **To what extent is the minimum wage amount connected to:**

- **(local) living costs?**
- **average salaries (general / sectoral)?**
- **social policies?**
- **fight against social dumping and protective measures? (e.g. fair competition at national or international level between companies?**
- **other national/international matters?**

As will be explained in more detail in section II of the present country report, minimum wages in Belgium are set through negotiations between social partners at both national and sectoral levels.

Both the guaranteed average minimum monthly income (resulting from the national, cross-sectoral social dialogue) and the sectoral minimum wage scales are automatically adjusted according to developments in consumer prices (see the answers to Q7 and Q12). At the same time, and pursuant to the Act of 26 July 1996, an upper bound for wage negotiations at all levels is set through the so-called 'wage norm', based on the projected development of hourly labour costs in three neighbouring countries.

Q2: How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?

See Q3.

Q3: In practice, what are the wages differences between posted workers and local workers? Provide an answer per sector. Is there evidence that posted workers earn (per sector) generally less/more than local workers?

Introductory comments

At this stage, there are no official or systematic data about the income levels of posted workers. It should be noted at the outset, however, that preparations are currently underway, in the framework of the implementation of Directive 2014/67/EU and the follow-up to the 'Plan for fair competition' in the construction sector (see below, Q6) to extend the LIMOSA reporting duty with a number of functions, including wage declaration. The extended declaration is expected to be operational in mid-2016.

All interviewees have confirmed the existence of wage differences between posted workers and local workers, whereby the former earn generally less than the latter. According to the competent inspection services, it happens very frequently that posted workers' wages are below the Belgian minimum wage scales[1]. Targeted controls (based on risk analyses) of undertakings in the context of the fight against social dumping result in the finding of violations in 80% of the cases, more than half of which concern cases of underpayment of wages[2]. According to the interviewee of the inspection services, violations of wage conditions are found in up to 4 out of 5 controls of foreign undertakings (see also below).

Often, the non-compliance with the Belgian 'minimum rates of pay' as ensured by the PWD is connected with other irregular or fraudulent practices. One of these is delocalisation, whereby Belgian employers set up subsidiaries in other Member States which, in some cases without developing any genuine activities, subsequently send workers to Belgium to work under a 'subcontracting' agreement for the Belgian mother company. This practice is encountered in particular in the road transport sector (see Q5), and to a lesser extent in the construction sector. Another frequently encountered illicit practice concerns posting of workers in contravention of the (federal and/or regional) legislation governing the hiring-out of workers (see also below, section III, sub A.2). This often emanates from 'posting agencies' established in Netherlands whose main or only activity consists of hiring workers with a view to posting them (see Q5). They do so, however, without possessing the necessary permits in Belgium, which is why they attempt to disguise their activities of hiring-out personnel as a contract for services, resorting to such instruments as 'framework contracts' or summary order forms (e.g. for works per m^2). It also occurs that these agencies only act as intermediary (go-between), in which case their services consist of connecting workers they have not hired with employers/users in Belgium, again running counter to (regional) legislation. Other examples of illicit practices include breaches of the rules in relation to working time (combined with failure to pay the corresponding extra payments) and bogus self-employment[3].

Controls intended to establish these breaches are time- and resource-consuming endeavours fraught with difficulties. These include language barriers, illegibility or unreliability of documents (e.g. wage slips) produced, difficulties associated with the identification of the employer and lack of cooperation on the part of the posted workers, the posting employers and/or the authorities of the sending State[4]. In some sectors,

[1] See the Activity report 2013 of the General Direction 'Monitoring of Social Laws' (*Toezicht Sociale Wetten - TSW/Contrôle des lois sociales – CLS*), 119.

[2] Inbreuken tegen sociale dumping bij 80% van gecontroleerde bedrijven (Breaches against social dumping at 80% of controlled companies) (De Standaard, 8 May 2014).

[3] A detailed discussion of these practices is beyond the scope of this report. For more information, see inter alia the activity report mentioned in the previous footnote (p. 120 e.s.); Y. JORENS, "Detachering in de Belgische praktijk: een overzicht van enkele toepassingsproblemen" (Belgian posting practice: an overview of some implementation problems), in Y. JORENS, B. BUYSSE et al., Handboek Europese detachering en vrij verkeer van diensten: economisch wondermiddel of sociaal kerkhof (Manual on posting in Europe and free movement of services: economic panacea or social graveyard), Bruges, die Keure, 2009, 370 e.s.; M.-P. SMETS and P. VANDEN BROECK, "Detachering en Sociale (Arbeids)inspectie – de Bestrijding van de Arbeidsrechtelijke Fraude" (Posting and Social (Labour) Inspection – the Fight against Fraud in Labour Law), in Y. JORENS, B. BUYSSE et al., o.c, 608 e.s.; J. BUELENS, Tewerkstelling van buitenlandse arbeidskrachten in de bouwsector: de constructies van deloyale concurrentie juridisch belicht en doorprikt (Employment of foreign labour force in the construction sector: schemes of unfair competition elucidated and dispelled), report commissioned by the Belgian social partners in the construction sector, University of Antwerp, 2007, 138 e.s.

[4] When it comes to cooperation with authorities, the inspection services report that this has improved substantially since the implementation of the IMI system (operational September 2011). There are differences between the Member States, however. Cooperation and data exchange through IMI are excellent with Poland,

notably the road transport sector, monitoring and enforcement problems are particularly severe (see Q5 and section III, B.5)[5]. The social partners' representatives interviewed for the purposes of the present study generally appreciate the problems faced by social inspection services in this regard, although interviewees from the construction employers' federations voiced some criticism over the emphasis on large unexpected on-site checks and suggested the targeted use of letters announcing controls.

In case breaches are found, the competent inspection services generally give preference to a regularisation of the illegal situation, rather than pursuing the traditional judicial enforcement system which is poorly adapted to combat cross-border fraud. Regularisation moreover safeguards the interests of the workers, who are best served with an effective payment of the correct wages. Only in cases of severe social fraud or where the employer fails to collaborate will the inspection services draw up an official report and relay it to the public prosecutor's office in view of judicial prosecution[6]. According to the interviewee of the inspection services, some 75-80% of the cases involving wage condition breaches result in regularisations.

In 2013, in terms of the number of cases dealt with by the competent inspection services involving foreign undertakings, those dealing with companies established in Poland (194 cases) and the Netherlands (130) clearly stand out[7]. Violations pertaining to wage conditions make up the main type of breaches (176), followed by working time violations (104). The bulk of regularisations further to non-compliance with the Belgian (minimum) wage conditions occurs in the construction sector (107), followed at a distance by the sectors of 'administrative services' (24), 'industry' (23) and 'road transport' (4)[8].

Wage differences

The representative of the cross-sectoral employers' federation drew attention to the fact that wage differences are not inextricably linked with posting. In those sectors (e.g. the metal sector) where posting is typically a matter of highly skilled workers, often from neighbouring countries, wage differences to the detriment of posted workers do not as a rule exist or in any case, are not regarded as problematic; such posted workers continue to receive their normal wages, complemented with cost compensations.

That being said, both the representatives of the social partners and the inspection services interviewed for the purposes of the present study are aware of significant wage differences between posted and local workers in the construction and road transport sectors.

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the Netherlands, Luxembourg, Germany and Portugal. On the contrary, there are few contacts with counterparts in the UK and Italy. See the aforementioned activity report on pp. 125 and 137-138. Cooperation with Romanian and Bulgarian authorities is sometimes hampered by the lack of resources and appropriate data infrastructure in these countries, according to the interviewee of the inspection services.

[5] Ibid. and M.-P. SMETS and P. VANDEN BROECK, o.c., 618.

[6] See notably the aforementioned activity report (p. 125) and the audit of the Court of Audit (*Rekenhof / Cour des comptes*) of 18 February 2015 entitled 'Carriage of goods by road – enforcement of the regulations' (p. 46).

[7] Romania (72 cases), Portugal (68), France (60), Luxembourg (56), Slovakia (43), Hungary (32), Bulgaria and Germany (both 31) complete the top 10.

[8] See the Activity report 2013 of the General Direction 'Monitoring of Social Laws', 129-130

In the absence of any (operational) mechanism of wage declaration for posting employers, data on wage differences to some extent remains anecdotal and stems from situations encountered during inspections, trade union actions, press reports etc. Cases where Portuguese construction workers on a Brussels building site were found to be paid EUR 3.40 per hour caused outrage among social partners[9]. Likewise, reports such as those of a Polish company that pays construction workers an hourly wage of EUR 6.50 and operates tariffs that are two to three times lower than those usual in Belgium, have given rise to parliamentary questions[10]. The transport practices of IKEA have received widespread media attention[11].

According to the transport union representatives, eastern European drivers working in Belgium typically receive a net monthly wage of ca. EUR 350-400, complemented with per diem allowances ranging between EUR 40-60 per day. In total, such drivers make between ca. EUR 1,400 and EUR 1,800, depending on the country of origin and the hours worked (often as many as 60 to 80 hours). While this is significantly less (sometimes up to half) than what a Belgian driver would make, taking into account extra-payments for overtime and work outside normal schedules, this still exceeds multiple times the wage they receive in their country of origin.

Interviewees from the employers' federations have mainly referred to the differences in wage costs in respect of Belgian workers and workers employed by companies in eastern European countries. In the road transport sector, calculations were made on the basis of actual wage slips of a Polish and Slovak driver operating in western Europe (data for 2011 and 2012 resp.), involving notably gross wages of EUR 350 and EUR 500 resp., net per diem allowances (paid per calendar day) of EUR 45 and, for the Slovak driver, a taxable pocket allowance of EUR 10 per calendar day. These calculations revealed that the Belgian wage cost (on an annual basis) was 110% higher than the Slovak one, and even 150% higher than the Polish one. In what regards the net wage, the wage difference was markedly smaller, i.e. 25% (Belgian vs. Slovak driver).

In the construction sector, employers' federations' representatives have referred to studies quantifying the structural wage cost disadvantage facing Belgian employers vis-à-vis posting employers, and which ranges from ca. 10% for neighbouring countries to ca. 35% for some eastern European countries. In nominal terms, the difference in hourly wage cost between a Belgian and an eastern European worker is ca. EUR 10-12. It is important to specify that these figures reflect the situation in which the PWD is respected and, thus, Belgian minimum wages are paid. The competitive disadvantage thus quantified is therefore mainly on account of the comparatively high Belgian social security contributions.

In the temporary work agency sector, the representative of the employers' federation has indicated that posted workers in practice do not obtain wages according to the user-pay principle, but instead receive the minimum wage complemented with cost compensations. See in more detail below, section III, sub B.

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[9] Confederatie Bouw, Sociale dumping maakt bouwsector kapot (*Social dumping destroys construction sector*), 15 April 2014, http://www.confederatiebouw.be/PressCommunication%5C%5CSociale%20dumping.pdf

[10] See e.g. the question of David Clarinval MP to the Minister of Labour of 4 July 2013, entitled "Massive hiring of foreign workers in Belgium – unfair competition" (No 0559, session 53).

[11] IKEA in grijze zone – bedrijf in opspraak door goedkope Slowaakse chauffeurs (*IKEA in grey area – company discredited by cheap Slovak drivers*) (De Morgen, 15 July 2014).

Q4: **In the temporary work agencies sector, could you describe who the "final users" of posted workers are?**

As will be explained under Q5 below, posting to Belgium as referred to in Article 1(3)(c) PWD is a limited phenomenon. According to assessments made by interviewees, the final users can be found in various sectors of the industry (incl. the cleaning sector, the meat-processing industry etc.). The construction and road transport sectors do not constitute specific targets.

Far more widespread, again in various sectors, is posting by posting agencies. Particularly the construction sector, but to a lesser extent also the road transport sector, are concerned here. See below Q5.
To our knowledge, more precise data and/or official statistics about the 'sectors of destination' of posted interim workers are not available.

Q5: **Is 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 (hereafter "PWD") implemented in your country so as to comply with minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers?**

As is explained in detail in section III below, sub A.1, the legal implementation of the PWD in Belgium is maximalist in nature, in that the transposing piece of legislation, i.e. the Act of 5 March 2002, declares virtually the entire body of Belgian labour law (whether of a statutory or conventional nature) applicable to posting employers. The Belgian legislature has used both extension possibilities of Article 3(10) PWD. At the same time, as will be shown *in extenso* under sub-section B of section III, the actual enforcement of the terms of employment, including as regards wages, is much less far-reaching and can even rightfully be called minimalistic.

Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?

From a legal point of view, since Belgium made use of the extension possibility contained in Article 3(10)(2) PWD, the implementation is similar across the sectors. Also the principles underpinning the enforcement of Article 3(1)(c) PWD do not, in principle, vary between the different sectors, according to the interviewee from the inspection services.

This being said, in practice, the picture for the different focus sectors looks quite diverse:

- the **construction** sector is by far the most important sector of the economy when it comes to the number of incoming posted workers (see below, quantitative assessment). It is therefore not surprising that both implementation and enforcement of the PWD are the most developed in this sector (see also section III below, sub B).

It may be noted that the dominant position of the construction sector in the posting debate is source of some irritation in other sectors of the economy. Particularly employers from other sectors sometimes complain that the measures taken to combat posting fraud, such as presence registration (*Checkinatwork*), the obligation to wear badges (*ConstruBadge*) or the introduction of chain liability, are all tailored to the construction sector but do not necessarily constitute appropriate solutions for other sectors. This may give rise to some degree of tension in the

relations between the federations representing employers in the construction sector and the cross-sectoral employers' federation representing the entire industry[12].

- the **road transport** sector is a truly specific one in this context, due to issues concerning the (unclear) applicability of the PWD, the existence of an entire set of specific legislation and the corresponding involvement of different authorities, and the intrinsically mobile character of the players involved. Whether transit and bilateral transport operations fall under the PWD is not a foregone conclusion. And while the Belgian social partners have agreed on the fact that cabotage operations are governed by the PWD[13], as also stated in recital 17 of Regulation (EC) No 1072/2009, interviewees from the sides of social partners and inspection services have confirmed that such application remains purely theoretical. The reason for this mainly lies in the sheer difficulty of applying, let alone enforcing, the minimum Belgian labour and wage conditions in respect of these transport operations, whose duration is often a matter of one hour or a couple of hours maximum. The same holds true for cases where a foreign company performs European transport operations for a Belgian client, insofar as the driving time spent on Belgian territory is concerned. Imposing the Belgian minimum rates of pay in respect of these services would, according to the inspection services, sit uneasily with EU law, notably the ruling in *Mazzoleni* (C-165/98).

Rather than monitoring compliance with the PWD and its Belgian implementing legislation, the focus of the inspection services in respect of foreign undertakings lies on combatting illegal cabotage and letter-box companies. In this last regard, when it can be proven that the subsidiary sending the drivers to work for the Belgian mother company fail to carry out any genuine activities in the country where it is established (often the Slovak Republic), compliance with the (full body of) Belgian labour and wage conditions will be enforced, in application of the Rome Convention as interpreted by the CJEU in *Koelzsch* (case C-29/10). On the spectrum between genuine activities and mere letter-box, however, many variants are possible, and it is difficult for the inspection services to substantiate that a subsidiary constitutes an illegal letter-box company rather than a legitimate case of delocalisation (flagging out). The fact that the provision of Article 5(c) of Regulation (EC) No 1071/2009 lends itself to different interpretations – as, incidentally, became very clear when interviewing both sides of the social partners in the transport sector – serves to complicate matters further. More in general, enforcement of the combined body of road transport legislation faces serious challenges and could, according to a recent audit by the Court of Audit (*Rekenhof / Cour des comptes*), be organised more efficiently[14].

[12] In this connection, the interviewee from the cross-sectoral employers' federation noted that in several sectors (e.g. the metal sector or the food industry), in which posting is typically a matter of highly-skilled personnel, social dumping is not considered an issue and, quite on the contrary, posting is seen as a necessary instrument to resort to expert services otherwise unavailable in Belgium.

[13] CLA of 13 March 2014 (No 121,724).

[14] The aforementioned audit finds, among other things, that different aspects of the legislation are difficultly enforceable, notably as a result of problems relating to proving breaches and the dependency on other Member States. Enforcement is also strongly focused on sanctioning (as opposed to e.g. auto-regulation) and is not underpinned with decent statistics. Finally, the cooperation between the multiple players involved could be further improved.

- Interviewees from the relevant trade union division and employers' federations have confirmed that they are unaware of any meaningful occurrence of posting in the sector of **health and care services** in Belgium, let alone of any relevant application of the PWD on a significant scale. The representatives of the inspection services have come across a few cases, notably concerning Polish and Bulgarian ladies providing permanent home care services to private (elderly) persons for a continuous period of two to three months, and where these workers failed to receive the Belgian minimum rates of pay. In addition, upon request of the previous State Secretary for the Fight against Social Fraud, a taskforce was set up within the Social Intelligence and Investigation Service (SIOD / SIRS) in order to examine whether any breaches could be found. It turned out that this was the case for some service providers, but that these constituted mainly violations against regional regulations (pertaining to qualifications etc.). At present, a criminal investigation is being held in Wallonia concerning an intermediary that established Bulgarian and Romania companies to post personnel to Belgian persons reliant on care.

For the abovementioned reason, the sector of health and care services will not be further dealt with in the present report; instead, increased attention is paid to the other sectors.

- posting in the **temporary work agency** sector, as referred to in Article 1(3)(c) PWD, whereby a foreign temporary work agency hires out its employees to a Belgian company - thereby putting these temporary agency workers directly under the authority of the Belgian company – is a relatively small-scale phenomenon in Belgium, according to the interviewee from the inspection services. A possible explanation is the well-developed regulation in Belgium with regard to hiring-out of workers, contained in the Act of 24 July 1987 (see also below, section III, sub A.2) as well as in regional legislation (permits).

In contrast, it happens very frequently that temporary agency workers are posted to Belgium by foreign undertakings that hired them (and did so for that sole purpose). The bulk of such undertakings are posting agencies established in countries whose legislation adopts a more flexible approach towards temporary agency work and hiring-out of workers, and which often do not develop any activities of the kind pursued by the final users to which they post. They may also collaborate with undertakings set up in these countries as subsidiaries of Belgian companies in the relevant sector. Only a small minority of these agencies have obtained the regional permit which is a precondition to carry out temporary work agency and/or placement services legally in Belgium[15] [16]. This kind of posting occurs in multiple sectors, but is particularly prevalent in the construction sector,

[15] On the basis of LIMOSA statistics, the welfare fund in the construction sector, fbz-fse Constructiv, has recently carried out an analysis of the companies (more than 2,000) established in the Netherlands that had posted, in the period between 1 July 2013 and 4 February 2015, non-Dutch workers to Belgium, while declaring the employee code as 'interim'. Of the more than 2,000 qualifying companies, 133 had declared more than 15 workers. Further analysis learned that half of these companies (66) clearly did not pursue building activities. Of these 66, 53 companies did not have a permit in any of the three Belgian regions.

[16] The competent regional authorities maintain lists of agencies that have been granted a permit in the Flemish, Walloon and Brussels-Capital regions.

to the point that it represents, according to the interviewee of the inspection services, the majority of cases encountered. Posting agencies (or 'project offices', 'placement agencies' etc.) are active in various – both neighbouring and eastern European – countries, but posting by Dutch agencies (the 'Dutch route') is particularly prevalent and explains the surprisingly high ranking of the Netherlands in terms of the main sending countries (see below). It is also typical for this kind of posting that the nationality of the posted worker and the country of the establishment of the sending employer do not correspond.

Quantitative assessment

Through the LIMOSA reporting duty, i.e. the mandatory online prior declaration that rests with non-Belgian employers (and self-employed persons) who intend to carry out services in Belgium, the Belgian authorities have a relatively comprehensive and reliable quantitative view of (a range of aspects of) posting to Belgium. LIMOSA is operational since 2007 and has undergone several amendments since, including as a result of the CJEU ruling in *Commission v. Belgium* (C-577/10). Further developments of LIMOSA, in the light of the fight against social dumping, are underway (see also Q3 and Q6).

The relevant legislation obliges the Belgian user who resorts to the services of posted workers, on pain of penal sanctions, to monitor the fulfilment of the LIMOSA declaration by the posting employer and, as the case may be, to signal the absence thereof to the authorities. This obligation, which has essentially been validated by the CJEU in the recent case *E.J. De Clerq et al.* (C-315/13), is considered by representatives of the social security institution as one of the main reasons why LIMOSA statistics sketch a more realistic picture of the volume of the phenomenon of posting to Belgium, compared to that stemming from analysis of the number of forms E101/ portable documents A1 in the context of the EU Social Security Coordination Regulations.

The table below shows the number of LIMOSA declarations counted per unique employed person from 2008 (i.e. the first full year of operation of LIMOSA) to 2014 for all sectors combined and from the entire world:

Year	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**
Nr. of employees (unique persons)	106,302	89,567	96,049	113,775	123,938	147,105	164,525

Source: National Social Security Office (Rijkdienst voor Sociale Zekerheid – RSZ / Office national de Sécurité sociale – ONSS)

An employee is considered in the above figures insofar as at least one LIMOSA declaration for one or more days has been made for him/her in the given year. Within that year, s/he is counted only once, even if – as happens very often – multiple declarations for that person are made that year. The total number of declarations therefore substantially exceeds the numbers of unique persons.

The spreadsheet in annex to this country report (courtesy of the RSZ-ONSS) provides a wealth of statistical information based on LIMOSA declarations (notably per unique person), grouped per sending country, per sector of the economy, per type of worker (employee or self-employed) and per year.

The breakdown **by country of establishment of the posting employer** shows that companies established in the Netherlands represent by far the main source of posted

workers to Belgium (52,955 unique employed persons in 2014), before Poland (19,552), Germany (19,133), France (15,204), Portugal (13,220), Romania (10,333), Luxembourg (9,048), Hungary (5,187), the Slovak Republic (4,112) and Bulgaria (3,896).

When considering the **breakdown by economic sector**, it is apparent that the *construction* sector is by far the sector that attracts the largest number of posted workers. These numbers have increased drastically in the past years, and so has the share of posted workers in the construction sector in relation to that in the total economy. In 2012, there were 46,666 LIMOSA declarations (unique employed persons) in the construction sector (or 37% of the economy). A year later, this number had risen to 71,952 (48%). In 2014, 94,165 LIMOSA declarations (unique employed persons) were registered (57%)[17].

In 2014, the largest (absolute) numbers of posted workers in the construction sector were sent by employers established in the Netherlands, Poland, Portugal, Germany, Romania and France. In relative terms, it is clear that posting workers to the construction sector is mainly a matter of eastern and some southern European Member States, where often the (large) majority of posted workers are sent to work in this specific sector (with strikingly high shares for Portugal, Hungary and Slovenia). In what regards companies established in countries like the Netherlands, Germany, France and Luxembourg, the construction sector is the sector of destination for a minority of posted workers (almost half in the case of the Netherlands). Incidentally, it is noted that a remarkably high number of self-employed persons established in the Slovak Republic posted themselves to work in the Belgian construction sector.

Looking at the nationality of (both employed and self-employed) workers posted to carry out construction activities in Belgium, an analysis carried out by fbz-fse Constructiv on the basis of LIMOSA declarations (unique persons) made between July 2013 and February 2015 shows that 25% of them are Dutch, 20% are Polish, 12% are Portuguese, 7% are Romanian, 6% each are German and French, 5% are Hungarian and 3% are Bulgarian. The confrontation of these data with those relating to the country of establishment of the posting employers and self-employed persons, reveals some instances of marked discrepancy: some 97% of the workers posted from Luxembourg do not have the nationality of that country. For Slovenia and Italy, these numbers are 77% and 65%. For Germany and the Netherlands, they are much lower, yet still significant: 32% and 20%, resp. On the other hand, a negligible 0.59% of the workers posted from Romania is not Romanian. For Poland, this number is 3.34%, while it stands at less than 7% for the Slovak Republic and Bulgaria.

When it comes to the *road transport* sector, the LIMOSA statistics in annex might be less reliable. This has to do with the fact that for this sector – unlike what is the case in the construction and temporary agency work sectors, considered particularly liable to fraud – the possibility exists, in respect of workers who come to work regularly in Belgium, to make a single declaration for a whole year. It is observed that declarations are often made by default (excessive declarations being not illegal). This said, the number of employees posted to this sector (including storage and distribution) in 2013 exceeded 300 only in a few sending countries, i.e. the Netherlands (which by far occupies the first

[17] See the reports of the Central Economic Council (*Centrale Raad voor het Bedrijfsleven - CRB / Conseil central de l'économie - CCE*) on the state of the construction sector of October 2014 (No 2014-1772, p. 17) and April 2015 (No 2015-0967, p. 19). See also the 2015 report (p. 33 e.s.) of the High Council for Employment (*Hoge Raad voor de Werkgelegenheid / Conseil supérieur de l'emploi*), downloadable at http://www.emploi.belgique.be/publicationDefault.aspx?id=43631.

place, with 3,251), Luxembourg (487), the Slovak Republic (477), Poland (470) and Romania (373). The rise in posted employees displayed by companies in the latter country is remarkable, as is the decline by Portuguese companies (315 in 2008; 15 in 2013).

The LIMOSA statistics in annex also confirm stakeholders' assessments relating to the marginal character of the posting phenomenon in the *health and care services* sector. Only three sending countries show numbers exceeding 50: the Netherlands (317), Bulgaria (76) and Germany (53).

Finally, the LIMOSA statistics also inform about posting in the temporary work agency sector, 'interim' being one of the 'employee codes' to be filled in upon making the declaration. Here as well, the reliability of the data might need to be put into perspective, in the light of the practices by some posting agencies described above under this answer. This said, in the country sending the largest number of posted workers to Belgium, i.e. the Netherlands, the interim employee code was checked for 11,753 posted workers in 2014 (i.e. 22% of all employees posted by Dutch companies that year). The bulk of them were Dutch (8,218), followed at a distance by Polish (1,366), German (293), Turkish (286) and Hungarian (231) employees[18].

Q6: To what extent is the subject of minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.

As one of the main triggers of the phenomenon of social dumping, the subject of minimum wages for workers posted to Belgium is definitely an issue of huge concern for social partners and policy makers. This is the case, first and foremost, in the construction sector and to a lesser extent, in other sectors such as road transport, cleaning and meat-processing.

It is noteworthy that the issue is not only debated in the relevant professional / sectoral circles, but is in addition recurrently reported in national mainstream media. For example, between the end of August and the end of September, more than five articles appeared in the Flemish newspaper *De Standaard* that dealt with social dumping in the context of the posting of workers[19]. Several of these articles appeared in the wake of the announcement by the construction employers' federation that some 17,300 jobs were lost in the construction sector since the end of 2011, mainly, so it was contended, as a result of intra-EU posting[20]. This announcement, incidentally, was in line with earlier

[18] RSZ-ONSS, LIMOSA statistics extracted upon request.

[19] Confederatie Bouw vraagt specifieke taxshift voor eigen sector (*Confederatie Bouw asks for specific tax shift for own sector)* (De Standaard, 26 August 2015); 33.000 bouwjobs worden ingevuld door buitenlanders (*33,000 construction jobs filled by foreigners*) (DS, 27 August); Buitenlandse bouwvakkers komen vaakst uit Nederland (*Foreign construction workers most often come from the Netherlands*); Hoe sociale dumping vrachtwagens gevaarlijker maakt (*How social dumping makes trucks more dangerous*) (DS, 27 August); Arbeiders zonder grenzen (*Workers without frontiers*) (DS, 29 August); De bouwwerf en de postbus (*The building site and the letterbox*) (DS, 1 September). The last three represent opinion articles by Frank Moreels, Marianne Thyssen and Tom Deleu respectively.

[20] See http://www.confederatiebouw.be/nl-be/actua/dumpingsocial.aspx

warnings by this federation about the displacement effects of social dumping in the sector[21].

In this last regard, and while social security (Dimona) data show that employment in the construction sector of Belgian socially insured persons is decreasing since 2011, which is also the year as of which the LIMOSA declarations (unique employed persons) started showing a rapid increase (see Q5)[22], the representative of the social security institution insisted that one should not too lightly draw conclusions about crowding-out effects as a result of posting, and that there may be other factors at play explaining this substitution (such as work shortages). In the same vein, the representative of an employers' federation in the road transport sector drew attention to the fact that the sector is characterised by a rapidly ageing (driving) workforce and is in need of foreign drivers to fill the gaps. The representative of the inspection services, however, referring to the construction sector, is of the opinion that there is a direct link between the abovementioned Dimona and LIMOSA trends.

It comes as no surprise that trade unions are quite active when it comes to taking action against social dumping. Several months ago, on 24 June, some 5,000 members of the three main Belgian trade unions protested against social dumping, demanding concrete measures at both national and European level to fight the phenomenon[23]. Regular press releases and news items emanate from employees' organisations, condemning the practices and warning against the effects of social dumping. For the sake of example, we may mention here the 'black books' produced by the socialist transport union ABVV-BTB / FGBT-UTB denouncing the practice of Belgian transport companies to establish subsidiaries in the Slovak Republic failing to pursue genuine activities[24].

Concerns relating to social dumping have not gone unnoticed by policymakers. Successive governments in the past decade have drawn up action plans and enacted legislation to fight against posting-related social fraud – in some cases, incidentally, finding themselves in conflict with EU institutions (e.g. LIMOSA and the so-called 'anti-abuse provision'). For the sake of example, we may refer to the introduction of joint and several liability for wage debts under the Programme Law of 29 March 2012[25].

The theme is the subject of frequent parliamentary questions[26]. In May 2015, the coalition parties agreed on a parliamentary resolution asking to step up the fight against posting fraud and social dumping[27].

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[21] See e.g. Bouwsector vraagt overheidsmaatregelen tegen sociale dumping (*Construction sector calls upon the government to take measures against social dumping*) (De Morgen, 18 November 2014).

[22] See the abovementioned reports of the Central Economic Council.

[23] Vakbonden protesteren tegen sociale dumping (*Trade unions protest against social dumping*) (De Standaard, 24 June 2015).

[24] http://www.btb-abvv.be/index.php?option=com_content&view=article&id=2939&Itemid=618&lang=nl#UK. See also the 2013 white book listing '25 measures against social dumping.

[25] See in this regard B. CROIMANS and F. VAN OVERMEIREN, "Hoofdelijke aansprakelijkheid voor loonschulden: eerste beoordeling van de juridische en praktische gevolgen" (*Joint and several liability for wage debts: a first assessment of the legal and practical consequences*), *Oriëntatie* 2014, 106 e.s.

[26] See e.g. the question by Catherine Fonck MP to the State Secretary for the Fight against Social Fraud, Privacy and the North Sea of 18 May 2015, entitled "Posting of workers – respect of the provisions relating to the minimum wage" (No 0043, session 54).

In June 2015, Kris Peeters, the Belgian Minister of Labour, along with six of his counterparts of other European countries, called upon Commissioner Thyssen to amend the PWD with a view to combating fraud.

In April 2015, the competent State Secretary, Bart Tommelein, launched a comprehensive 'Action plan 2015 for the fight against social fraud and social dumping', whose second chapter lists some 20 priority actions both at national and international level that are specifically aimed at combating cross-border fraud through illegal posting[28]. Compliance with the Belgian minimum pay rates, posting schemes (via letter-box companies) and illegal interim posting form part of the monitoring priorities set by the plan. As a part of a sectoral approach, round tables with the social partners are organised for sectors liable to fraud, i.e. the construction sector, the cleaning sector, the transport sector, the meat-processing sector, the horeca sector and the surveillance sector.

While in the road transport sector, the round table is underway, in the construction sector the consultation process has already resulted, on 8 July 2015, in a tripartite 'Plan for fair competition' consisting of 40 concrete measures to fight social dumping at national, international/Benelux and EU-levels[29]. For the sake of example, we mention the following: an increased exploitation of LIMOSA as a tool against fraud; a strengthened monitoring of foreign posting- and temporary work agencies; the establishment of an informative table containing hourly wage data in respect of three wage categories for the 10 main sending countries in case of correct application of the PWD and Regulation (EC) No 883/2004; an awareness-raising campaign about social dumping in the construction sector; a review of the legislation relating to public tendering; advocating, at Benelux and EU-levels, a specific, shorter (social security) posting period of six months for the construction sector as well as a system of social security contribution collection in the State of employment with subsequent contributions transfer to the State of origin.

At international level, we may refer to the recent recommendation of the Benelux Committee of Ministers, dated 23 September 2015, relating to the development of a multilateral cooperation in the fight against social fraud at Benelux- and European levels. The recommendation provides *inter alia* for joint inspections and the cross-border exchange of data with a view to combating social fraud.

II. WAGE-SETTING MECHANISMS

II.1. A better understanding of minimum wage-setting mechanisms

Q7: **Which types of legal instruments/practices are used to set minimum wages? Describe in details the mechanism(s) used.**

- **Statutory provisions**
- **Law, regulations or administrative provisions**

[27] Meerderheid wil tandje bijsteken in strijd tegen sociale dumping (*Majority wants to step up fight against social dumping*) (De Standaard, 20 May 2015).

[28] See http://www.tommelein.com/actieplan-sociale-fraude-zet-in-op-samenwerking-en-digitalisering/. See also the State Secretary's 'Action plan social dumping' of December 2014 as well as the 'Action plan social dumping' approved by the Ministerial Council of 28 November 2013.

[29] http://borsus.belgium.be/sites/default/files/articles/Plan%20concurrentie%20Bouwsector.pdf

- **other administrative practices (e.g. "social clauses" in public procurement rules)**
- **Collective agreements**
- **collective agreement with "statutory" value (e.g. procedure of extension)**
- **cross-industry**
- **multi-sectoral, sectoral**
- **local (regional, community…)**
- **company or infra-company (e.g. establishment level)**
- **management unilateral rules**
- **arbitration awards**
- **other mechanisms/practices**

Which collective agreement are (or may be) universally applicable within the meaning of Article 3(8) PWD?

Minimum-wage setting in Belgium is a matter of collective agreements both at national and sectoral level, whereby those at sectoral level, concluded within the joint committees and sub-committees (J(S)Cs), constitute the main source[30].

Sectoral CLAs lay down function classification schemes (see the answer to Q10) and corresponding minimum wage scales (see section III, A.2), while at the same time implementing the automatic indexation mechanism (see the answer to Q13).

Legal extension of sectoral CLAs by royal decree is easy and is consistently applied. CLAs that have been declared universally applicable are binding for all employers within the remit of the J(S)C and within the scope of the CLA; also employers that are not affiliated with the employers' federation that signed the CLA are obliged to respect the CLA in respect of their employees, regardless of whether or not the latter are a member of a signatory trade union[31]. The respect of universally applicable CLAs is penally enforced. For this study, mainly CLAs concluded within JC 124 (construction) and JSC 140.03 (road transport) will be examined.

While collective bargaining at sectoral level occupies a dominant position in terms of (minimum-)wage setting, account must also be taken of a series of **centralised instruments coordinating the collective bargaining system**. One of them is the so-called 'interprofessional agreements' (IPAs) in principle concluded every two years by key players of the national social partners (the 'Group of Ten') and fixing, among other things, the wage norm, i.e. the maximum increase in hourly wages that can be granted during subsequent collective bargaining at lower levels, in particular at the sectoral level. The wage norm (*loonnorm / norme salariale*) is based on the Act of 26 July 1996 and was introduced to safeguard the cost competitiveness of the country's economy. To that end, the ex-ante margin for wage growth is set on the basis of the projected development of hourly labour costs in Belgium's main trading partners, i.e. Germany, France and the Netherlands. Automatic indexation and automatic wage scale increases (e.g. based on seniority) fall outside the scope of the law, and are guaranteed as per the applicable CLAs. In case social partners fail to come to a comprehensive agreement, the

[30] S. VANDEKERCKHOVE and G. VAN GYES, *Collectively agreed wages in Belgium: indicators and trends*, HIVA KU Leuven, 2012, 2-4. ; M. KEUNE, Sector-level bargaining and possibilities for deviations at company level: Belgium, Eurofound, 2011, 1.

[31] S. VANDEKERCKHOVE and G. VAN GYES, *o.c.*, 2-4; M. KEUNE, *o.c.*, 1.

federal government can lay down the wage norm in a binding manner, as it has done 2011-2012 and 2013-2014. For the period 2015-2016, the wage norm is exceptionally fixed by law (Act of 28 April 2015)[32].

The second central coordination tool directly relates to minimum-wage setting. Intersectoral CLAs concluded within the National Labour Council (*Nationale Arbeidsraad / Conseil national du Travail*) determine the **guaranteed average minimum monthly income (GAMMI)**. The relevant agreements are **CLAs Nos 43** of 2 May 1988 (lastly amended by CLA No 43 quaterdecies of 26 May 2015) and **CLA No 50** (of 29 October 1991, lastly amended by CLA No 50 ter of 26 May 2015). Both have been declared universally applicable by royal decree and extend to all private-sector employees. The GAMMI (not to be confused with the subsistence minimum, which is a social assistance benefit) is subject to automatic indexation according to developments in the health index (see the reply to Q12). It acts as a floor for all wages paid in Belgium: in the absence of a specific scale within the sector or the company, an employee's wage should correspond at least to the GAMMI. It may be noted that the GAMMI includes certain amounts paid in the course of the year, such as the end-of-year bonus. The GAMMI amount varies according to age and seniority (see the reply to Q10). Since December 2012, it corresponds to EUR 1,559.38 for an employee aged 20 or over with at least 12 months' seniority.

As stated in the replies to Q11 and Q13, collective bargaining at **company level** is relatively rare as a phenomenon, especially so in the focus sectors, and infrequently deal with wages.

Q8: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)**

As already mentioned, minimum-wage setting in Belgium is essentially a matter of CLAs concluded at cross-sectoral and sectoral levels that have been declared universally applicable.

According to the hierarchy of labour law norms contained in Article 51 of the Act of 5 December 1968, universally applicable CLAs concluded in the National Labour Council (NAR/CNT) take precedence over universally applicable CLAs concluded in joint committees, which in turn take precedence over universally applicable CLAs concluded in joint sub-committees. The former are only preceded, in terms of their legal value, by mandatory provisions of legislation.

This means, put simply, that lower-level agreements can only improve (from the employees' perspective, i.e. guarantee a higher wage) what has been negotiated at a higher level[33].

In the absence of a specific scale within the sector or the company – *quod non* in the focus sectors, where sectoral scales do apply – the wage should correspond at least to the guaranteed average minimum monthly income (GAMMI) fixed within the National

[32] S. VANDEKERCKHOVE and G. VAN GYES, *o.c.*, 5-8; European Commission, Country Report 2015 (including an in-depth review on the prevention and correction of macro-economic imbalances), Commission staff working document, COM(2015) 85 final, 10 e.s.

[33] S. VANDEKERCKHOVE and G. VAN GYES, *o.c.*, 2.

Labour Council. Note, however, that the GAMMI cannot be readily compared with a monthly minimum wage, as it extends (as a rule) to all wage components paid in consideration of the normal work performance, which may encompass benefits paid in the course of the year such as e.g. an end-of-year bonus (see Article 5 of CLA No 43). Whether the wage actually paid respects the GAMMI is therefore assessed on a yearly basis.

The minimum wages provided for in CLAs may be exceeded in individual agreements. The opposite is not allowed, i.e. wages in individual agreements cannot be lower than those in sectoral CLAs.

Q9: **To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wages? What groups/what share of workers do not receive the minimum wages, and what reasons can be identified?**

Having regard to the principle set out in the reply to the previous question, minimum wages set at sectoral level exceed those set at intersectoral level.

Minimum wage coverage is virtually comprehensive[34], thanks to a system combining sectoral minimum wages contained in CLAs binding for all employers and employees within the sector, with a national minimum wage (guaranteed average minimum monthly income, GAMMI) which, notwithstanding its conventional nature, acts as a statutory-like floor for all private sector employees in Belgium[35].

As already noted before, CLA No 50 contains specific sub-minima for employees aged under 18 and for students aged 18, 19 or 20. Specific sectoral minima may also apply for these groups, as is the case in the construction sector (see the reply to Q10).

Part-time workers are covered by a different CLA concluded in the National Labour Council (NAR/CNT), i.e. CLA No 35 of 27 February 1981. Article 10 of this CLA provides that part-time employees are entitled to an average minimum monthly income that is proportionally calculated, pro rata of the working time, on the basis of the average minimum monthly income of a full-time employee, as laid down in sectoral or, failing that, cross-sectoral CLA.

The following groups are excluded from the scope of both CLAs No 43 and 50:
- persons who are employed in a family company in which usually only relatives or foster children perform labour under the exclusive authority of the father, mother or guardian;
- employees which are usually employed for periods of less than one calendar month.

Q10: **To what extent do the wage-setting mechanisms differentiate rules on minimum wage according to:**

- **Employee's conventional classification,**

[34] 3% and 6% of wage earners earn below the national and sectoral minimum wages, respectively. Also the share of employees earning at the minimum wage is low, i.e. 6.9 and 11.4% resp. See R. PLASMAN, *The minimum wages system in Belgium The mismatch in Brussels' Region*, Dulbea, ULB, 2015, 11; F. RYCKX and S. KAMPELMANN, *Who earns minimum wages in Europe?*, ETUI, report 124, 2012, 11.

[35] See also A. GARNERO, S. KAMPELMANN and F. RYCKX, *Sharp teeth or empty mouths? Revisiting the minimum wage bite with sectoral data*, Dulbea, ULB, 2013, 11 and 18.

- **Employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.),**
- **Employment policies: type of working contract (e.g. low number of hours /week), person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc.**
- **Other criteria**

The **sectoral minimum wage scales** (construction and road transport) depend on the functional classification as laid down in the relevant sectoral universally applicable CLAs (i.e. the conventional classification). This conventional classification, in turn, is based on elements pertaining to the employees' personal situation and other criteria.

In the construction sector, the CLA of 12 June 2014 (No 123,570) distinguishes between six different categories (I, IA, II, IIA, III, IV) according to professional skills, training or experience, whereby category I covers (blue-collar) workers carrying out very simple tasks requiring no special skills whatsoever (e.g. cleaning up the construction site), whereas category IV is intended for workers who are manifestly more skilled than category III-workers, the latter being workers who have acquired a thorough knowledge of their profession through an apprenticeship and have at least three years' experience. Additionally there are two categories for 'head of team' and one for 'foreman'. The decision about the classification of the employee rests with his/her employer.

There are different minimum wage scales for various categories of young workers, notably:
- students (with a different rate according to whether or not they are following a building education, CLA of 12 June 2014, No 123,027);
- industrial apprentices (CLA of 25 June 2009, No 95,392), sub-divided in youth apprentices and building sector apprentices, each with (monthly) minimum wages depending on age (15-21 and 18-21 resp.) and seniority (0 or 1 month of seniority); and
- young people subject to part-time compulsory education (CLA of 15 May 2009, No 93,292), with minimum hourly wages as a percentage of the category-I wage scale varying according to age (15-18).

In the road transport sector, there are five different categories of road transport workers (vehicle crew members). Apart from categories 1 (assistant-attendant) and 2 (worker in training), these vary according to the payload of the vehicle (less than 7 T (3), between 7 and 15 T (4), and more than 15 T (5)) and/or its specific type (refrigerator, approved ADR or articulated vehicle, all classified in the 'heaviest' category). Vehicle crew members working in delivery services, courier services and taxi pick-up services also follow this classification, with the former being in category 3 or 4 depending on whether or not they have at least six months' seniority in the sector, while those engaged in courier and taxi pick-up services are in category 5.

It should be noted that the sectoral social partners have negotiated a revision of this categorisation, which results in a reduction of the number of categories (down to four), varying according the activities / capabilities of the worker rather than the characteristics of his/her vehicle. In particular, the new system is based on the attribution of a number of points to the worker's score (graded in three levels) on ten different indicators, incl. the type of drivers' licence required, the degree of autonomy and planning, physical efforts, number of delivery addresses per day, mentorship, control of cargo, technical or

regulatory knowledge required, degree of complexity associated with loading and unloading etc. The relevant CLA was concluded on 19 June 2014 but its entry into force is subject to the signature of another CLA linking wage scales to the new classification. Such a CLA has not yet been concluded and, as confirmed by a number of interviewees, will not be anytime soon.

For temporary agency workers, the minimum wages as laid down in CLAs concluded in the sector and/or the company of the user are decisive. See also below, section III, sub A.2.

For completeness' sake, we mention that at **national level**, pursuant to CLA No 43, the guaranteed average minimum monthly income (GAMMI) for workers aged 18 and older varies according to age and seniority (three categories: over age 18; over age 19 and a half and more than six months' seniority; over age 20 and more than 12 months' seniority). CLA No 50 lays down specific minima for workers aged below 18 (depending on age, 17 or 16 and below) as well as for youngsters aged between 18 and 21 with a student contract or following an alternating education (depending on age, 18, 19, 20).

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

Interviewees have not reported evolutions of the type suggested by the examples. Indeed, CLAs providing for specific rules for posted workers were and still are marginal phenomenon (see the answer to Q17). According to representatives of an employers' federation in the road transport sector, it is unlikely that such specific provisions will emerge in the foreseeable future, having regard to the position of the trade unions, according to which – so the said representatives argued – Belgian labour and wage conditions should apply from the moment a foreign lorry/drivers sets 'wheel" on Belgian territory.

In the same vein, minimum-wage setting continues to be dominated by universally applicable sectoral CLAs. Calls for more decentralisation from various angles[36] generally find little resonance in Belgium[37]. As stated in the answer to Q13, company-level CLAs are rare, including in the construction and road transport sectors, and in addition infrequently deal with minimum-wage setting. A range of (interrelated) factors help to explain the scarcity of company CLAs, including the fact that company-level bargaining can only be *in melis*, the high degree of price competition, the mechanism of automatic indexation and the wage moderation through the wage norm[38].

Several interviewees from the trade unions (construction and road transport) have reported that social dialogue in the field of minimum wages has become increasingly difficult over the last decades, as a result of globalisation and increased international

[36] Notably from the OECD, see lastly the Belgian country note in OECD, Economic Policy Reforms 2015: Going for Growth, 149. See also J. KONINGS, C. LECOCQ and R. VANDENDRIESSCHE, Decentralisatie van het Sociaal Overleg *(Decentralisation of the Social Dialogue)*, Vives KU Leuven, 2015, 41.

[37] M. KEUNE, Sector-level bargaining and possibilities for deviations at company level: Belgium, Eurofound, 2011, 1 and 6.

[38] J. KONINGS *et al.*, *o.c.*, 21-22; M. KEUNE, *o.c.*, 2.

(incl. southern and eastern European) competition combined with the introduction of the so-called wage norm in 1996 to safeguard Belgium's competitiveness (see the reply to Q10).

The interviewees from the construction union pointed out that the abovementioned factors put great pressure on the model of social dialogue and, by extension, the social market economy (Rhine capitalism). They observe a clear reduction of the willingness at employers' side to enter into (cross-)sectoral agreements, as well as some cases of unilateral action previously unheard of. As one of them put it, "the truly good agreements are things from the past".

Their counterpart from the road transport union specifically referred to the increased difficulty of reaching agreements on wage increases, adding that if there is any room on the part of employers for an increase, they press for net allowances.
A concrete illustration of the current climate is the new function classification agreed by CLA of 19 June 2014, which is not operational for lack of an agreement about the corresponding minimum wages (see below, section III, sub A.2). The trade unions have described employer proposals to that effect as "shameless"[39].

The interviewee from the cross-sectoral employers' federation concurs with the statement that wage negotiations have become more difficult, and points to increased global competition and Belgium's 'wage handicap' as principal explanations.

Q12: **How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce minimum wage?) Is there an automatic indexation rule? Which criteria are taken into account when deciding on changes of the minimum wage level?**
Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

Belgium has a particularly strong tradition of automatic wage indexation. The quasi-totality of private-sector employees in Belgium are covered by a system that automatically links their wage to the inflation, in particular to developments in the so-called health index (using a four-month moving average of this index)[40]. This (virtually) complete coverage by an automatic wage adjustment mechanism is rather unique in Europe[41]. The system is not centrally organised, but is rather a patchwork of sector-level mechanisms[42].

For the road transport and construction sectors, automatic indexation is provided for in the sectoral CLAs laying down the minimum wage scales.

[39] http://www.btb-abvv.be/images/stories/Wegvervoer/pamflet_loonkoppeling_FR.pdf

[40] The health index exists since 1994 and is determined by removing a number of products from the consumer price index product basket, in particular alcoholic beverages (bought in a shop or consumed in a bar), tobacco products and motor fuels except for LPG.

[41] Nationale Bank van België / Banque nationale de Belgique, Overzicht van de loonindexering in België en Europa (*Overview of wage indexation in Belgium and Europe*), 2012.

[42] S. VANDEKERCKHOVE and G. VAN GYES, *Collectively agreed wages in Belgium: indicators and trends*, HIVA KU Leuven, 2012, 6.

For the construction sector, the CLA of 12 June 2014 (No 123,027) provides that the minimum wages are adjusted on a quarterly basis to the evolution of the health index, whereby the index percentage equals the fraction of the average of the first two months of the last quarter divided by the average of the first two months of the last but one quarter. In case the result of this calculation is a negative amount (which was the case for example, in October 2014) this amount is not applied but considered for the next quarter (accordingly, there was no indexation in January 2015). In July 2015, minimum wage scales underwent a small increase (+ EUR 0.07 or 0.08 per hour, depending on the category).

It may be noted that the compensation for boarding and housing costs as well as the supplement for work within the confines of petrochemical companies in operation (see below, section III, A.2) are also adjusted to the cost-of-living on a quarterly basis, be it according to slightly different principles.

Minimum wage indexation in the road transport sector is dealt with in the CLA of 26 November 2009 (No 96,984), which provides for an annual adjustment, on 1 January of each year, in accordance with the evolution of the health index. This indexation does not only apply to the minimum wage scales, but also to a series of premiums and allowances, such as the premium for night work, the flat-rate residence allowance, the GRLP allowance and the seniority supplement.

In both sectors, the indexation of the minimum wages is also applied to the wage effectively paid.

For the temporary agency sector, there are no specific provisions relating to indexation. The indexation arrangements agreed within the joint (sub-)committee of the user undertaking apply.

At cross-sectoral level, the GAMMI is also linked to the health index, according to the pivot system (see Articles 3 and 8 of CLA No 43).

It should be noted that the current centre-right government, headed by PM Charles Michel, has decided to suspend all wage-indexation schemes until the health index has risen by 2%.

II.2. Minimum wage-setting mechanisms in the context of posting of workers

Q13: **What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?**

- **To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?**
- **To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?**
- **To what extent would the extension be easy to implement (and to control) from an administrative point of view?**

- **To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?**
- **To what extent would it reduce the displacement effect on local undertakings and labour force?**

As already pointed out, the dominant instrument of wage setting in Belgium clearly is the CLA concluded within the joint (sub-)committees. Such CLAs are, moreover, consistently declared universally applicable. It follows that (minimum-)wage setting in Belgium is effectively and comprehensively "caught" by the current formulation of Article 3(8) PWD.

Generally speaking, CLAs concluded at company level are relatively rare, mainly occur in larger companies and often deal with other elements than wages[43]. From a sectoral perspective, 14% of blue-collar workers in the *transport* sector (JC 140) are covered by a company-CLA[44]. According to social partners interviewed for the purposes of this study, such CLAs can be mainly found in the logistics sub-sector and for transport of very specific goods (niches), such as explosive materials. An example would be a CLA awarding an additional premium for night work. As a rule, however, company-CLAs deal with qualitative, as opposed to quantitative, aspects of labour conditions. In the *construction* sector (JC 124), the degree of decentralisation is even smaller: 3% of the blue-collar workers are covered by a CLA concluded at the level of the company[45]. In the majority of cases, these deal with working time, although some also awards premiums (e.g. for work during weekends) or fringe benefits (e.g. meal or eco vouchers). In the sector of temporary agency work (JC 322), company-level CLAs do not exist altogether[46] [47].

It is therefore not surprising that according to the interviewees, extending Article 3(8) PWD to company agreements would have little effect and, in any case, would not solve the problems that are experienced with posting of workers to Belgium, in particular the displacement effects (see section I). These problems, insofar as they could be avoided by a correct application of the PWD (and hence are not the result of the basic principles underlying the legal framework in relation to posting), are essentially related to the enforceability of the wage conditions which fall within the 'hard core' (be it on account of the broad Belgian delineation), rather than to the fact that some wage conditions would, under the current terms of the PWD, not be covered.

For the reasons stated above, any impact of this extension on the coverage and the level of the minimum rates of pay would be minimal.

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[43] S. VANDEKERCKHOVE and G. VAN GYES, *Collectively agreed wages in Belgium: indicators and trends*, HIVA KU Leuven, 2012, 3/

[44] The figures are taken from M. RUSINEK and F. RYCX, "Rent-Sharing under Different Bargaining Regimes: Evidence from Linked Employer–Employee Data", *British Journal of Industrial Relations* 2013, 51, 28-58, cited in J. KONINGS, C. LECOCQ and R. VANDENDRIESSCHE, Decentralisatie van het Sociaal Overleg *(Decentralisation of the Social Dialogue)*, Vives KU Leuven, 2015, 24.

[45] Ibid.

[46] Ibid.

[47] But note that temporary agency workers are, according to the user-pay principle, in principle entitled to the advantages and premiums contained in company-CLAs of the user undertaking (see infra, section III, A.2 in fine).

Several interviewees referred to the fact that, if there would be any impact, it would be in terms of increased complexity; extending the instruments capable of containing the 'hard core' would be difficult to implement for foreign companies, bring more difficulties for inspection services when it comes to monitoring and enforcement, and eventually lead to more outsourcing, circumvention and incorrect practices, as reported by interviewees from the cross-sectoral and road transport employers' organisation and inspection services. According to the latter, the extension would also produce more litigation before civil courts (precisely because such CLAs are not penally enforced).

Interviewees representing construction workers expressed in less negative terms about the possible extension, which according to them would result in a higher (be it theoretical) coverage rate and should be manageable for foreign undertakings posting workers. In this last regard, they referred to the obligation of deposit at, and registration by, the services of the Federal Public Service Employment, Labour and Social Dialogue.

III. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

III.1. The regulatory framework in relation to minimum rates of pay

III.1.1. General perspective

The PWD is transposed into Belgian legislation by the Act of 5 March 2002 (Belgian Monitor, 13 March 2002) as well the Royal Decree of 29 March 2002 laying down arrangements for implementing the simplified establishment and social documentation system for undertakings posting workers to Belgium and defining the activities in the construction industry listed in Article 6(2) of the Act of 5 March 2002 (Belgian Monitor, 17 April 2002).

As is well known, the Belgian legislature has opted for an extremely broad transposition of the PWD. This holds true for the personal scope, but certainly also for the material scope, which is defined by means of an open-ended rule activating both the substantive extension of Article 3(10)(1) (i.e. other public policy provisions) and the formal one of Article 3(10)(2) (universally applicable collective agreements beyond the construction sector)[48].

The main criterion is the penal enforcement of the provisions laying down the employment terms and conditions. In particular, Article 5(1) of the Act of 5 March 2002 stipulates that an employer posting an employee to Belgium has to comply with "labour, wage and employment conditions laid down by law, administrative regulations or conventional provisions (i.e. agreements) which are enforced by penal law".

Knowing that almost the entire body of labour law is penally enforced in Belgium, this formal criterion effectively implies that virtually the whole labour law applies as of the moment that a foreign employer instructs his/her employee to perform any one activity in Belgium. It is apparent from the explanatory memorandum that the government

[48] Cf. BEERNAERT, J. and MAES, S., "Detacheren naar Belgie: navigeren in woelige Europese wateren", *Or.* 2010, 9, 225.

considered this criterion to be an objective one and capable of encompassing the concept of 'public policy provisions' referred to in Article 3(10)(1)[49].

This "maximalist" Belgian interpretation of the PWD[50] has been widely commented in literature, with several commentators having raised doubts as to its compatibility with the PWD and the free provision of services. These doubts were corroborated after the CJEU held the fairly similar Luxembourg transposition of the PWD to run counter to the PWD and the TFEU[51].

Specifically as regards wage conditions, Article 5(1) second paragraph specifies that these are taken to mean "the wages, salaries and remunerations which are due pursuant to collective agreements which have been declared universally applicable in accordance with the Act of 5 December 1968 on collective labour agreements and the joint committees, with the exception of supplementary occupational retirement pension schemes". Article 5(1) in fine reiterates the provision of Article 3(7)(2) PWD in relation to allowances specific to the posting[52].

This specification pertaining to wage conditions, in particular the reference to CLAs that have been declared universally applicable, adds little to the general rule set out in the first paragraph, to the extent that (only) these CLAs are criminally enforced[53].

As already explained in section II, wage-setting in Belgium is done through collective bargaining at several levels, the most important being the sectoral level. CLAs concluded within the joint (sub)committees lay down the minimum wage for the different professional sectors, including minimum wage scales (i.e. rules for categorising workers into pay groups) according to various criteria as well as indexation arrangements. Furthermore, the sectoral CLAs typically provide for a wide range of bonuses and additional payments. Sectoral CLAs dealing with wage-setting are systematically declared universally applicable.

Let us now have a closer look at wage-setting in the different focus sectors.

III.1.2. Sectoral perspectives

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[49] *Parl. St.* Kamer/Chambre 2001-02, DOC 50, 1441/001, http://www.lachambre.be/FLWB/pdf/50/1441/50K1441001.pdf

[50] Coupled with a 'minimalist' approach towards the derogations, with only the (mandatory) derogation of Article 3(2) PWD having been implemented in Belgian legislation, as opposed to the (facultative) derogations of the next three paragraphs.

[51] Case C-319/06, *Commission v. Luxembourg*. E.g. BEERNAERT, J. and MAES, S., o.c., 2010, 233-238; JORENS, Y., "Detachering en het individuele arbeidsrecht", in JORENS, Y., BUYSSE, B. *et al*., *Handboek Europese detachering en vrij verkeer van diensten: economisch wondermiddel of sociaal kerkhof?*, Bruges, die Keure, 2009, 215; R. BLANPAIN, *Arbeidsmarktrecht*, Bruges, die Keure, 2011, 157; F. VAN OVERMEIREN, *Buitenlandse arbeidskrachten op de Belgische arbeidsmarkt. Sociaal recht en vrij verkeer*, Larcier, Gent, 2008, 111 e.s.

[52] Note however that the Act refers to 'allowances directly connected with the posting', whereas the word 'directly' is not present in the Dutch text of the PWD.

[53] Article 189 of the Belgian Social Criminal Code.

In the **construction** sector (JC 124), several CLAs (all declared universally applicable) regulate the minimum wage scales and their indexation (most recently CLA of 12 June 2014, No 123,027), the accompanying workers' classification (CLA of 12 June 2014, No 123,570) and various wage and employment conditions such as board and lodging, bonuses, cost reimbursements and supplementary social advantages (e.g. CLA of 12 June 2014, No 123,026; CLA of 13 October 2011, No 106,851).

In what regards the **minimum wage scales**, there are six different **categories** (I, IA, II, IIA, III, IV) according to professional skills, training or experience (for more details, see the reply to Q10). For each category, an hourly gross minimum wage is provided for (e.g. EUR 13.379 for category I; EUR 16.099 for category IV). It is understood that these are minimum rates, which the employer is free to exceed. The hourly rates are on a weekly basis of 40 working hours, which is converted to the cross-sectoral standard of 38 hours per week by granting 12 rest days, of which 6 additional rest days.

On top of these minimum wage scales, the relevant CLAs provide for a range of **premiums or advantages of a diverging nature**. These include *allowances for specific sub-sectors* (*wage allowance for skilled blue-collar workers in carpentry and joinery companies*; *wages and bonuses for the blue-collar workers on board the dredging equipment*; *specific supplements in companies that produce and / or supply ready-mixed concrete*) as well as *allowances for work in specific circumstances* (*supplement for work within the confines of petrochemical companies in operation*; *work undergoing the influence of the tides*; and the *wage allowances for special work*). Without delving into more detail than necessary, it is useful to expand a bit about the latter of these allowances, i.e. the wage allowances for special work. These allowances consist of proportional wage supplements, ranging from 4% up to as much as 300%, granted for certain activities listed in great detail and categorised as "activities during the execution of which the blue-collar workers may experience feelings of uncertainty, fear, unrest, in spite of the affected security measures" (e.g. working at height, 10-40%) and "unhealthy, harmful or difficult activities" (e.g. working in tunnels that are in operation, 25%, or applying roads asphalt, 10%).

CLAs also provide for additional *allowances for work under specific schedules*, notably *work in successive shifts*, *work performances outside normal daytime hours* as well as *overtime and Saturday work* (the latter being regulated by the Royal Decree No 213 of 26 September 1983).

A number of CLAs oblige employers to *cover certain costs* (*costs related to medical sifting and the tachograph*) and/or to *provide for certain objects, tools and facilities* (*working clothes* and their maintenance/cleaning; *boarding and housing (costs)*), often allowing the employers to discharge their obligations through the payment of a compensation (which is also the case for the *fee for wear of own tools*).
The *allowance for travel expenses* includes a reimbursement of traveling expenses when the worker travels by his/her own means, complemented with a *mobility allowance* which the worker also enjoys when s/he travels in a vehicle that the employer makes available.

A special category of additional benefits are those administered by the *welfare fund*[54] of the construction sector (fbz-fse Constructiv). These include notably benefits which are

[54] Welfare funds (*fondsen voor bestaanszekerheid/fonds de sécurité d'existence*) are entities established at sectoral level at the initiative of the social partners by means of CLAs declared universally applicable. Welfare funds are jointly administered by the representatives of employers and employees in the given sector, and they are financed through employers' contributions. Among the aims of the welfare funds is the allocation of social

akin to (supplementary) social protection, such as a *sectoral medical plan*, a *hospitalisation insurance* for the members of the workers' family and a *supplementary pension scheme*. Other benefits provided by the welfare fund are the *promotion fee* (partly covering the repayment of a mortgage loan taken out by a construction worker and relating to his main residence) and the benefits under the form of "stamps", i.e. the *weather stamps* and the *fidelity stamps*. The former compensate for the loss of income in case of interruption of a started working day because of bad weather. These weather stamps are interrelated with the *bad weather premium*, which consists of the guaranteed payment by the employer (as opposed to the welfare fund) of the full daily remuneration in the same circumstance. The employer may only pay half of the normal wage for the hours not worked, if the complement is compensated by fbz-fse Constructiv in the form of weather stamps. The fidelity stamps, on their part, essentially correspond to an end-of-year bonus; it concerns a yearly premium paid to workers who have worked in the construction sector in the course of the service year, thus rewarding their fidelity and encouraging them to keep working in the sector. We will come back to this advantage below.

The last advantage we can mention here is the *seniority premium*, according to which blue-collar workers with a continuous seniority with the same company of 25 (35) years are entitled to receive a one-off gross premium from their employer.

In the sector of **road transport** (road transport and logistics on behalf of third persons, JSC 140.03), a fairly similar picture arises, with both minimum wage scales and various premiums entirely governed by CLAs that have been declared universally applicable.

Minimum wage scales are set, in the form of hourly gross wages, for the five categories of road transport workers (vehicle crew members) (see the reply to Q10 for more details). On 1 January 2015, the hourly gross wage ranged from EUR 10.3230 (category 1) to EUR 11.3470 (category 5).

When it comes to **premiums**, much in the same way as in the construction sector, CLAs provide for additional *allowances for work under specific schedules or otherwise linked with (extra) working time*, in particular *a premium for night work*, for work on *Sundays and public holidays*, the *bonus for availability time* (which is remunerated at 99% of the basic hourly wage of the relevant category), *overtime remuneration* and, lastly, *bonuses for exceeding the average service hours* (see CLAs of 26 November 2009, No 96,987; 27 January 2005, No 74,050; and 30 September 2005, No 77,084).

Also for the road transport sector, several CLAs oblige employers to *cover certain costs*, to *provide for certain objects, tools and facilities* and/or to *pay a corresponding compensation*. In this regard, the social partners have agreed that employers should bear the costs associated with the *driver card for digital recording equipment (tachograph)* (CLA of 18 April 2013, No 114,996), the *ADR training* (CLA of 21 November 2013, No 118,574) and the *medical sifting* CLA of 18 April 2013, No 114,998), in which case they are eligible for a financial participation paid by the sectoral welfare fund (Social Fund Transport and Logistics). Such participation is also open to employers who contributed towards the *costs of obtaining the driver licence C or CE* (CLA of 19 September 2013, No 117,654).

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advantages. These differ from sector to sector. Their nature, amount and the award conditions are laid down by CLAs.

The *flat-rate residence allowance* and the so-called *GRLP allowance* are the subject of the CLA of 26 November 2009 (No 96,986). The former is due to workers who are obliged, by necessity of the service, to take their daily and / or weekly rest (as provided for by Regulation (EC) No 561/2006) outside their place of residence or outside their working place as provided in their labour agreement. The latter allowance, whose acronym refers to the General Regulation on Labour Protection (*ARAB/RGPT*), is intended to compensate the costs which are incurred by workers outside the employer's offices and which are at the employer's expense (e.g. sanitary facilities, drinks etc.). The GRLP allowance is granted per attendance hour (i.e. working hour plus availability time)[55].
When it comes to *travel expenses*, except where the employer guarantees free transportation, workers are as per CLA entitled to a financial intervention in the costs of public or private transportation (CLA of 4 May 2009, No 95,499).
An old CLA (13 July 1972, No 1452) stipulates that the employer is obliged to put working clothes at the disposal of the workers and to maintain them, failing which s/he has to pay them a monthly compensation.

A fairly extensive list of benefits is *administered by the Social Fund Transport and Logistics* (SFTL). These include the *compensation in case of dismissal due to the permanent loss of the medical certificate* (CLA of 19 September 2013, No 117,655), the *farewell bonus* (CLA of 28 June 2007, No 84,266), *the compensation in case of fatal accident at work or death at work* (CLA of 13 February 2014, No 121,128), the *compensation in case of damage, loss or theft of personal belongings* **(**CLA of 26 November 2009, No 96,990), the *contract for assistance during professional voyages* (CLA of 16 February 2012, No 109,262), the *end-of-year bonus* (CLA of 26 April 2004, No 71,335), the *hospitalisation insurance* (CLA of 25 September 2009, No 96,074), the *supplementary pension* (CLA of 15 September 2011, No 106,704, as amended) and the *supplementary allowances in case of (non-employment-related) incapacity for work* (CLA of 15 September 2011, No 106,710). It may be noted that the first two benefits are initially paid by the employer, who is subsequently reimbursed by the SFTL.

Unlike in the construction sector, the *seniority supplement* (CLA of 15 September 2011, No 106,713) consists of a supplement paid by the employer on an hourly basis (for working and availability hours) to workers have at least one year of continuous service in the company. The amount gradually increases in line with the seniority (3, 5, 8, 10, 15, 20 years).

Finally, we may already mention here the CLA of 13 March 2014 (No 121,724) entitled 'equal pay for equal work', to which we will come back later.

In the sector – or rather the field – of **temporary agency work**, the picture is quite different. In Belgium, temporary agency work is regulated by the Act of 24 July 1987 on temporary work, agency work and hiring-out of workers (Belgian Monitor, 20 August 1987). It is only authorised in four well-defined circumstances, i.e. replacement of an employee whose employment contract is suspended or has ended; temporary increase of the work; performance of exceptional work; and hiring-out in view of subsequent recruitment.

Article 10, first paragraph of the said Act lays down the so-called user-pay principle, where it stipulates that "[t]he wage of a temporary agency worker cannot be lower than

[55] The GRLP allowance also exists in other sectors where employees habitually perform work outside the employer's office, e.g. cleaning (JC 121) and trade in fuels (JC 127).

the one s/he would be entitled to in case s/he were engaged under the same conditions by the user as fixed employee". The term 'wage' within the meaning of Article 10 should be understood in a broad fashion, to include also all allowances and advantages awarded to fixed employees carrying out the same function in the user's company[56]. Derogations of the user-pay principle are possible insofar as it concerns the award of equivalent benefits through CLAs concluded in the joint committee for temporary agency work (JC 322) which have been declared universally applicable (Article 10, second paragraph).

It follows that, for temporary agency workers, the wage-setting CLAs concluded in the sector or the company of the user are, as a rule, decisive. In some cases, CLAs concluded in JC 322 enter the picture, either to fully replace the corresponding arrangement provided for the user's fixed staff (as is the case for the *end-of-year bonus* for temporary agency workers, as per CLA of 5 December 2013, No 119,443) or, in a subsidiary way, to provide benefits to those agency workers hired out to users not bound by such arrangements under sectoral or company CLAs (as it the case for the *compensation of transport expenses*, as per CLA of 11 March 2014, No 121,528). The CLA of 17 December 2013 (No 120,396) is dedicated to social advantages to temporary agency workers and notably guarantees them additional allowances in case of (technical and economical) unemployment[57] and long-term (non-employment-related) incapacity for work (excluding maternity). Both the end-of-year bonus and the social advantages are administered by the Social Fund for the Temporary Agency Workers (as regards its functioning and financing, see notably CLA of 5 December 2013, No 119,444).

It should be noted that temporary agency work in construction companies is subject to specific rules which are laid down by CLA concluded between the social partners in the construction sector (JC 124). The relevant CLA (of 4 December 2014, No 125,614) limits the circumstances in which temporary agency work is permitted in construction companies to three (not including exceptional work) and provides that the user-undertaking must see to it that the temp worker holds a 'safety pass' attesting to attendance of a safety training of at least 16 hours. Furthermore, the CLA lists a number of conditions to be complied with by construction companies resorting to temp workers, including falling under JC 124 and proving fulfilment of the conditions for access to the profession.

III.2. The determination of the components of the minimum rates of pay for posted workers

III.2.1. Introductory comments

On the face of the 'maximalist' Belgian legislation, the situation is rather straightforward. To the extent that the abovementioned wage scales and premiums / advantages are contained in sectoral CLAs that have been declared universally applicable and which are therefore penally enforced, they form part of the wage conditions that have to be complied with by sending employers pursuant to Article 5 of the Act of 5 March 2002. It would be different only for those aspects explicitly excluded by the said Article, i.e. supplementary occupational retirement pension schemes (which, as shown above, exist

[56] Cf. *Parl. Doc.* Senaat/Senate 1986-87, No. 558, 2.

[57] Not applicable to temporary agency (blue-collar) workers who become unemployed while working for a temporary work agency certified to carry out activities in the joint committee for the construction sector (JC 124).

in both the construction and road transport sectors) and allowances paid in reimbursement of expenditure actually incurred on account of the posting.

Regardless of the question as to whether this broad transposition is in keeping with Article 56 TFEU as interpreted by the CJEU[58], it seems that in practice, social partners hold positions which could be seen as less sweeping. The actual enforcement of the wage conditions vis-à-vis sending employers could even rightfully be called minimalistic.

In general, the situation in Belgium as regards the application of Belgian wage conditions to posted workers and their employers is characterised by a remarkable discrepancy between (legal) theory and (social, administrative) practice[59].

Many of the social partner representatives interviewed for the purposes of the study are of the opinion that the abovementioned wage conditions, insofar as they are contained in universally applicable sectoral agreements, should in principle be applied to posted workers and their employers. At the same time, there seems to be a clear awareness that the reality in the field is different.

Some interviewees (notably from employers' side in construction) have pointed to the difference for an advantage having to be complied with by posting employers and that same advantage to be actually part of the 'minimum rates of pay'. The latter would not be the case, for example, for certain cost compensations at the expense of the employer; even so, posted workers are entitled to them, as they obligatorily apply to their employers. One can wonder whether this distinction (applicable vs. applicable as part of the minimum pay rates) makes much difference in practice, other than possibly depriving the foreign employer of a degree of flexibility (consisting of attaining the host State's minimum pay rates, incl. e.g. the compensation, through other wage components).

It should also be noted at the outset that several of the abovementioned advantages and premiums, by their very nature, sit uneasily with temporary, cross-border posting. Benefits such as for example the *seniority premium*[60], the welfare fund advantages or the *costs related to medical sifting and the tachograph* in the construction sector presuppose a stable, long-lasting employment relationship, to such an extent that it is sometimes difficult to conceive their application in situations of posting. Often this is also reflected in the conditions for their award as provided by the relevant CLA. The last mentioned benefit, for example, is to be (partly) reimbursed by the worker if s/he subsequently leaves the company within a fixed timeframe. Likewise, the application of conditions pertaining to completion of a certain prior period of service or employment, possibly over a longer reference period, is problematic in a posting context. Whilst it is certainly true that mechanisms exist to avoid that such conditions hamper free movement (of workers, persons) (notably aggregation of periods), one could wonder whether the establishment

[58] On this, see above, sub A.1

[59] See also below, sub B.6.

[60] Even though the summary of the relevant CLA (14 May 2009, No 93.291) on the website of the Federal Public Service Employment, Labour and Social Dialogue mentions that "according to the Labour Inspectorate, the seniority acquired in the country of origin is taken into account". See also M.-P. SMETS and P. VANDEN BROECK, "Detachering en Sociale (Arbeids)inspectie – de Bestrijding van de Arbeidsrechtelijke Fraude" (*Posting and Social (Labour) Inspection – the Fight against Fraud in Labour Law*), in JORENS, Y., BUYSSE, B. *et al*., Handboek Europese detachering en vrij verkeer van diensten: economisch wondermiddel of social kerkhof? (*Manual on posting in Europe and free movement of services: economic panacea or social graveyard*), Bruges, die Keure, 2009, 614.

of the necessary administrative framework would still be in keeping with the free provision of services.

Problems related to the application of Belgian wage conditions are particularly evident in the road transport sector, which is not only characterised by the intrinsic mobility of key players (i.e. the 'posted' drivers) but also by the fact that the PWD is considered to be applicable only to cabotage, which remains, even in a country that records the highest cabotage penetration rate in the EU, a small part of national transport operations[61].

In the following lines, we will first investigate whether the sectoral minimum wage scales are considered to be part of the minimum rates of pay. Next, we will look into the question as to which extent the advantages administered by the sectoral welfare funds are taken into account for the determination of the minimum pay rates. Afterwards, the other advantages and premiums will be examined along the same lines, i.e. by reference to the categorisation used above. First, however, we will investigate the application of the minimum wage scales to posted workers and their employers.

The following analysis is to a very large extent based on interviews. It represents the views of the stakeholders (i.e. the social partners) on the issue, knowing that these do not always correspond to what is happening on the field. In that last regard, views and documents obtained from the social inspection services as to the extent of actual enforcement constitute - to some extent - the touchstone.

III.2.2. Basic salary / minimum wage scales

The application to posted workers, as a part of the 'minimum rates of pay', of the minimum wage scales laid down in sectoral universally applicable CLAs, is uncontroversial among the stakeholders interviewed and indeed, has been validated by the CJEU in *Sähköalojen ammattiliitto* (case C-396/13)[62].

In what regards enforcement, without questioning their applicability, the approach of the inspection is imbued with pragmatism. In case the actual function of the worker and the corresponding scale cannot be determined, inspectors are advised to place him/her on the second (i.e. the one but lowest) wage scale, unless it clearly concerns an unexperienced worker (a novice). Only in some cases, where the actually performed work by a worker, his/her declarations and/or other elements of proof undoubtedly attest to his/her belonging to a higher category, will the inspector place the worker in a higher wage scale.

The approach is truly pragmatic: it minimises the risk of legal challenge on the part of the foreign employers, thus ensuring a rapid "return-on-investment". In practice, so the

[61] 8.4% in 2011, according to Eurostat (compared to 2.2% for the EU as a whole): see http://ec.europa.eu/eurostat/statistics-explained/index.php/Road_freight_transport_statistics_-_cabotage#Cabotage_penetration_rate_for_hire_and_reward_transport

[62] Provided of course the categorisation rules are "*binding and meet the requirements of transparency, which means, in particular, that they must be accessible and clear*" (*Sähköalojen ammattiliitto*, § 44). In the Belgian case, the binding nature of the categorisation is beyond dispute. Insofar as their transparency is concerned, tangible efforts are being undertaken by the Federal Public Service Employment, Labour and Social Dialogue: see http://www.employment.belgium.be/defaultTab.aspx?id=38256 (including fiches – available in English – with summaries of wage-setting CLAs in various sectors, incl. construction and road transport) and www.minimumlonen.be / www.salairesminimums.be (providing an overview of the minimum wages for each sector, in Dutch and French).

interviewee from the inspection services indicated, there is indeed hardly any *contentieux* as regards the classification into pay groups.

In all cases, the wages taken into account are *gross*. The same holds true, incidentally, for the other components of the minimum rates of pay.

III.2.3. Welfare fund advantages

This said discrepancy – and the ensuing lack of legal certainty – can be clearly observed in relation to the sectoral welfare fund advantages described above. With the exception of the end-of-year bonus, these are not applied to posted workers and/or their employers.

The reasons for this non-application stated by representatives of the social partners interviewed for this study correspond to a mix of legal and practical obstacles, the main element being that these benefits are financed by contributions from employers for their employees subject to Belgian social security legislation. As the posted workers are not insured in Belgium and their employers do not contribute towards the schemes, they are excluded from them. In addition, it is questioned by some interviewees from the employers' side whether obliging foreign employers to participate in these schemes would be a necessary and proportionate means to achieve workers' protection, thereby referring to the CJEU judgment in *Mazzoleni* (C-165/98). Mention is also made of practical problems to which an extension of the benefit schemes administered by the welfare funds to posted workers and their employers would lead, such as the difficulty to determine the calculation basis. Finally, some interviewees (employers' side) refer to the fact that these additional advantages are often linked with – and their design inspired by – social security risks (notably unemployment, sickness) and hence that their application should naturally be consistent with that of statutory social security.

Whilst not denying the non-application in practice of welfare fund advantages in the context of posting, interviewees from the trade unions deplore this situation, arguing that posted workers are entitled as a matter of principle, and cite it as one of the factors exacerbating the competitive advantage by foreign employers (construction sector).

As already noted above, the matter is different for the **end-of-year bonus** in the **construction sector** (the so-called 'fidelity stamps'), in respect of which, as a direct consequence of CJEU rulings in *Guiot and Climatec* (C-272/94) and *Arblade and Leloup* (C-369/96 and C-376/96), a specific arrangement has been elaborated for foreign undertakings posting workers to Belgium. The relevant CLA (of 13 September 2007, No 87,528) is one of the very few instruments containing specific provisions in relation to posted workers, where it states in its Article 1(4) that "this agreement is not applicable to foreign employers, established in one of the Member States of the European Union, and to the workers which they temporarily employ in Belgium, where these workers, for the duration of their employment in Belgium, already benefit from advantages that are comparable to the weather and fidelity stamps, in accordance with regulations to which their employer is bound in his/her country of establishment". The rules implementing the application of the fidelity stamps to posting employers are laid down in an information note[63] drafted by the Employers' Office for Organisation and Supervision of the Welfare Fund Schemes (*Patronale Dienst voor Organisatie en Kontrole van de*

[63] https://www.socialsecurity.be/foreign/fr/employer_limosa/infos/documents/pdf/opoc_brochure_F.pdf

Bestaanszekerheidsstelsels - PDOK/ Office Patronal d'Organisation et de Contrôle des Régimes de Sécurité d'Existence - OPOC), to which the competent welfare fund fbz-fse Constructiv has outsourced the administration of both the fidelity and the weather stamps.

The central issue is to know whether or not the workers, further to regulations to which their employer is subject, enjoy an advantage which is 'equivalent' to the fidelity stamps. An equivalent arrangement is one which obliges the employer to pay, over and above the normal wage, either a premium (often called fidelity / end-of-year bonus or 13th month) or contributions funding such a premium. It typically concerns yearly payments whose amount broadly corresponds to a monthly wage.

All foreign undertakings posting workers to Belgium have to report to the PDOK/OPOC, which provides them with a form in which they have to specify whether they are subject to an equivalent arrangement. More recently, on the basis of electronic data exchanges generated by the LIMOSA declaration, PDOK/OPOC reaches out proactively to the foreign undertakings. If the latter believe they are subject to an equivalent arrangement in the country where they are established, they should describe this arrangement by replying to certain questions. Unless it appears from the supporting documents that the arrangement is not equivalent or the motivation is unsatisfactory, PDOK/OPOC accepts that the foreign undertaking does not declare wages nor pays contributions. The latter is bound, however, to provide PDOK/OPOC on a quarterly basis with a list of workers carrying out activities in Belgium. Moreover, the exemption is without prejudice to a verification done by the competent inspection services (*Toezicht Sociale Wetten - TSW/Contrôle des lois sociales – CLS*).

In the absence of an equivalent arrangement, the foreign undertaking should (in principle) make a quarterly wage declaration, using a dedicated form provided by PDOK/OPOC, and pay a contribution of 9.12% of the wages thus declared. These contributions are used to effectively award the benefit of the fidelity stamps to the posted workers concerned.

Unwarranted failure to declare wages and pay contributions to PDOK/OPOC may have serious consequences: it leads to the existence of a 'social debt' for the foreign undertaking, which, in accordance with Article 30a of the Act on the National Social Security Office (RSZ/ONSS), creates the obligation for principals and contractors who have recourse to such undertaking – on pain of imposition of joint and several liability – to withhold 35% of the invoice and transfer it to the RSZ/ONSS.

In practice, as was confirmed by the interviewee from fbz-fse Constructiv, the payment of the abovementioned 'stamp-contribution' by foreign employers is never enforced due to the lack of reliable data.

The fidelity-stamps regulation described above does not in principle apply to German and Dutch undertakings posting workers to Belgium, pursuant to agreements which Belgium concluded with these countries. Subject to certain conditions (prior declaration to ULAK or SOKA-BAU for Germany; affiliation to the CLA Construction for the Netherlands), the equivalence is assumed and the exemption is granted automatically. According to the representative of an employers' federation in the construction sector, application of the Belgo-Dutch agreement is watering down in recent years.

For the other countries, the equivalence assessment is carried out on a case-by-case basis by the PDOK/OPOC. Foreign undertakings are anxious to convince the PDOK/OPOC

of the existence of an equivalent arrangement. The practice of some to produce written statements from renowned law firms "certifying" this equivalence may illustrate this.

Finally, we may note in this regard that in reply to a question by Jules Maaten MEP on the application of the Belgian fidelity stamps regime to foreign undertakings, then Commissioner McCreevy replied, by reference to the aforementioned *Arblade and Leloup* ruling, that the said scheme does not seem to fall under Article 3(1) PWD and that even if its imposition would be in keeping with the PWD, the administrative procedure to obtain exemptions should also respect the free provision of services and not be too burdensome and costly[64].

For the other welfare fund advantage in the form of stamps in the construction sector, i.e. the **weather stamps**, the solution adopted is different. The abovementioned information note provides that foreign employers posting workers to Belgium are *not* subject to this benefit, and hence, do not have to pay the corresponding contributions. However it adds that "the foreign employer is bound to apply the general Belgian legal provisions that guarantee the award of a full daily wage in case of weather-related interruption of a working day".

In the sector of **temporary agency work**, the gist of the abovementioned CJEU case is reflected in the CLA dealing with the operation and financing of the sectoral welfare fund, i.e. CLA No 109,444 of 5 December 2013. Temporary work agencies established in another Member State and providing services in Belgium are in principle subject to the same (or at least very similar) contributory obligations as their counterparts with seat in Belgium, unless they are able to demonstrate that an equivalent contribution, destined notably to fund the end-of-year bonus, exists in their home country.

In a ruling dating back to 2002, the Council of State (*Raad van State / Conseil d'Etat*) annulled the decision of the competent regional authority refusing the requisite permit to a French temporary work agency on the grounds that it had failed to pay the above welfare fund contribution. The Council sided with the French agency, reproaching the regional permit committee that it had not proceeded to the necessary comparison of the French regulation (providing for an *indemnité de précarité*) and the Belgian end-of-year bonus. According to the Council of State, the central question in such comparison is not the objective of the respective legal arrangements, but their protective impact on the worker, which implies an analysis of the overall protection enjoyed by a worker in the temporary work agency sector[65].

III.2.4. Other advantages and premiums

Allowances for work under specific schedules and/or extra working time

Working time, and the extra payments to which excess of the normal working schedules and hours give rise, are extensively regulated in Belgium, notably in legislation (particularly the Labour Act of 16 March 1971, laying down as a general rule a 50% extra payment for overtime, increased to 100% during Sundays and holidays), royal decrees (particularly, for the construction sector, Royal Decree No 213, fixing a fiscally favourable

[64] E-4207/06.

[65] Council of State, judgement No 105,056 of 25 March 2002, case A. 93.271/IX-2451.

20% increase under certain conditions, as an alternative to compensatory rest) and (universally applicable) sectoral CLAs (cf. *supra*).

Such 'extra payments for overtime' are considered to be part of the minimum rates of pay and are actually enforced, especially those laid down in the Labour Act. According to the representative of the inspection services interviewed for the purposes of the present study, these overtime payments account for a considerable part of the amounts to be regularised in case of breaches, and they occur in the overwhelming majority of the cases. The importance of this component can be easily understood if one knows that posted workers are generally very willing – eager even – to work overtime[66] [67]. Overtime payments impact significantly on wage costs and their non-application by posting employers confers on the latter a vast competitive advantage.

While the above in principle holds true for the road transport sector as well, it is much less clear to what extent the statutory extra-payments in case of excess of the normal working schedules, the *allowances for work under specific schedules and/or extra working time* are enforced in this sector. According to the social partners' representatives interviewed, enforcement is generally weak in the transport sector (see also the reply to Q5). Employers' representatives have also pointed to the difficulties in applying these advantages, in particular in assessing satisfaction of award conditions for certain premiums, having regard to the sector's specificities. The example given referred to the *premium for night work*, which, according to the relevant CLA, is granted to workers who either in the course of a calendar month have been employed at least five consecutive working days in a labour arrangement involving night work performances or to those who in the course of the calendar month have been employed at least half of the worked days in a labour arrangement involving night performances. Even if it could be established that a foreign driver has been doing night performances in Belgium for five working days in a row, so the interviewee pointed out, it might well be that only one of these performances corresponded to a performance in respect of which the PWD applies (i.e. cabotage).

Allowances for work in specific circumstances (construction sector)

Of all the advantages and premiums discussed above, the inclusion of allowances for work in specific circumstances (notably the *wage allowances for special work* as per CLA of 12 June 2014, No 123,049) in the scope of the minimum rates of pay seems to generate the least opposition. This could be explained by the fact that there is a clear and direct link between these allowances, generally consisting of a percentage supplement to the hourly wage, and the work carried out. The supplements are granted on account of the "tensions and emotions" which such special work encompasses for the workers, and only for the time during which these special performances are actually pursued.

Even so, according to the representative of the inspection services interviewed, only a small portion of the wage supplements are effectively enforced, and this only under

[66] As mentioned by several interviewees, it is relatively common for workers from Portugal and some eastern European Member States to (have the intention to) work in Belgium (and other western European countries) for a certain period (which could be as long as a decade), thereby working very long hours and returning only occasionally to the home State. Their goal is to return one day to their home country and acquire some real property there from their proceeds.

[67] This is different for the road transport sector, due to the strict EU-wide regulations on driving time. According to the representative of a sectoral employers' federation, differences in working time are relatively small between Eastern and Western European countries.

certain conditions. The reason for this minimalistic enforcement seems to be essentially of a pragmatic nature. The list of special works and corresponding supplements is long (ca. 50) and detailed, and the nature of posted workers' activities is variable and often difficult to determine. This makes enforcement a thorny undertaking, according to the inspection representative.

At the end of the day, only supplements for work at heights, supplements for work carried out in Seveso/petrochemical companies (i.e. the *supplement for work within the confines of petrochemical companies in operation)* and supplements for roof works are effectively enforced, and only insofar as the performance of the said work corresponds to the posted worker's normal activities in the sending country. Hence, an employer who sends a worker specialised in roof works to Belgium to perform this particular activity, will see the minimum hourly pay rate increase by 4%. This is as opposed to the case of a "generalist" construction worker who, as part of the renovation of a house, engages in some roof works, next to activities of isolating, plastering etc.

Provisions in kind / cost compensations

Advantages in the form of provisions in kind or corresponding cost compensations are not considered to be part of the minimum rates of pay by the inspection services and hence are not enforced.

This general rule is applied somewhat differently in the construction sector, in what regards *boarding and housing (costs)*. The relevant CLA (of 12 June 2014, No 123,026) provides that "*when the blue-collar worker is employed on a building site whose distance from his/her place of residence is such that returning home on a daily basis is impossible, the employer shall provide him proper boarding and housing*". The employer may discharge himself of this obligation by paying a compensation for boarding and housing (EUR 26.06 and EUR 12.45, resp. in January 2015).

While this compensatory allowance is not seen as part of the minimum wage, it is imposed upon foreign employers posting construction workers to Belgium, where necessary through enforcement. There has been a recent discussion between inspection services and construction sector employers relating to the extent of this application to posted workers. Unlike the latter, who believe that such interpretation runs counter to EU law, the inspection services take the stance that the place of residence (*woonplaats/domicile*) of a posted worker refers to the place where s/he has the centre of his/her private interests, as opposed to his/her temporary place of stay in Belgium. In other words, workers posted to Belgium are (in principle) automatically entitled to boarding and housing.

At the same time, the inspection services emphasise that, in practice, situations of actual enforcement of this provision do not occur frequently. The reason is that very often foreign employers themselves provide for boarding and housing or, failing that, comply with the obligation contained in the Belgian CLA by paying a fixed cost allowance (per diem) (see also the reply to Q19). Only those who do neither, see themselves confronted with the obligation to provide boarding and housing according to said Belgian CLA. If that policy were not followed, so the argument of the inspection services goes, not only would posted workers be denied a legitimate advantage (or be imposed an additional wage deduction), but also would foreign companies have an additional and unjustifiable competitive advantage over Belgian companies.

III.2.5. Specific comments relating to the transport sector and temporary agency work

In principle, and unless otherwise indicated, the information in the previous sub-sections applies to all sectors. The inspection services do not as a rule apply distinctions when it comes to the determination of the wage components that are actually enforced vis-à-vis posting employers.

However, while critical comments about the extent and the type of inspections have been reported by social partners across the different sectors, it seems that inspection efforts are more directed towards the construction sector than they are towards the road transport and temporary agency work sectors[68].

When it comes to **road transport**, social partners from both sides have pointed to the fact that enforcement of the PWD is virtually inexistent, linking this with the specific characteristics of the sector which render checks extremely difficult: (controversial) applicability to a one type of transport (cabotage); the inherent mobile character of drivers/vehicles; and (combined with) the small size of the Belgian territory (see also Q5).

Mention should be made of the CLA 'Equal Pay for Equal Work' (of 13 March 2014, No 121,724), which was concluded by the social partners in the road transport sector against the backdrop of "the presence of foreign drivers and companies [on the market] against whom they cannot compete". The social partners observe that these companies "use all kinds of schemes to engage cheap labour force thus putting downward pressure on the transport prices". The result, so they continue, is that "Belgian drivers lose their jobs while Belgian companies go bankrupt or are obliged to start a company in another EU Member State where costs are much lower. Both employers and employees are victim of a lack of European legislation, control and enforcement at Belgian and European levels".

On a substantive level, the CLA mainly confirms the applicability of the PWD to operations of cabotage (by reference to recital 17 of Regulation (EC) No 1072/2009) and its repercussions in terms of the application of the Belgian rules as provided for in Article 5 of the Act of 5 March 2002. The Belgian employers commit themselves to verifying for each posted worker whether the LIMOSA declaration was delivered and in case it was not, to notify this to the Belgian authorities.

The main interest of the CLA probably lies in its chapter 5, in a provision which implicitly refers to the subsidiaries which many Belgian transport companies have established in new Member States, notably the Slovak Republic or Bulgaria, which the trade unions denounce as being mere "letter-box companies", and from which drivers are posted to Belgium. The CLA states that Belgian companies are to stipulate, in subcontracting arrangements with foreign companies posting workers to Belgium, that the latter should be awarded the Belgian labour conditions when this follows on from the PWD or when these workers are attached to a Belgian "connecting place" (*standplaats /lieu d'attache*), even if a different applicable legislation was chosen. Belgian companies also commit themselves to inform these posted workers about the labour conditions applicable to

[68] Road transport accounts for 7% of the cases treated by the social inspection services ('Monitoring of Social Laws'), according to the abovementioned audit by the Court of Audit.

them. 'Labour conditions' are defined as labour and wage conditions as agreed within the JC, comprising wage and other remunerations, working time including extra work, rest time, availability time, night work, pauses, weekend work and holiday period. The definition of the central notion of 'connecting place', on its part, is clearly inspired by the CJEU's interpretation of Article 6(2)(a) of the Rome Convention in *Koelzsch* (case C-29/10, § 49), i.e. "the place from which the employee habitually carries out his/her transport tasks, receives instructions concerning his/her tasks and organises his/her work, and the place where his/her work tools are situated (e.g. where s/he picks up his/her truck at the beginning of a transport task and leaves it upon completion). Account is taken of the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his/her tasks".

According to an interviewee representing road transport workers, the CLA's provisions remain hollow phrases to date. Currently, the trade union (ABVV-BTB) is legally representing foreign drivers in two court cases in an attempt to enforce award of the Belgian labour conditions on the basis of this CLA.

Also the organisation representing **temporary work agencies** has reported insufficient monitoring when it comes to compliance with the applicable wage conditions. The respect of the user-pay principle, according to which the temporary agency worker is entitled to the wage and advantages which s/he would receive if s/he were a fixed employee of the user company, including for example advantages provided for in company CLAs, is not controlled, according to the interviewee. In practice, what is paid is the legal minimum, complemented with net cost compensations.

The representative of the inspection services interviewed for the purposes of this report confirmed that the user-pay principle is only enforced in the relatively few number of cases where foreign temporary work agencies place their employees directly under the authority of Belgian user companies, but not in the those cases (making up the majority of situations encountered) where foreign companies post employees hired exclusively for that purpose (see above Q5). In this last regard, he made mention of a conflict between the provisions of Article 10 of the Act of 24 July 1987 and Article 3 PWD, with priority being given to the latter.

III.2.6. Concluding remarks

The picture emerging from the above discussion is far from coherent and attests, as already said, to a serious gap between the "law in the books" and the "law in action". In short, Belgian legislation declares virtually the full set of wage conditions applicable to foreign employers across the sectors. Social partners have different opinions as to which wage conditions should effectively apply to foreign employers posting workers to Belgium, but all agree that the legislation is not applied in practice. At the end of the day, and in principle across the sectors, only a few components are effectively enforced as being part of the minimum rates of pay: the minimum wage scales, overtime payments and, under strict conditions, a limited number of supplements directly related to the work performed. However, enforcement faces serious challenges and is, insofar as compliance with the PWD is concerned, virtually inexistent in the road transport sector.

The minimalistic approach to enforcement is a conscious, pragmatic policy, dictated by the wish to avoid disputes with foreign employers and, ultimately, with "Europe". Incidentally, several interviewees from the social partners have criticized the fear among

Belgian enforcement authorities of treading on Europe's toes, in other words of being accused of hampering the free provision of services. A representative of the construction sector employers referred in this regard to a case of 'EU-phobia'. The inspection services, on their part, replicate that Belgium has had its share when it comes to EC infringement proceedings and CJEU preliminary rulings, adding that, unlike social partners, inspection services' actions render the Belgian state liable.

While the abovementioned discrepancy between legislation and enforcement is not conducive to legal certainty nor fully satisfactory under EU law, it should be noted that the Belgian authorities undertake real efforts to inform posting employers about their obligations in terms of labour and wage conditions in Belgium. In this regard, mention can be made of a model letter for foreign employers/service providers emanating from the inspection services (available in several languages) as well as dedicated web pages of the Federal Public Service Employment, Labour and Social Dialogue[69].

Incidentally, the enforcement policy seems also partially inspired by the notion of the "guaranteed average minimum monthly income" (GAMMI) as laid down in CLA No 43 concluded within the National Labour Council. It is stated in the commentary of this CLA that "the criterion for the inclusion of premiums and other advantages in the average minimum monthly income is the entitlement which the employee can assert, directly or indirectly at the expense of the employer, by virtue of the normal labour performance s/he has carried out". This excludes *inter alia* cost compensations, provision of tools and clothing, meals etc.[70]

III.3. Constituent elements of the minimum rates of pay: the host country perspective

The Belgian situation, as described at length above, presents some challenges when it comes to completing the trio of questions (Q14-Q15-Q16) relating to the determination of the minimum rates of pay. I have opted for the criterion of actual enforcement as the yardstick for 'undoubted inclusion in the MRPs', rather than the letter of the (sweeping) legislation. The answers below are brief; for detailed explanations, reference is made to the above text.

Q14: Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).

- Basic salary: the (gross) minimum wage scales (as a rule the one but lowest category is enforced) (see B.2 for details)
- Extra-payment for overtime (see B.4 for details)
- Additional remuneration based on working conditions: some wage allowances for special work, notably the supplement for work at heights, the supplement for work within the confines of petrochemical companies in

[69] See also the URLs cited in footnote 63.

[70] On the other hand, it also excludes overtime remuneration.

operation and the supplement for roof works, provided the performance of the said work corresponds to the posted worker's normal activities in the sending country (see B.4 for details)

This in principle applies to all sectors; in practice, however, mainly the construction sector is concerned.

In addition, although they are not considered to be part of the minimum rates of pay, are imposed upon foreign employers posting workers:

- Social protection-related advantages / bonus granted on a regular basis: end-of-year bonuses – which are considered as deferred wage – unless the posted worker, further to regulations to which his/her employer is subject, enjoys an equivalent advantage. Note that in the construction section, the application of the end-of-year bonus ('fidelity stamps') is dealt with by the PDOK/OPOC; the inspection services only intervene (in principle) when the procedure is not (correctly) implemented. In practice, however, enforcement never seems to occur (see B.3 for details);
- Other advantages in kind / cost reimbursements: boarding and housing (costs) (but see our remarks under B.4).

Holiday pay in principle also applies to posted workers and their employers, but in practice, this is never enforced. The reason stated by the interviewee from the inspection services is that posted workers and their employers are all subject – and continue to be so during the posting period - to a more or less similar regime in the sending state

All components considered are gross.

N.B.: 'allowances specific to the posting' and 'per diem/flat-rate compensation for working abroad' are dealt with under Q19.

Q15: **Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)**

- Provisions in kind / cost reimbursements (except boarding and housing (costs) in the construction sector);
- Social protection-related advantages: the welfare fund advantages (except the end-of-year bonus in the construction sector);

Bonuses granted as one-time flat-rate sum and bonuses based on individual/collective objectives: to the extent that such bonuses would be provided for in sectoral CLAs declared universally applicable – which does not seem to be the case in the focus sectors – they are not enforced;

- Social security contributions;
- Income tax deduction;
- Dismissal compensations.

Q16: Which components (NB: use the indicative list above) are in the "grey area"? (= not clearly belonging or excluded for the calculation of the minimum pay rates)

Explain your response and give examples. Describe concrete difficulties encountered per sector.

Bearing in mind the Belgian situation as described *in extenso* above, one might say that all the components which are mentioned *supra* under A.2 and which are not 'undoubtedly included' (i.e. stated in the reply to Q14), are in the 'grey area'. They belong to the 'minimum rates of pay' pursuant to the letter of the legislation, but they are not enforced accordingly.

Q17: In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?

In general, the answer is negative; CLAs dealing with wage setting do not contain specific provisions for posted workers, let alone special arrangements as regards the determination of the constituent elements of the minimum rates of pay.

Only a few CLAs specifically refer to the case of posting of workers:

- the CLAs dealing with weather and fidelity stamps in the construction sector (CLA of 13 September 2007, No 87,528) and with (i*nter alia*) the financing of the welfare fund for temporary agency workers (JC 322, CLA of 5 December 2013, No 119.444) (for a discussion, see above, B3)
- the CLA 'Equal Pay for Equal Work' in the road transport sector (CLA of 13 March 2014, No 121,724) (for a discussion, see above, B5).

In both cases, these CLAs, far from establishing specific rules relating to the determination of the minimum rates of pay, relate to the confirmation of general posting principles.

Social partners in the construction sector are in the process of investigating the possibility to make specific provision - conventional or otherwise – for foreign employers in respect to the arrangements regarding compensatory rest days in the framework of the regulations relating to working time (reduction), as laid down by Royal Decree No 213 and relevant CLAs. A normal working week in the construction sector lasts 40 hours. To realise the general (statutory) working time reduction to 38 hours, 12 (6+6 additional) compensatory rest days are allocated to construction workers on a yearly basis. During these days, the sectoral welfare fund (fbz-fse Constructiv) pays flat-rate income replacement compensation. Foreign employers do not apply this arrangement (see in this regard also above, sub B.3). The option whose feasibility is currently being assessed would be to oblige foreign employers to award the compensatory days (*pro rata temporis*), failing which they would be asked to pay a certain contribution.

Q18: How do the differences in the definition of minimum rates of pay impact income levels of posted workers (also taking into account compensation of expenses)?

Q19: In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with requirements of the host country on minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as listed above? If so, which ones?)

Introductory remarks

As a general rule, the social inspection services accept, towards establishing whether the Belgian minimum pay rates are respected, all payments which are directly linked to the work performance. The link with the work performed should be direct, in the sense that there should be a clear positive relationship between the work carried out and the benefit paid. A supplement paid further to sending State regulations on the basis of the (arduous) nature of the work, for instance, would easily fulfil that criterion. Such a link would not be present, on the other hand, as regards a purely flat-rate, one-off bonus, which is paid in the same amount to a worker posted for three months and to one posted for twice that period.

Other allowances, in respect of which the link with the work performed is less obvious (and essentially resides in the fact that they are paid per working day, week, etc.), can also be considered as wage components (for example daily allowances, expatriation allowances etc.), insofar as – and this is closely monitored – they do *not* constitute a reimbursement of costs actually incurred.

Flat-rate / daily allowances

Very often, and across the focus sectors, posting employers have recourse to daily flat-rate allowances (per diem allowances), whose amount in many cases exceeds that of the actual wage paid to the posted worker (see section I), and may reach up to EUR 110 per calendar day[71]. The practice is well known among interviewed stakeholders, to such an extent that these per diem allowances are often referred to by their original name, notably *diety* (Poland), *diurna* (Romania) or *ajuda de custo estrangeiro* (Portugal). Also other flat-rate allowances paid to posted workers are come across.

Such allowances are generally considered to be paid in reimbursement of expenditure incurred on account of the posting, and hence are rejected, i.e. disregarded for the purposes of assessing whether the Belgian minimum rates of pay are met. This general rule, however, is applied with some leniency. There are basically two derogations:

- If the employer demonstrably bears the costs associated with the posting (travel, boarding, housing) and, additionally, pays a per diem allowance (like a *diety* or *diurna*, normally intended to cover such costs) or another flat-rate allowance, such allowance can be regarded as a component of the minimum rates of pay, to the extent of the costs actually borne by the employer. The fulfilment of this condition is meticulously scrutinised by the inspection services. In particular, the employer needs to provide physical evidence attesting to his/her providing for food, transportation, travel, accommodation, in the form of vouchers, a rental contract, hotel invoices etc.

- In respect of flat-rate allowances other than the "familiar" per diem allowances, posting employers may also refute the principal denial as a

[71] See the Activity report 2013 of the General Direction 'Monitoring of Social Laws' (*Toezicht Sociale Wetten - TSW/Contrôle des lois sociales – CLS*), 119.

wage component by proving that the allowance, far from covering costs, serves a different purpose (e.g. an expatriation allowance) and/or is directly related to the work carried out (see also infra).

It should be noted that the payment frequency of these allowances (daily, weekly, monthly) is immaterial in the light of the abovementioned rule and its derogations.

The same goes for the fact as to whether or not they are subject to social security contributions in the sending State. In actual fact, it is well known that many of these allowances are not (e.g. the *ajuda de custo estrangeiro*) or only partially (e.g. diety) subject to contributions. If they are accepted as a wage component, the inspection services never proceed to conversions. Net therefore equals gross. Needless to say that this confers a significant competitive advantage for posting employers, especially having regard to the fact that these allowances sometimes account for up to 75% of the amounts paid to posted workers. This is indeed an important factor of social dumping, mainly because of the wage cost distortion but also because it results in posted workers obtaining a very attractive remuneration (i.e. by the home State standards and even if too low pursuant to the PWD) compared to their colleagues working in the home country, thus making them reluctant to denounce their situation.

In cases they accept flat-rate allowances paid by posting employers as wage components, the social inspection services consistently report this fact to their counterparts in the sending country through the Internal Market Information System (IMI), so as they enable them to proceed, as the case may be, to the levy of social security contributions and/or payroll tax.

Social inspection services are sometimes confronted with situations where the costs associated with the posting are, as per labour contract, charged with the posted worker, and where accordingly a certain amount is withheld from the latter's wage on account of lodging costs (accommodation being effectively provided by the employer). Even when such withholding would run counter to the Belgian Wage Protection Act of 12 April 1965 (it does not comply with the limits and condition set by Article 6 relating to remuneration in kind and hence contradicts the provision of Article 23 relating to wage withholdings), it would only be rejected if it would result in the wage falling beneath the Belgian minimum wage. This policy is dictated by the inspection's position that the Wage Protection Act does not belong to the 'hard core' of the PWD.

Wage supplements

Supplements specifically paid by posted employers to comply with the requirements of the Belgian minimum pay rates are considered as wage components. They are marked as such on the wage slips, and reported via IMI to the sending State authorities. Such wage supplements are typically paid by foreign employers who are familiar with the system, i.e. who have posted workers to Belgium before and know that/what they need to pay in addition in order to the reach the Belgian 'floor'.

'Grey area' allowances

According to the interviewee from the social inspection services, there exists a grey area of allowances in respect of which it is unclear whether they are cost-covering or not. This may concern payments made in connection with costs that are not really necessary or are linked rather with the situation of the posted workers rather than with their work.

Examples would be contributions towards television, internet etc. Often they are embedded in pocket-money. Such allowances are not as a rule accepted.

In general, the biggest uncertainty, and the most discussions and disputes, concern the question whether some flat-rate allowances paid by foreign employers are intended to reward work performed or instead to cover costs. According to the inspection representative, the information exchange through IMI proves to be very useful in this regard.

III.4. Constituent elements of the minimum rates of pay: the sending country perspective

Q20: In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country on minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as listed above? If so, which ones?)

As confirmed by multiple interviewees – and even if the majority of such posting takes place to Belgium's (affluent) neighbouring countries – this is hardly an issue as a result of Belgium's high wage levels.

Workers sent abroad by Belgian employers continue to be paid according to the Belgian wage conditions, as laid down notably in sectoral CLAs. This implies that the advantages and premiums mentioned above under A continue to be paid.

Often, posting from Belgium is a matter for highly skilled workforce, which in any case are paid well above minimum rates. For large companies, it is customary to provide per diems agreed at company level, set per country of destination based on a range of indicators[72].

The representative of the employers' federation in the construction sector mentioned a problem (apparently going back a long time and regularly resurfacing) in the relation with France, which is reportedly asking Belgian posted workers to affiliate to the '*caisses congé intempéries*' as regards unemployment due to bad weather circumstances. Still in the construction sector, negotiations with Germany and the Netherlands were conducted (and completed successfully) in the 1990s to avoid double payment of contributions in respect of schemes operated by fbz-fse Constuctiv.

[72] These comments were made by the representative of the cross-sectoral employers' federation and are not specific to any of the focus sectors.

GERMANY

I. OVERVIEW

EU level data that have been gathered on the basis of the number of A1 portable documents show[73] that Germany is both the main receiving and sending country of posted workers and that at least with view on the period of 2009 to 2011 the number of postings has increased significantly both into and from Germany as the following table illustrates:

Table 1 : Number of A1 portable documents issued for postings to and from Germany 2009 – 2011

	Postings to Germany	Postings from Germany
2009	221,222	170,345
2010	250,054	201,436
2011	311,361	226,850
Main sending/receiving countries 2011	Poland, Hungary, Romania, France, Slovakia, Austria	Austria, Netherlands, Switzerland, France, Belgium, Italy, Luxembourg

Source: European Commission 2012

Data on the main sending and receiving countries for postings into and from Germany show that the countries that joined the European Union since 2004 contributed to around 80 per cent of all postings into Germany (2011) with the most important sending countries being Poland, Hungary and Romania. In contrast, postings from Germany mainly went into Western and Southern neighboring countries, in particular Austria, the Netherlands and Switzerland. The EU data differ significantly from those that have been published by the German Government, e.g. in a recent reply of the Federal Government to a parliamentary inquiry 2014.[74] Based on different sources (Federal Employment Agency and data delivered by the German Public Pension Insurance), the number of postings to Germany was calculated much lower:

Table 2: Number of postings to Germany 2010 – 2014 according to the German government

2010	2011	2012	2013	2014 (Jan-Oct)
126,646	195,090	215,425	199,544	175,367

Source: Bundesregierung 2014, based on data of the Federal Employment Agency and the German Pension Insurance.

[73] European Commission (2012) Posting of Workers in the European Union and EFTA Countries: Report on A1 portable documents issued in 2010 and 2011. European Social Affairs and Inclusion DG.

[74] Bundesregierung 2014: Faire Mobilität in der EU. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Beate Müller-Gemmeke, Brigitte Pothmer, Corinna Rüffer, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN, Drucksache 18/3520 v. 12.12.2014.

However, a study published in July 2015 that is based on EU-level A1 figures as well as data of the German Pension Insurance on postings to Germany in the years 2012/2013 indicates much higher figures:[75] The reason for this is that the data also take into account the frequency of postings (as the same worker could be posted several times during one year). According to the study, the number of postings to Germany during the 15 month period from 1.1.2012 until 31.3.2013 was more than 1 million (1,008,232), i.e. around 806,000 for 2012 if calculated in constant monthly figures. This figure is four times higher than the data that are provided by the EU Commission.[76]

The study also provides information on the main sectors that received posted workers and thereby confirm already existing patterns. For the 15 month period mentioned above, around 19.5 per cent of all postings were in the construction sector and around 15 per cent in the meat processing industries. While in the construction sector, posted workers in 2012 and 2013 were covered by a collective agreement on minimum wage, there was no such agreement in the meat industry. Thus, wages of posted workers in this sector were set on the basis of the sending countries regulation. According to media information[77] this since 2012 has resulted in growing public interest about working and pay conditions in particular in the meat industry. In the meantime, the sector is also covered by the Posted Workers Act (hereafter PWA) with a collective agreement on minimum wage.

It has to be highlighted here, that all interviewees involved in the preparation of this survey have stressed that there is a significant lack of data and that the A1 data is not sufficient. For example representatives of the Ministry of Labour and Social Affairs (BMAS) highlighted several weaknesses (i.e. lack of clarification between postings and posted persons, in most cases no information is provided on the sector though this is question is included in the A1 form) that result from the fact that the A1 documents have been designed for social security purposes and not for labour market statistics.[78] Similar problems occur for sectoral data, e.g. on the care or transport sector where only statistics exist for social security purposes or transport volumes but the statistical data for labour market monitoring is insufficient.

Data on posting in the construction sector

According to all experts contacted in the context of this study, the construction sector is the only economic sector, where detailed and reliable data and figures on postings to Germany exist. The reason for this is the registration of all posting enterprises and posted workers in the context of the bipartite social fund (*Sozialkasse Bau*, SOKA) that exists in the construction sector. As the fund annually publishes figures, it is also possible to identify certain quantitative trends of posting in the construction sector:

- Between 2004 and 2009, the number of postings into the German construction sector decreased from 95,130 to 51,240

[75] Wagner, B./Hassel, A. 2015: Europäische Arbeitskräftemobilität nach Deutschland – Ein Überblick über Entsendung, Arbeitnehmerfreizügigkeit und Niederlassungsfreiheit von EU-Bürgern in Deutschland, Hertie School of Governance, Berlin.

[76] It should be mentioned that the German trade unions in their reply to this study have stressed that the actual number of postings should be taken into account in order to draw a realistic picture of the role and extend of posting, while the main cross-sectoral employer organisation, BDA in a written comment stated that the individual posted workers and not the number of postings should be the basis of further consideration.

[77] Grossarth 2013: Das Billige Fleisch hat einen Preis. Frankfurter Allgemeine Zeitung 15.04.2013.

[78] Interview at the Federal Ministry of Labour and Social Affairs (BMAS).

- After 2008 it increased again and amounted to 69,308 in 2011, 88,923 in 2013 and 98,214 in 2014[79]

The data also show that (in 2014) more than 90 per cent of all posted workers worked less than six months in Germany.

As the following table shows, the largest sending country for posted workers in the construction sector is Poland that with more than 26,000 posted workers nearly contributes to one third of the whole. Large numbers of posted workers also come from Hungary, Austria, Romania, Croatia and Slovenia. [80]

Table 3: Posting enterprises and posted workers in the German construction sector, 2013 and 2014

Country	Posting enterprises		Posted workers	
	2013	2014	2013	2014
Belgium	92	93	601	618
Bosnia-Herzegovina	88	94	3,370	3,099
Bulgaria	45	86	1,375	1,869
Denmark	67	74	671	1,055
France	65	62	436	337
Great Britain	9	19	140	229
Ireland	9	25	54	166
Italy	103	138	696	1,104
Croatia	213	194	6,660	5,942
Latvia	25	21	374	293
Lithuania	22	35	261	502
Luxembourg	172	185	1,624	1,620
Netherlands	617	743	3,831	5,401
Austria	662	790	8,003	8,987
Poland	805	937	24,726	26,206
Portugal	99	94	4,258	3,899
Romania	104	168	7,045	10,372
Switzerland	81	113	593	699
Serbia	99	100	2,603	3,017
Slovakia	397	486	5,187	5,812
Slovenia	397	486	5,187	5,812
Spain	118	173	1,445	1,484
Czech Republic	183	198	1,688	2,092
Turkey	24	16	932	699
Hungary	375	412	9,520	9,551
Others	24	22	213	193

[79] Sozialkasse BAU: Geschäftsbericht 2014, p. 32/33.

[80] It should be noted that the statistics of the SOKA-Bau is counting a posted workers only once (even if he/she would be involved in several postings). However, if a posted workers switch to another company, he/she will be counted twice.

Country	Posting enterprises		Posted workers	
	2013	2014	2013	2014
SUM	**4,680**	**5,454**	**88,923**	**98,214**

*Source: SOKA BAU, Annual report 2014. * Each worker is only counted*

Further data exist for the duration of posting in the construction sector as shown in the following table. In 2014, 90 per cent of the posted workers in the German construction sector were employed in Germany for less than six months.

Table 4: Number and duration of postings by sending country in the German construction sector, 2014

Table

Land		1-91Tage	92-179 Tage	180-300 Tage	301-364 Tage	Ganzjäh.	Anz. Ent-Vh.	Anz. AN
ROOT		**170.744**	**27.206**	**14.794**	**4.170**	**2.690**	**219.604**	**95.886**
EWR-STAATEN	**EWR_Staaten**	*156.948*	*22.118*	*11.217*	*3.514*	*2.413*	*196.210*	*82.410*
AT	Österreich	21.138	1.245	579	129	233	23.324	9.176
BE	Belgien	1.657	92	121	12	61	1.943	724
BG	Bulgarien	1.372	572	328	65	40	2.377	1.899
CZ	Tschechische Re	5.119	468	210	24	46	5.867	2.128
DE	Deutschland	3	3	15	0	0	21	21
DK	Dänemark	752	233	269	68	163	1.485	1.059
EE	Estland	9	0	4	1	2	16	16
ES	Spanien	2.142	232	87	27	2	2.490	1.534
FI	Finnland	0	2	4	0	0	6	6
FR	Frankreich	569	37	12	12	3	633	356
GB	Grossbritannien	169	71	23	3	12	278	230
GR	Griechenland	156	17	0	0	0	173	111
HU	Ungarn	17.089	2.459	1.231	589	310	21.678	9.098
IE	Irland	106	27	35	16	0	184	171
IT	Italien	1.429	284	96	32	24	1.865	1.143
LI	Lichtenstein	67	4	0	0	0	71	40
LT	Litauen	1.593	146	13	6	0	1.758	547
LU	Luxemburg	7.927	115	6	0	4	8.052	1.671
LV	Lettland	580	43	45	17	0	685	305
NL	Niederlande	22.110	428	239	66	20	22.863	5.412
PL	Polen	44.320	7.854	4.656	1.698	1.188	59.716	25.396
PT	Portugal	4.044	995	419	224	175	5.857	3.694
RO	Rumänien	7.724	4.610	1.977	341	64	14.716	9.171
SE	Schweden	13	3	0	0	0	16	12
SI	Slowenien	10.963	1.465	624	129	51	13.232	5.457
SK	Slowakai	5.897	713	224	55	15	6.904	3.033
MOE-STAATEN	**MOE-Staaten**	*13.796*	*5.088*	*3.577*	*656*	*277*	*23.394*	*13.476*
BA	Bosnien-Herz.	2.484	1.259	1.060	98	44	4.945	3.147
CH	Schweiz	2.747	36	20	1	6	2.810	702
HR	Kroatien	6.397	2.219	1.419	476	188	10.699	5.833
MD	Moldau	3	0	0	0	0	3	3
MK	Mazedonien	28	27	14	0	0	69	53
RS	Serbien	1.780	1.262	856	81	37	4.016	3.024
TR	Türkei	357	285	208	0	2	852	714

*Erfasst ist nur die jeweilige Dauer der Entsendung nach Deutschland

Source: SOKA-BAU

Data on posting in other sectors

According to the data of the Federal Government (Federal Employment Agency and data delivered by the German Public Pension Insurance) the sectors - transport, care and temporary agency work – are not among the ten sectors in Germany, which use posted workers the most.[81] The employers' association of the *transport sector* (DSLV) points out that while there are no statistics on posted workers the number of them must be quite

[81] Bundesregierung 2014: Faire Mobilität in der EU. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Beate Müller-Gemmeke, Brigitte Pothmer, Corinna Rüffer, weiterer Abgeordneter und der FraktionBÜNDNIS 90/DIE GRÜNEN, Drucksache 18/3520 v. 12.12.2014, p. 7.

high, since German freight forwarders make great use of foreign transport companies in particular from Eastern Europe. Additionally, the employer organisation representative expects that the introduction of the minimum wage in Germany in January 2015 would have no negative effects on the number of postings.[82]

The interviewed employers' association from the *care sector* also mentions a lack of data, but points to estimates on undeclared work in the care sector which indicates that the proportion of foreign workers employed by private households is quite high, although these workers are probably not posted but rather directly hired or work as self-employed.[83]

Regarding the *temporary agency* work sector, due to the obligation of temporary work agencies to obtain a license, there are quite comprehensive data available on general trends. According to figures provided by the Ministry of Labour and Social Affairs in the context of this study, there has been a quite constant increase in the number of foreign temporary work agencies that post workers to Germany. Between 2010 and the beginning of 2015 the number of foreign agencies that have obtained a license in Germany has increased from 294 to 750.[84] However, in terms of the share of foreign agencies in the total business population as well as in overall temporary agency employment, the role of posting in this sector is still quite marginal. The 750 foreign temporary work agencies have registered around 7,000 agency workers, whereas in December 2014 there were around 18,000 temporary agencies in Germany with approximately 817,000 registered temporary agency workers.

However, according to the representative of the largest employers' association in temporary agency work, these numbers are, considered far too low, even when taken into consideration that the freedom of movement was not yet implemented in Romania, Bulgaria and Croatia at that time. The association also realizes that often German employers recruit directly abroad instead of making use of posted workers.[85]

II. BACKGROUND INFORMATION

Q1: To what extent is the minimum wage amount connected to (local) living costs,average salaries (general / sectoral), social policies, fight against social dumping and protective measures, (e.g. fair competition at national or international level between companies, other national/international matters?

It is important to make a difference between the statutory minimum wage that exists only since January 2015 and the sectoral collective minimum pay agreements that are declared generally binding under the German PWA.

Statutory minimum wage:

Since January 2015, according to the new minimum wage act (hereafter MiLoG), there is a gross hourly wage of 8.50 Euro (Article 1 (2) MiLoG) which equals a gross wage of

[82] Interview, DSLV; German Association of Freight Forwarding and Logistics.

[83] Interview, Care Sector Employers' Association, Arbeitgeberverband Pflege e. V.

[84] Data provided by the Ministry of Labour and Social Affairs.

[85] Interview, Employers' Association of Private Employment Agencies, Bundesarbeitgeberverband der Personaldienstleister e. V. (BAP).

around 1,400 Euros. According to interviews with stakeholders and experts, this amount has been the result of a political negotiation process that took into account different considerations, e.g. average incomes and salaries/wages. Also minimum wage levels in other EU countries were taken into account.[86]

This amount was defined on the basis of demands from the trade unions and is based also on the threshold of income that is guaranteed in the case of private insolvencies (1,080 Euro (net) as of July 2015 per month for a single person). The amount also is roughly half of the average wage level in Germany.

According to the DGB trade union statement for this study, the minimum wage amount in Germany also is linked to the still existing significant wage and income differences between Western Germany and the Eastern Federal States. Here, the amount of 8.50 Euro is a compromise: While from the Western German perspective, the hourly minimum wage might be regarded as low or even too low for many sectors, the amount from the perspective of Eastern German companies in many sectors is comparatively high.[87]

The statutory or general minimum wage regulation still is in the process of implementation and has been also the case of a number of law cases, for example in regard to the exact calculation and components.[88] It should be noted here also, that wages of less than €8.50 per hour will be allowed until 31 December 2016 in situations when this has been provided for in a corresponding collective agreement between representative parties and has been made binding by means of an ordinance that is based on the PWA or the Act on Temporary Employment Business (hereafter AÜG) for all employers based in Germany or abroad who fall within the scope of the collective agreement and their employees (see below).

However, starting from 1 January 2017, the minimum wage for all employed persons was set at €8.50 and will apply to all sectors. Effective from 1 January 2018, the general statutory minimum wage will be adjusted after recommendations of the Minimum Wage Commission and after a public order of the German government, applying without restriction.

Sector-level minimum wage agreements

As of July 2015 there are 14 sectors, where collective bargaining agreements on minimum wage levels are in place that fall within the scope of the PWA.

As the following table shows, there are sectors (such as hairdressing, agriculture, forestry and horticulture or temporary agency work, where sectoral minimum wages are below the statutory minimum wage level of 8.50.

Minimum wage setting at sectoral level follows a different rationale and reflects sectoral wage levels as well as the bargaining positions of trade unions as well as employers. Hourly minimum wages in 2015 varied between 7.20 Euro (agriculture, forestry and horticulture) and 14.20 Euro (minimum wage for qualified workers in construction) as the following table overview shows.

[86] Expert interview with the scientific expert (nomited by the trade unions) in the minimum wage commission and the DGB.

[87] This assessment however is put into question by the employer organisation BDA that stressed in a comment for this study that also for certain companies in Western Germany the minimum wage level of 8.50 Euro might be too high.

[88] See for example the still pending judgement of the labour court of Düsseldorf of 20 April 2015 (Akz: 5 Ca 1675/15) which is about the question whether performance bonus (*Leistungsbonus*) could be included in the calculation or not.

Table 5: Sectoral minimum wages according to the German Posted Workers Act, minimum wage level according to the Act on Temporary Employment Business and according to the Collective Agreements Act as of 1 July 2015

Business	Western Germany	Eastern Germany	Uniform rate
Further education services	13.35	12.50	
Painting and decoration trade o Unskilled o Skilled	 10.10 13.10	 10.10 11.30	
Construction sector o Wage group 1 (unskilled) o Skilled	 11.15 14.20	 10.75 ---	
Scaffolding erection			10.50
Roofing trade			11.85
Industrial cleaning o Interior cleaning o Face of buildings	 9.55 12.65	 8.50 10.63	
Electricians trade	10.10	9.35	
Care provision sector	9.40	8.65	
Laundry services in the commercial customer business	8.50	8.00	
Slaughter and meat processing			8.00
Hairdressing sector	8.00	7.50	8.50 (from 1 Aug 2015)
Agriculture, forestry, horticulture	7.40	7.20	
Textile and clothing industry	8.50	7.50	
Temporary agency employment	8.80	8.20	

Source: Ministry for Labour and Social Affairs

Q2: How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?

According to the German government there are no data available regarding salary and wage levels, wage differences and real wages of posted workers.[89]

However, evidence provided for example in the context of the project "*Faire Mobilität*" that was launched by the DGB trade union federation in 2011 (co-funded by the Federal Ministry of Labour, BMAS) for delivering advice to posted workers from the CEEC indicates that in practice, posted workers structurally earn less than German workers for various reasons (see Q3 below). There are sectors such as the meat industry, construction and care/household services, where most of the posted workers receive less than indigenous workers. This assessment is based on the evaluation of work contracts and wage structures of individual cases.[90]

Regarding the care sector, however, the interviewed employers' association objects that posted workers working in qualified care positions are paid much more than the minimum wage due to the fact that there is a massive labour shortage of presently 30.000 workers in the industry.[91] Low wages might be found on the large market for

[89] Written response, Federal Ministry of Finance (BMF).

[90] Written response, DGB.

[91] Interview, Care Sector Employers' Association, Arbeitgeberverband Pflege e. V.

migrant workers in private home care. Home care in private households is predestined for a high share of undeclared work and agreements about non-financial benefits (such as use of a car, lodging, and meals) also reduce income.[92] In addition, as various studies indicate and as confirmed by the interviews for this study, posted work in the home care sector seems not be very relevant for both service providers and users because there are more attractive forms of work and as in this market there is a very high share of undeclared work, which tends to be more or less tolerated because of the nursing crisis in Germany.[93]

The transport sector is covered by the minimum wage in accordance with the MiLoG. However, the interviewed representative of the employers' association DSLV does not expect that this minimum wage is paid to all posted workers because the controls for transit traffic have now been suspended after the EU Commission has started an investigation on the conformity of the German minimum wage regulation with the EU law. In addition, according to the employer organisation representative violations detected during inspections would barely lead to legal consequences for the posting companies and the economic performances of Eastern European trucking companies simply do not allow the payment of the German minimum wage. In addition to this there are also high administrative burdens, when, for example, inspections ask for all documents required to control compliance with the law in German.[94] The service trade union *ver.di* remarks that administrative requirements are a necessity to carry out effective controls. Furthermore, the union points out that public control authority often find documents without German translations. Furthermore, the sanctions for unlawful behavior according to the union are inadequate to bring about a behavioral change.[95] The organization *camionpro* also reports on issues of poor working- and living as well as income conditions of Eastern European drivers.[96]

Regarding temporary agency work it is the case that posted workers are paid according to the Second Regulation Concerning a Minimum Wage Level in Temporary Agency Work. Domestic workers, however, are likely to benefit from collective bargaining agreements, which cover 90 % of the sector and that provide for higher and more differentiated remuneration, and offers additional pay for work in certain sectors (sector-specific supplement payment). However, posted temporary agency workers are also eligible for remuneration and working conditions of sectors laid out in the PWA. These provisions, e. g. concerning working time accounts take precedence over the Second Regulation Concerning a Minimum Wage Level in Temporary Agency Work, if they are more favourable for the worker. The legal position in this regard is not yet finally clarified. Because this is very difficult to carry out in each individual case, the employers' organization expects that posting companies might be easily overwhelmed by the complexity of correct wage and working conditions determination as laid down in the collective agreement for this sector.[97]

[92] Verdi: Migrantinnen aus Osteuropa in Privathaushalten: Problemstellungen und politische Herausforderungen.

[93] Interview, Care Sector Employers' Association, Arbeitgeberverband Pflege e. V. See also Körner (2014).

[94] Interview, DSLV; German Association of Freight Forwarding and Logistics

[95] Written response, ver.di trade union.

[96] See e. g. http://www.camionpro.de/camionpro-de/index.php

[97] Interview, Employers' Association of Private Employment Agencies, Bundesarbeitgeberverband der Personaldienstleister e. V. (BAP).

According to the two employer organisations of the construction industry in Germany, there are no reliable data on actual wages paid to posted workers in the construction industry. However, both organisations have the experience that wages in practice are not higher than the lower wage group level of the sectoral minimum wage agreement.[98]

Q3: In practice, what are the wages differences between posted workers and local workers? Provide an answer per sector. Is there evidence that posted workers earn (per sector) generally less/more than local workers?

As reported by the trade unions (DGB and its member organisations, based on evidence from main sectors that received posted workers in particular)[99] the following reasons for wage gaps should be highlighted:

- In sectors that were not covered by collective agreements on minimum pay (e.g. meat industry before August 2014, transport sector before the introduction of the statutory minimum wage), it was possible for posting enterprises to set wages that were below the wages paid to indigenous workers. This gap has decreased however since the statutory minimum wage and the opening of the PWA for all sectors.
- In most cases, posted workers irrespective of their professional qualification are classified in the lowest minimum wage group (e.g. in the construction sector) while indigenous workers with a long-term employment relationship and with comparable professional experience receive much higher wages due to higher wage groups.
- Furthermore, posted workers face different treatment and rights when it comes to wage components that are paid to indigenous workers but not to posted workers, e.g. Christmas bonus, additional holiday bonus (if paid out on a monthly basis), continued pay in case of sickness, specific forms of performance premiums, etc.
- In this context it has also been highlighted that most posted workers come from countries where social security contributions are much lower than in Germany. This results in financial claims of posted workers being lower than in the case of German workers and states a major (cost) motivation of German client enterprises to use posted workers .
- Finally, according to the experience of the DGB and sector-related trade unions there are also a lot of practices and creative "wage setting practices" (see also Q19) that result in wage gaps between posted workers and indigenous workers. Particularly widespread for example are longer working time without receiving overtime payment and piecework wage that according to experts and supervisory authorities are very difficult to control (Wagner/Hassel 2015).

However, as also stressed by the employer organisations involved in this study it is not possible to present quantitative data on wage differences and gaps. These depend very much on the specific sector and even enterprise specific context. As stated for example

[98] Written statements for this study by Zentralverband Deutsches Baugewerbe (ZDB) and Hauptverband der Deutschen Bauindustrie (HDB).

[99] Written statement of the DGB trade union federation for this study.

by the employer organisation in the construction industry ZDB, wage levels and differences are resulting from various factors and are also related to question whether or not the employer is a member of the employer organisation and therefore obliged to apply the respective wage agreement. In such a case, also the wage of the posted worker of that company would be above the minimum wage level.

Q4: In the temporary work agencies sector, could you describe who the "final users" of posted workers are?

As already highlighted above in the section on available data on posted workers, the role of cross-border posting in the temporary agency business sector is quite modest.

One reason for the comparative small number of posting in the temporary agency work sector is seen in the introduction of the Minimum Wage Level in 2011 that from the beginning also covers posted workers. According to the German trade unions, this reduced the possibilities of wage/social dumping and has made agency work less attractive for German clients. As a result, according to various stakeholders other forms of indirect employment, in particular self-employment and contract work (*'Werkverträge'*) have increased significantly (reflecting also a strong pattern of employment that characterises the construction sector where agency work is not allowed according to the German TAW regulation).[100]

However, data from the federal employment agency indicate that the numbers of foreign labour agencies that have received a license for trans-border posting have increased significantly during the last years, in particular after restrictions for new EU member states have been removed. According to a report of the German Federal Government on temporary agency work that includes data as of the end of 2012, most licenses were granted to agencies in Poland (116 – in 2008 there were only 9[101]), Austria (112), Great Britain (73), the Netherlands (43) and France (37). Apart from that also agencies from Hungary, Slovenia, Lithuania, the Czech Republic and Slovakia more recently have started to apply for temporary agency work in Germany (Bundesregierung 2014, p. 37).

According to data provided by the German government (Bundesregierung 2014, p. 28), as well as information provided by the social partners in the temporary agency work sector as well as the Ministry of Labour and Social Affairs in the context of this study, most temporary agency workers that are posted to Germany are of Polish origin (e.g. 2,663 out of 3,700 in 2010). It should be mentioned here however, that there is a significant lack of data: Since May 2010 and the application of the EU regulation on social security coordination (EG 883/2004 and EG 987/2009) specific information whether or not the posting enterprise is an agency or not is no longer gathered.

According to evidence provided by local public employment services, there is some kind of sectoral patterns of posting agency workers, e.g. from Hungarian agencies posting workers into the German meat industry, agencies from the Baltic countries in the road transport sector and agencies from the Nordic countries in the offshore wind sector.

One of the two employers' associations of the transport sector contacted in the context of this study believes that temporary agency work is very important in the industry in order to cover peak situations, the proportion of temporary agency workers among all

[100] Statement of the DGB in the context of this study. Self-solo employment and contract work are also issues in the transport sector. Interview, DSLV; German Association of Freight Forwarding and Logistics.

[101] It should be mentioned however in this context that at this time the cross-border mobility of Polish workers was still restricted.

employees is, however, less than 10%.[102] In the care sector temporary agency work also plays a significant role, because the number of beds in care facilities depends on the number of qualified care staff. To avoid a reduction of beds on offer, a lack of qualified personal can be bridged by temporary workers on-short-call.[103]

With view on temporary agency work it has to be stressed here also that the German Law on TWA does not allow agency work in the construction sector (with few exceptions of intra-sectoral employment lease).

***Q5**: Is 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 (hereafter "PWD") implemented in your country so as to comply with minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers? Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?*

In Germany, the first legislation regarding cross-border services taking the form of posting of workers already was implemented in 1996, based on a narrow scope with view on sectors covered (only construction sector) as well as minimum protection (minimum wage level) of interpreting of the Directive.[104]

Originally, the PWA was introduced in order to define a certain standard of working and pay conditions in the German construction sector that faced a strong competition from foreign low pay enterprises. Therefore, the law required foreign construction companies to pay their posted workers according to the minimum wage level that has been agreed in the collective agreement in the construction sector and that has been declared generally binding according to the German Collective Agreements Act (hereafter TVG). Originally, only this type of collective agreements that were signed by both signatory parties was the possible source of declaring an agreement universally binding.

An important change took place in 1998 when the principle was established that a collective agreement no longer was declared generally binding on the basis of the TVG but by a specific public order according to the PWA. In the context of this change also the restriction was lifted that the minimum wage declared generally binding only could include the lowest wage group defined in a collective agreement.

However, still the interpretation of the Directive was a narrow one – until today, only the terms and conditions of employment defined in Art. 5 of the German PWA are applicable.[105]

Since 1998 there is also the possibility of declaring an agreement generally binding by an alternative way and outside of the TVG, i.e. by statutory regulation through the Ministry of Labour and Social Affair. Furthermore, the amendment 1998 stipulated that it is no longer necessary that at least 50 per cent of the employees are covered by the scope of the agreement in order to be declared generally binding.

[102] Interview, DSLV; German Association of Freight Forwarding and Logistics

[103] Interview, Care Sector Employers' Association, Arbeitgeberverband Pflege e. V.

[104] As stated by the representatives of the BMAS as well as other interview partners.

[105] Interview BMAS.

While the PWA until 2007 was limited to the construction sector only, it was extended for the first time 2007 when the commercial cleaning sector was included (reflecting also in this sector a growing social/wage dumping by foreign companies).

A further extension of the sectors covered by the PWA happened in the reform of the PWA in 2009 when its scope was extended to six further sectors, in which minimum pay conditions could be set by statutory regulation regarding the general binding of a collective agreement.

In 2009, also for the care sector the possibility of regulating minimum working and pay conditions within the scope of the PWA was established. However, against the peculiarity of labour relations (a strong role of religious institutions in the sector that don't have concluded any collective agreements) and the significant internal diversity with view on pay conditions within the sector (also in regard to regional and local differences) a specific and tailor made solution was established (Art.12 PWA 2009) and a Care Commission was established that is composed of religious as well as other employers organisations, trade unions and employee representatives from the church-related care institutions on an equal basis. Based on suggestions and applications from either party, the Commission can take a decision on minimum working and pay conditions that then can be declared generally binding by statutory regulation by the Ministry of Labour.

After the sectoral scope of the PWA has been subsequently extended since the initial legislation, the amendment of the collective bargaining act in 2014 finally extended the scope to all sectors. However, as stated in the interview with the Ministry of Labour and Social Affairs, only nation-wide collective agreements on minimum wages that are declared generally binding fall under the scope of the PWA.

***Q6**: To what extent is the subject of minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.*

Posting as a concern of social partners, policy makers and companies

In the Treaty of Accession with the new Member States, it was agreed that the old Member States can restrict the labor market access by new EU citizens during a three-phase, seven-year transitional period (2+3+2 model). In consultation with the social partners Germany has – with the exception of the most recent member state Croatia - fully exploited the seven years of transitional provisions. While the protection of the German labor market on the grounds of cheap labor and social dumping used to be a given reasons, the positive aspects of a foreign work force in view of the demographic change in German society and the shortage of skilled workers are currently clearly emphasized (Bundesministerium für Arbeit und Soziales 2011). In sectors where the federal government saw concrete need for action to protect the domestic labor market, minimum standards in working conditions were created by the PWA.

Concerning the interpretation of the Posting of Workers Directive, German unions criticize the dominance of economic freedoms over fundamental social rights in general. The jurisprudence of the European Court in the decisions regarding posted workers and working conditions in particular earned much criticism, when it interpreted the minimum social standards in the Directive as highest standards possible (DGB 2012). Furthermore the unions in particular require that abuses in the implementation of the PWA must be countered. As mentioned above the DGB carries out the project "Faire Mobilität" which tries to enforce fair wages and fair working conditions for workers from Central and

Eastern European Member States on the German labor market and is sponsored by the Federal Ministry of Labour and Social Affairs and the European Social Fund.[106]

In particular in sectors such as the meat-processing industry or in ship-building, health and safety accidents scandals and terrible working and living conditions of posted workers have raised massive public concern and media attention. This has resulted also in a growing awareness of single companies that for example in the meat industry have signed a (voluntary) 'code of conduct' or single shipbuilders to conclude a company based collective agreement with the metalworkers union on certain minimum standards for posted workers.[107]

The BDA and many of its member associations see in the posting of workers a positive contribution to the German economy, as German employers take advantage of the possibility to use posted workers to fulfill contracts. However, also employer organisations have stressed the need for an effective and targeted combat against misuse and social dumping. At the same time however, employers' associations have raised concern in the regard to the successive extension of the number of sectors that are covered by the PWA, which no further requires a consensual agreement of the bargaining committee, the bureaucracy involved in the implementation of the law and liability requirements when subcontracting (BDA 2014).

Posting as the topic of legal discussion and research

The issue posting has been addressed quite extensively by legal studies and also by labour market and industrial relations disciplines. The existing literature can be categorized in the following four different types of research:

- Legal studies, guidelines and advise on contents of the Posting of Workers Directive (PWD) and implementation in the German law
- European case law and its impact on the interpretation of the (minimum wage) regulation in Germany
- The role of posted workers in the German labour market, including working conditions

Concerning legal studies on the implementation of the Posting of Workers Directive (PWD) in German law led to a rather large amount of advisory opinions, commentaries, explanatory notes and case studies by law professors and other legal experts. Judicial decisions of the Court of Justice of the European Union (CJEU), above all in the Viking, Laval and Rüffert cases, led furthermore to a number of juridical articles and papers, who saw an excessive intervention of the court decisions in the autonomy of social partnership (see for example Blanke 2008, Bücker, Warneck 2011, Schlichtherle 2010, Seikel (2014). In the context of political science, studies deal with the impact of posted workers on the German labour market and raised issues because of (poor) working conditions and missing employee representation (Apel 2012, Czommer, Worthmann 2005, Eichhorst 2005, Sell 2015, Hassel 2015, Wagner 2014, Wagner 2015). The investigation on these issues is focusing heavily on the construction sector and the meat industry.

[106] http://www.faire-mobilitaet.de/ueber-uns/++co++aad7ecc8-efae-11e1-8a24-00188b4dc422

[107] Interview BMAS.

III. WAGE-SETTING MECHANISMS

III.1. A better understanding of minimum wage-setting mechanisms

Q7: Which types of legal instruments/practices are used to set minimum wages? Describe in details the mechanism(s) used. Which collective agreement are (or may be) universally applicable within the meaning of Article 3(8) PWD?

There are the following kinds of minimum wage setting in Germany:

- The statutory minimum wage of 8,50 Euro (MiLoG)[108]
- Collective agreements on sectoral minimum wages declared generally binding by means of an ordinance/statutory regulation by the Ministry of Labour in accordance to the PWA[109]
- Collective agreements on sectoral minimum wages declared generally binding according to the TVG
- Collective agreement on a minimum wage floor ("*Lohnuntergrenze*") declared generally binding by means of an ordinance by the Ministry of Labour in accordance to the AÜG.

While the statutory minimum wage is binding for all employees (for groups that are excluded see below Q9) an alternative way to set minimum wage levels traditionally has been sectoral collective agreements that are declared generally binding by an ordinance of the Ministry of Labour.

In case of a collective agreement declared generally binding, not only those companies are covered and obliged to implement it but also those that are not members of the signatory parties but fall into the scope of the agreement.

The practice of declaring a collective agreement as generally binding is a special feature of the German industrial relations system (as well as of most other EU countries) and plays an important role to establish certain minimum standards of working conditions and avoid unfair competition between enterprises within a sector (either at national or regional level).

Sectoral minimum wages according to the Collective Agreements Act (TVG)

In July 2015, according to the Ministry of Labour and Social Affairs, there are around 70,000 collective agreements that are valid and of which 502 have been declared generally binding.[110]

To be declared generally binding, a collective agreement, there is a specific procedure, that is laid down in Article 5 of the TVG: After the signatory parties of an agreement have made a respective application, the bipartite Collective Bargaining Committee

[108] Gesetz zur Regelung eines allgemeinen Mindestlohns (Mindestlohngesetz - MiLoG)- http://www.gesetze-im-internet.de/milog/inhalts_bersicht.html

[109] There is one further and specific possibility to establish a sectoral minimum wage by public order according to § 10ff of the German PWA: By public order and in accordance to § 11 PWA not a collective agreement will be declared generally binding but a recommendation of a bipartite commission of representatives of trade unions and employer organisations. This solution has been applied in the care sector to set the minimum wage.

[110] Full list available at: http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen-DinA4/arbeitsrecht-verzeichnis-allgemeinverbindlicher-tarifvertraege.pdf;jsessionid=B9EB6F5B6C69A637E37A97113FE6ECB7?__blob=publicationFile

(*Tarifausschuss*)[111] of the peak level social partners' organisations (*DGB* and *BDA*) at federal and federal state level have to mutually agree before the agreement can be declared generally binding by the Ministry of Labour. This also means that either social partner group would be able to veto such a decision.

Furthermore, there are certain qualitative criteria for a collective agreement to be declared generally binding: Until 2014, the main criterion was that the collective agreement as such/without declaration of generally binding would cover employers, whose enterprises employ at least 50 per cent of the workforce of the agreements' scope. This has changed significantly due to a legal reform in 2014, the "Act for Promoting Collective Bargaining Autonomy" (*Tarifautonomiestärkungsgesetz*). The reform abolished the previous threshold of 50 per cent of workers covered and introduced the criteria that an agreement has to be in the "public interest" as the major criteria for an extension. According to § 5 TVG, the public interest is defined in case of the following situations:

- the collective agreement has a predominant relevance for the formation of the working conditions of those companies and employees that fall within its scope; or
- there is a need to guarantee certain collectively agreed standards by an extension in order to avoid undesirable economic development.

The legal reform of 2014 also brought another significant change: Collective agreements that are declared generally binding on the basis of the TVG since the legal reform of 2014 are only applicable for companies that post workers to Germany if their scope is the main construction sector and related activities (*Bauhaupt- und Nebengewerbe*). In all other sectors the setting of a minimum wage is only possible by public order according to the posting of Workers Act (see below).

It should be noted here that also under the new regulation of extending a collective agreement, there is the need to agree such an extension with the social partner organisations in the Collective Bargaining Committee, either at national level, or – in case of regional agreements at the level of federal states.

Minimum wages according to the Posting of Workers Act and the Act on Temporary Employment Business

The Ministry is able to declare a collective agreement generally binding by an extension/declaring it generally binding in accordance to Article 7 and 7a PWA.

According to Article 3 AÜG the Ministry of Labour – in response to the demand made by the signatory parties of the respective agreement – can also define a minimum wage floor for the temporary agency business by an ordinance.

The Collective Bargaining Committee plays also a role in the context of declaring collective agreements generally binding by an ordinance of the Ministry of Labour according to the PWA and AÜG. However, in contrast to extensions according to the TVG, the Committee members (six in total) have no veto power and the Ministry is able to

[111] In order to avoid misunderstanding, it should be noted here that the role of the "*Tarifausschuss*" is not to negotiate or conclude collective agreements. The function is to delivering a suggestion of the two cross-sectoral social partners on declaring an already existing collective agreement generally binding by public order.

extend an agreement by ordinance also against the will of either the union or employers' side.

In temporary agency work there are tariff communities of various associations on the part of trade unions (DGB "*Joint Collective Bargaining Unit*") and the two main employers' organizations of the sector. The bargaining committee ("*Tarifausschuss*") unanimously approved the Second Regulation Concerning a Minimum Wage Level in Temporary Agency Work by April 2014.

Minimum wage in the care sector

As described already above, against the background of the specific character of the care sector, it is treated in a specific way when it comes to minimum wage setting. Here, the procedure of setting a minimum wage follows a procedure that is defined in Article 11 of the PWA.

The so-called third way in regard to the Care Commission aims at the general equality of terms of church employment contracts with collective agreements and the equal treatment of the Care Commission. Within the definition of the law the Care Commission may decide whether to propose a minimum wage at all and on what level and whether there is a differentiation according to the type of activity, qualification or region.

The Commission is bound in its proposal to the legislative objectives of Article 1 of the PWA which states the creation and enforcement of adequate minimum working conditions that ensure fair and functioning competition maintaining the social security system and respect the order and pacification function of collective bargaining. Moreover, a high quality of care services and non-statutory welfare are to be considered. The Care Commission negotiated agreements in 2010 and 2014. The minimum wage is currently 9.40 Euro (Western Germany) and 8.65 Euro (Eastern Germany. According to the employers' association wage disparities in the care sector in Germany are very large and the level of the minimum wage had to build a common basis for many different forms of care, outpatient and inpatient care, large and small businesses, metropolitan and regional areas as well as full-time and part-time personnel.[112] A third round of bargaining is scheduled for October 2017.

Overview of the different forms of minimum wage setting

The following overview table illustrates the legal basis of minimum wage setting mechanisms that currently exist in Germany. Apart from the general statutory minimum wage, in 17 sectors sector-related minimum wages existed in 2015, covering around 4.6 million workers. These sectoral agreements have been declared generally binding on the basis of the Posted Workers Act, the Act on Temporary Employment Business and the Collective Agreements Act.

There are however also further instruments and regulation sources to set minimum wage floors and define minimum standards of working conditions. An important instrument in this context is social clauses in public procurement and minimum wage regulations at federal state level. These are briefly described below at the end of this section.

[112] Interview, Care Sector Employers' Association, Arbeitgeberverband Pflege e. V.

Table 6: Overview of the different forms of minimum wage setting as of July 2015

Legal basis		Since	Employees covered
MiLoG	General statutory minimum wage	01/2015	3,700,000[113]
§7 AEntG	Painting and decoration trade	12/2013	115,300
§7 AEntG	Construction sector	01/1997	540,400
§7 AEntG	Scaffolding erection	08/2013	31,000
§7 AEntG	Industrial cleaning	07/2007	700,000
§5 TVG	Electricians trade	06/1997	335,500
§11 AEntG	Care provision sector	08/2010	800,000
§7 AEntG	Laundry services in the commercial customer business	11/2009	34,000
§7 AEntG	Slaughter and meat processing	08/2014	80,000
§7a AEntG	Hairdressing sector*	11/2013	171,000
§7a AEntG	Agriculture, forestry, horticulture	01/2015	750,000
§7a AEntG	Textile and clothing industry	01/2015	85,400
§3a AÜG	Temporary agency employment	01/2012	n.n.
§5 TVG	Chimney sweeping trade	04/2014	7,500
§7 AEntG	Waste management**	01/2010	175,000
§7 AEntG	Further education services within the framework of the Germany Social Codebook II and IIII**	08/2012	30,000
§7 AEntG	Roofing trade**	10/1997	71,500
§7 AEntG	Stonemason and stone sculptor**	10/2013	13,200

** Not applied since 31 July 2015. ** Not yet made generally binding. Source: WSI Collective Bargaining Database*

Minimum wage regulation at the level of federal states

In 14 out of the 16 German federal states, there are regulations of minimum wage levels and certain social criteria in place that is relevant in the context of public procurement. With view on sectoral coverage, most federal states have adopted a regulation that covers all sectors that are covered by the PWA. Furthermore, in most states public procurement in the public transport sector is linked to the respect of the most representative collective agreement. And finally, 12 federal states have established a minimum wage in the context of public procurement, that in most cases reflects the general minimum wage level 8.50 Euro but in some states is slightly higher.[114]

[113] According to figures provided by the Ministry of Labour. The Minimum Wage Act of course covers all employees within the scope of the Act. The figure of 3.7 million refers to the number of those who according to estimates in 2015 have profited from the statutory minimum wage as their hourly income as less than 8.50 Euros.

[114] See: http://www.boeckler.de/pdf/wsi_ta_tariftreue_uebersicht_stand_2015_03.pdf. For further information see Sarter et al. 2014, Schulten et al. 2012.

With view on the public procurement clauses ECJ judgments have played on important role. Apart from the Rüffert court rule (ECJ C-346/06)[115] also a more recent example illustrates that the ECJ tends to regard guaranteeing the free competition within a common market of service providers as very important, in this cases more important than the setting of minimum wage levels in public procurement. In the ECJ case (C-549/13) the ECJ in September 2014 took a decision against the public procurement legislation in the City of Dortmund in North-Rhine Westphalia. This legislation stipulated a binding collective bargaining regulation in public procurement that included a minimum wage of at least 8.62 Euro per hour that must be paid by any tenderer and subcontractor. In this case, the City of Dortmund had awarded a contract to the Federal Printing Establishment (*Bundesdruckerei*) that subcontracted the tasks to a Polish business operator in Poland. Under the NRW legislation, the Federal Printing Establishment was obliged to pay the minimum wage. The ECF ruled that this legal requirement prevents subcontractors established in other member states from deriving a competitive advantage from differences in the respective rates of pay. It ruled that NRW goes beyond what is necessary to ensure that the objective of employee protection is met.

Q8**: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)

With view on the interaction of the different minimum wage-setting mechanisms that are in place in Germany, the legal regulation is based on certain rules within the overall norm of the favourability principle. According to the favourability principle, deviation from the norms set by a collective bargaining is only possible if it either favours the employee or the collective agreement includes an opening/deviation clause (Articles 4/3) TVG.[116]

Also in MiLoG Article 1(3) it is regulated that collective agreements according to the TVG, PWA or AÜG are regarded as the superior source for norm setting, if they benefit the individual employee more than the MiLoG provisions.

In contrast, the minimum wage takes priority over collective agreement provisions that conflict with the minimum wage and are less favourable for workers.

There is an important exception from this general rule however regarding a transitional period until the end of 2016: A minimum wage of €8.50 per hour will generally apply with effect from 1 January 2015. Wages of less than €8.50 per hour will be allowed until

[115] Rechtssache C-346/06 Dirk Rüffert als Insolvenzverwalter über das Vermögen der Objekt und Bauregie GmbH & Co. KG gegen Land Niedersachsen. http://curia.europa.eu/juris/document/document.jsf?text=&docid=68391&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1. See also: Hänlein 2008.

[116] Against the background of increasing unemployment in Germany, sectoral agreements from the mid-1990s increasingly included such opening or 'hardship clauses' whereby companies – temporarily and after being confirmed by the social partners - got the possibility to undermine sectoral standards in exchange for the safeguarding of jobs. At first, such deviations were only possible under relatively strict conditions. However, over time the criteria for opening clauses were no longer restricted to the danger of bankruptcy but were widened to embrace all kind of situations and motivations including even the 'improvement of competitiveness'. In exchange for the workers' concessions the companies usually had to agree to make no compulsory redundancies for a certain period of time. In some cases the companies also agreed concrete funding or projects for new investment. By the mid-2000s almost all major industry-wide agreements included opening clauses which gave far-reaching opportunities for deviations at company level (See: Bispinck and Schulten 2011, Hassel 2014). Though opening clauses have no immediate direct influence on minimum rates of pay, they may have an indirect effect as they often involve a postponement of agreed wage increases or the reduction of agreed bonus payments (such as Christmas or holiday pay) or a temporary reduction of working time, with respective reductions of pay.

31 December 2016 only when this has been provided for in a corresponding collective agreement between representative parties and has been made binding by means of an ordinance that is based on the PWA or the AÜG for all employers based in Germany or abroad who fall within the scope of the collective agreement and their employees.

As a precondition for deviating from the minimum wage, the respective sector must conclude a nationwide, sector-level representative collective agreement that has been made binding in accordance with the PWA or the AÜG for all companies based in Germany or abroad which fall within the scope of the agreement and for their employees.

Collective agreements that undercut the statutory minimum wage are those in the in the hairdressing sector (which is however not applied since 31 July 2015), the sector of agriculture, forestry and horticulture and the textile and clothing industry that applied for permission to extend by means of an ordinance pursuant to the PWA.

Pursuant to the AÜG, the following minimum wage levels apply to temporary agency workers in Germany's eastern states and Berlin: since 1 April 2014: €7.86; starting 1 April 2015: €8.20; starting 1 June 2016, entitlement is €8.50 per hour.

***Q9**: To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wages? What groups/what share of workers do not receive the minimum wages, and what reasons can be identified?*

According to the Ministry of Labour and the German government it is estimated that some 3.7 million people benefit from the statutory minimum wage starting 2015. The calculation of the Ministry is based on studies of a major macro-economic institute based on data of 2012, whereby it is not totally clear how the working-time factor was calculated.[117] There are also other estimations that calculate much higher numbers, up to 6.5 million (i.e. not based on full-time equivalents).

However, also against the experience of sectoral minimum wage agreements that already exist for a longer period it is commonly agreed that the minimum wage has a positive effect on the income within low pay employment groups as well as social and employment security (i.e. reduction in marginal part-time employment).

Here, there is plenty of research evidence and empirical data in particular on sectors such as construction, temporary agency work, care services as well as the meat industry that report such positive effects – also in contrast to sectors that are characterised by a high share of marginal part-time employment and precarious working conditions that don't have any sectoral minimum wage floors, namely hotels and restaurants, the retail sector or the moving business of the transport sector. In these sectors there are sometimes only regional collective agreements that have been declared generally binding.

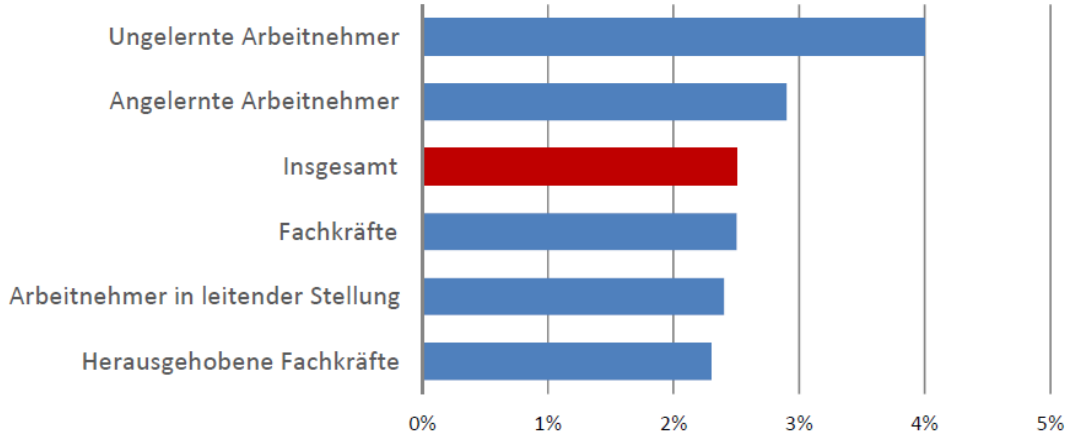
Positive effects are highlighted in a recent publication of the Ministry of Labour and Social Affairs that summarises initial results of the statutory minimum wage. The report stressed that the statutory minimum wage positively has effected income developments in the low pay sector. Furthermore, it is highlighted that the minimum wage has had a positive effect on the transformation of marginal jobs into employment that is covered by social insurance contributions (Bundesministerium für Arbeit und Soziales 2015). While these effects have also been highlighted by the German trade unions, there are also

[117] https://www.diw.de/documents/publikationen/73/diw_01.c.436181.de/14-5-1.pdf .

more critical voices such as the research institute of the employer organisations that has stressed that it is too early to make a thorough assessment.[118]

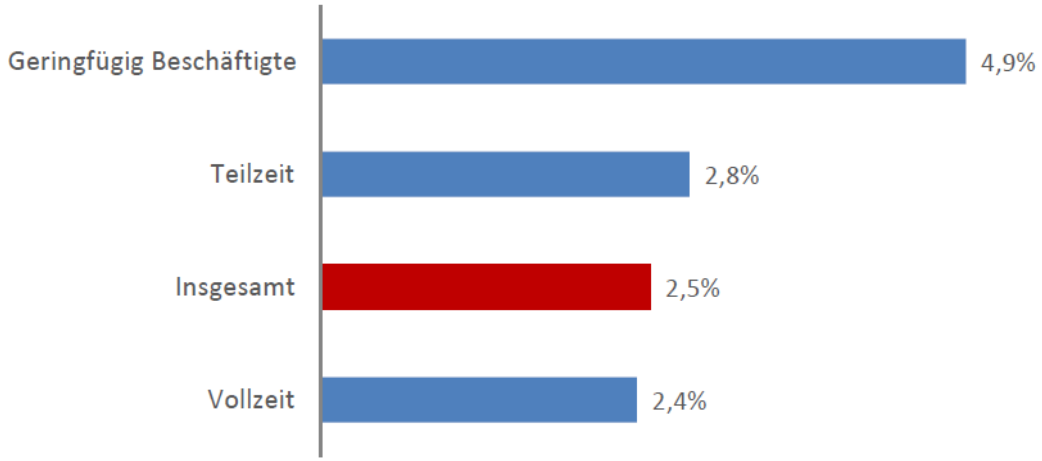
This is highlighted in the following two figures that are taken from the publication.

Figure 1: Income of workers with low qualifications has increased stronger than in other groups
(Changes in per cent against the 1st quarter 2014, without marginal part-time employment)



Quelle: Statistisches Bundesamt, Nominallohnindex, Vorläufige Ergebnisse für das 1. Quartal 2015

Figure 2: Income increase of marginal-part time employees („minijobber") in comparison to other groups (Changes in per cent against the 1st quarter 2014)



Quelle: Statistisches Bundesamt, Nominallohnindex, Vorläufige Ergebnisse für das 1. Quartal 2015

With view on the study questions regarding the share of workers that do not receive the minimum wages, and the respective reasons, no quantitative data exist. However, it is important to differentiate between legal or other (i.e. in the respective collective agreements) regulation that excludes certain categories of workers and employees and actual practices of enterprises to circumvent the payment of minimum wages. While the

[118] See: http://www.iwkoeln.de/infodienste/iw-nachrichten/beitrag/mindestlohn-zu-frueh-fuer-eine-bilanz-243301).

first element is described in more detail in the next section (Q10), illegal practices to circumvent minimum pay regulations in the context of posting of workers is described in Q19.

***Q10**: To what extent do the wage-setting mechanisms differentiate rules on minimum wage according to: employee's conventional classification, employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.), employment policies: type of working contract (e.g. low number of hours /week), person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc., other criteria?*

There are significant differences between the statutory minimum wage and sectoral minimum wages.

The general statutory minimum wage does not involve any wage groups, classification along professional qualification or regional differentiation between East and Western Germany (as in some sectoral agreements). There are however a number of groups that are excluded from the minimum wage:

The general minimum wage applies to employees and certain interns. The following are not employees within the meaning of the MiLoG:

- Anyone who is a trainee under the Vocational Training Act, including persons who are enrolled in vocational training preparation measures.
- Anyone who works as a volunteer/in an honorary capacity.
- Anyone who does voluntary service.
- Anyone who is enrolled in a measure that actively promotes their participation in the labour market.
- Anyone who is a home worker under the Home Works Act.
- Anyone who is self-employed.

Therefore the minimum wage does not apply to:

- Youths who are under the age of 18 and,
- Long-term unemployed persons during the first six months of their employment
- specific groups of interns in compulsory internships, voluntary orientation internships lasting up to three months, voluntary internships lasting up to three months that are undertaken during vocational training or university studies,
- Internships in connection with introductory training for young people.

There are also deviation arrangements for specific professions:

A special arrangement for newspaper deliverers which is similarly effective for a limited period is based on this stepwise introduction of the minimum wage. Currently, the minimum wage for this group is only 6.38 Euro and will increase to 7.23 Euros from the beginning of 2016 until it reaches 8.50 Euros from 1 January 2017.

As highlighted by the DGB trade union federation, also many seasonal workers (e.g. in the hotel and restaurant sector or in agriculture and horticulture are not covered entirely by the minimum wage: In principle seasonal workers receive the minimum wage. However, in many cases employers take advantage of an exceptional clause in the regulation. According to this so-called '70 days rule' they are not obliged to pay social

security contributions if workers are working not longer than 70 days and if the employment is not the main professional activity. This exceptional rule initially was addressed to pupils and students but according to the trade unions has been used increasingly as an easy way of reducing labour costs that is very difficult to control by labour inspection services.

A further specificity of seasonal work exists: In contrast to other sector where this is legally not allowed it is possible that workers receive parts of their wage in kind (this possibility only exists in those sectors that are covered by the statutory minimum wage and not in those covered by the PWA or AÜG).

As a result, there are a number of exceptions from the general rules of the statutory minimum wage regulation that – according to the DGB trade union – are problematic both for a proper implementation as well as for establishing a solid acceptance within the business community. The employer organisation BDA has stressed that the exception rules are defined in quite a vague manner and not easy to understand for employers and often results in implementation problems.

Foreign drivers in transit through Germany and in cabotage transport

The transport and haulage sector is one of those sectors that is characterized by a high share of foreign workers (it is estimated that around 40 per cent of all toll-related traffic is done by drivers of foreign drivers that live outside Germany). At the same time, the transport and haulage sector before the establishment of a statutory minimum wage with view exceptions (such as the logistics sector) had no experience with minimum wage agreements or sector-wide collective bargaining agreements.

Against this, the implementation of the general minimum wage is a highly relevant issue for the sector and key stakeholders. While the social partners *ver.di* and the German Goods Traffic, Logistics and Waste Disposal Association (*Bundesverband Güterkraftverkehr Logistik und Entsorgung*, BGL) – presenting mainly trucking companies - at sector level have quite a strong joint understanding and interest to implement the minimum wage regulation without any exceptions or deviations[119], the employer's association German Association of Freight Forwarding and Logistics (DSLV) - representing large forwarding agencies – and the cross-sectoral employers' organization BDA has articulated a more differentiated opinion in the context of this issues and also the EU Commission has raised concerns in particular with view on the application of the minimum wage in regard to transit traffic. The differences of opinion between the employers' organizations can be explained by the fact that the members of the German Association of Freight Forwarding and Logistics (DSLV) use competing member companies of the German Goods Traffic, Logistics and Waste Disposal Association and posted workers to carry out orders. At the time of writing this report the EU Commission has been scrutinizing whether the German practice is in accordance to EU law.

Against this, and limited to the area of pure transit through Germany, the checks performed by state agencies to monitor compliance with the MiLoG will be suspended for the time until the issues arising under European law that concern the application of the MiLoG to the transport sector have been clarified. Proceedings for administrative offences pursuant to the MiLoG will not be instituted. In the event that proceedings have already been instituted, they will be discontinued. As long as the issues arising under European law that concern the application of the Minimum Wage to the transport sector are being examined, reports and/or duty rosters for the purely transit area and records based on

[119] Joint Statement of the DGB and the employers' organisation in transport and haulage, BGL on the minimum wage regulation, 9.3.2015.

the MiLoG or the respective ordinances do not have to be submitted and/or drawn up.

This suspension does not however apply to the area of cabotage transport or to cross-border road transport with loading or unloading in Germany. This transitional solution will apply until the issues under European law that concerns the application of the minimum wage in the transit area have been clarified.

Sectoral minimum wage agreements

Minimum wage agreements concluded by social partners at sectoral level in many ways differ from the statutory minimum wage insofar as the contents of regulation is not limited to wage issues but often also address further issues . In most cases there are several framework agreements in place that address specific issues (e.g. social funds, skills and apprenticeship, qualification groups, etc.).

Here, only some important aspects in regard to the study question above should be highlighted:

- In contrast to the general minimum wage, sector-level minimum wage agreements in most cases have a regional differentiation between Western and Eastern Germany in order to reflect the social and economic diversity within Germany;
- A number of agreements have defined at least two minimum wage groups, normally for workers without or with only very basic qualification levels and professional workers;[120]
- Collective agreements that are declared generally binding under the PWA or the AÜG furthermore often include regulations regarding bonuses and allowances, e.g. for dirty or dangerous work, piece work, work on Sundays etc., or quality bonuses as well as Christmas and/or holiday pay that also are binding for posted workers if they match certain legal criteria (details on this in section iii).
- Against the peculiarity of temporary agency work (namely the triangular employment relationship between agency, temporary worker and receiving company) and also the EU TAW Directive on equal pay the sectoral agreement or the temporary agency business involves a number of specific regulations regarding different forms of minimum pay, equal pay rights and other rights.
- In regard to the care sector it should be noted that nursing students do not receive the minimum wage. Another exception poses the employment directly in private households because the minimum wage is only applicable to undertakings.

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

[120] Here, the DGB as well as the construction union IGBAU has highlighted that this often is a source of discriminating posted workers in Germany. Irrespective of their actual professional qualification and expertise they are in most cases classified in the lowest wage group.

Generally binding collective agreements in Germany have a long tradition that dates back to the 1950s and has been part of the TVG since its beginning. However, the Posted Workers Act in 1996 constitutes a new dynamic as for the first time – and against significant opposition –declaring a sectoral agreement on minimum wage levels generally binding by statutory public order became practice:

- Limited to the construction sector originally, the PWA was established in 1996 with the clear objective to limit a social and wage dumping and establish an environment for fair competition in this sector that at that time faced a strong influx of workers and companies from Southern Europe
- Since then, the posted workers regulation was significantly opened for further sectors by legal amendments until in 2014 the final step was taken establish the general possibility of all sectors to negotiate and conclude collective agreements at sector level that then would be declared generally binding for all employees within its scope. In the end there were 14 sector were specific collective agreements on minimum pay rates and conditions were in place in 2014. All sectors are characterized by a strong competition based on wage costs rather than the quality of the service delivered.
- In order to the increase the coverage of minimum rates of pay also to those sectors where sector level minimum wage agreements not exist, the German government in 2015 then established a general statutory minimum wage for all employees.

The increasing role of minimum wage agreements via the PWA has to be seen against changes within the German labour market as well as the collective bargaining system that resulted in an increased pressure on wages and a growing low wage sector. The PWA here provided for a relatively easy way of regulating working conditions in those sectors that are characterized by a strong experience of social dumping and wage competition by foreign companies as well as employees.

In contrast, the minimum wage act 2015 not only provides for a further extension of the scope of minimum wage – now the whole labour market but also is a reflection of the situation in those sectors that have faced a strong increase in low wage and increased internal competition on wages. At the same time, due to low organization rates both in unions as well as employers or a highly decentralised industrial relations environment concluding sector wide agreements that qualify for a national extension were very difficult or even not possible.

Q12**: **How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce minimum wage?) Is there an automatic indexation rule? Which criteria are taken into account when deciding on changes of the minimum wage level?

Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

There is not automatic indexation mechanism neither in the statutory nor in the sectoral minimum wage setting practice.

In the context of the new statutory minimum wage, the main actor is an autonomous Minimum Wage Commission that was established as part of the Minimum Wage Act 2015 in order to make suggestions on adjusting the minimum wage. On this basis the Ministry

of Labour can adjust the minimum wage level. At sector-level, adjustments of the minimum wage levels are made by new collective agreements that then may be declared generally binding by public order. The only exception is the care-sector where according to Art. 12 of the Posted Workers Act a Commission has been established that will make suggestions on adjustments.

Wage adjustments in general take into account various aspects such as the general economic development as well as average collective bargaining agreement results. They also take into account the specific economic requirements and needs from the sectoral perspective. Finally it is always a political negotiation process. With view on the statutory minimum wage, § 9 of the MiLoG stipulates that the minimum wage commission should orientated its suggestions on adjustments of the minimum wage towards the general development of wage levels in Germany.

Sectoral as well as other specificities also explain sectoral differences in minimum wage negotiations and agreements, e.g. whether or not there are regional differences in the minimum wage or whether there are further groups, e.g. according to qualification levels of occupational profiles (e.g. in the industrial cleaning sector for cleaning within a building and the cleaning of facades).

There also is always a general discussion whether regional or other differentiation is necessary and how it may be designed (e.g. in the care sector, where the trade unions are strongly demanding a comprehensive minimum wage grid that also includes for example technical or kitchen staff).

In the transport sector the bargaining structure is highly fragmented, although there often is a tariff community of all employer associations in the sector involved. E.g. for each federal state in Germany there is a different collective agreement negotiated. The existing collective agreements provide already before the implementation of the MiLoG for wages higher than the later introduced general minimum wage, except for some parts of Eastern Germany. Since not seeing itself as a low-wage sector an admission of the transport sector to the PWA was never considered, at least from an employers' side of view.[121]

III.2. Minimum wage-setting mechanisms in the context of posting of workers

***Q13**: What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?*

- ***To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?***
- ***To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?***
- ***To what extent would the extension be easy to implement (and to control) from an administrative point of view?***
- ***To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?***

[121] Interview, DSLV; German Association of Freight Forwarding and Logistics.

- ***To what extent would it reduce the displacement effect on local undertakings and labour force?***

Interview partners had problems to understand the exact purpose of this question, namely what is meant by "extension of the scope of Article 3(1) PWD". Against this, the remarks received were quite different and reflect a different understanding:

From the point of view of most interview partners an extension of the scope of the Directive is neither necessary nor feasible. The key issue is the proper implementation and the reduction of misuse and circumventing the regulation.

Furthermore, Art. 3(1) PWD and the criteria laid down in Article 3(8) have to be understood in the context of significant differences in national wage setting mechanisms and extension practices of collective agreements, e.g. countries with a strong tradition of legal instruments and government ordinances of extensions and/or minimum wage setting (for example France, Spain, CEEC) in contrast to those where extension plays no role at all due to strong collective bargaining systems (Austria, Nordic Countries) or because of the opposite, a lack of collective bargaining competences at sectoral or cross-sectoral level (CEEC).

While thus most of our interview partners found it difficult to imagine a concrete situation of extending the scope of Art. 3(1), the trade unions have highlighted a number of demands:

The DGB stressed that still a significant share of posted workers are not covered by sectoral minimum wage agreements under the PWA and suggested a reflection for example on possibilities that not only collective minimum wage agreements that are declared generally binding in the context of the PWA but also those according to the TVG would be included in the scope of the Directive. In contrast to the more restricted and focused minimum wage agreements, the agreements according to Article 5 TVG (i.e. declared generally binding) often contain a broader scope of contents.

This would also meet a further demand of the trade unions: the demand that the regional/federal state level public procurement clauses in regard to the respect and application of collective agreements and wage levels are eligible with the Directive.

The trade unions also would be in favour of a legal ban of wage dumping ('*sittenwidrige Löhne',* i.e. wages that are less than 1/3 of the collectively agreed wage level would be forbidden) in the context of the posting regulation.[122]

According to the DGB a prerequisite to the implementation of the proposals made in Q13 would be that the posting of workers is obliged to registration. As a consequence of the implementation the DGB expects that wages would rise, and a shift from lower to higher-value services and activities would set in, reducing competitive advantage based on low wage policies.[123]

In contrast, employer organisations, in particular at cross-sector level always have been reluctant and rather critical to use the PWA as a means of minimum wage regulation.

Any extensions of the scope of course would result in higher costs and administrative as well as supportive activities. The employers' association in temporary agency work points to a strong negative impact on the supply of posted temporary agency workers and a

[122] The employer organisation BDA has expressed the opinion that the legal basis on unlawful wage dumping would be sufficient and there is no need to further codify civil law. According to the BDA also the protection of posted workers is provided in a sufficient way by Art. 2 of the AEntG.

[123] Written reply to the survey of DGB (German Trade Union Federation), 20. July 2015.

negative effect on the German economy as a whole if extensions were to be implemented.[124]

The employers' organization interviewed in the transport sector noted that in light of the large number of existing collective agreements in the sector in Germany, foreign companies would be very likely to avoid trips through various federal states in this scenario, with the result of an overall economic crisis in Germany.[125]

One employer organisation in the construction industry (HDB) commented the following on the question:

"The construction industry belongs to those sectors that are covered by the German PWA and the collective agreements on minimum wage levels are declared generally binding. Thus, the question is not relevant for our sector."

The written statement of the other employer organisation (ZDB) is more comprehensive and addresses also the application of collective agreement provisions that go beyond minimum wage standards: According to the ZDB statement an extension of collective agreements that would be covered by the PWA and the inclusion of further components would result in making the posting of workers more complicated and would also increase the costs for posting. The effect would be that posting of workers would become less attractive.

"For example, if not only the provisions of collective agreements regarding the minimum wage level is applied in the context of posting but also further components and the entire collective agreement floor would become relevant for an individual posted workers, posting companies would be covered for the duration of the posting by the entire collective agreement. This would result in significant additional financial as well as bureaucratic strains and would require a comprehensive knowledge of foreign firms about collective agreements in the hosting country. This could be regarded as discrimination."

Furthermore, according to the ZDB, the monitoring and controlling of the correct application of the PWA would become much more difficult for the German authorities (i.e. the Customs Service). Already today the customs service is overburdened because it lacks the staff that would be required (also because the customs since January 2015 is responsible for monitoring and controlling the statutory minimum wage regulation, there has been an increase in the available workforce but this by far is not sufficient). Thus, any extension of the scope of the PWA would put significant further burden on the control authorities (already now it has proved extremely difficult for example to control the correct classification of posted workers in the minimum wage groups 1 and 2). The United Services Trade Union ver.di states, however, that a lack of personnel must not be used to serve as an argument against implementing rules, but rather a sufficient number of staff needs to be hired. [126]

[124] Interview, Employers' Association of Private Employment Agencies**,** Bundesarbeitgeberverband der Personaldienstleister e. V. (BAP).

[125] Interview, DSLV; German Association of Freight Forwarding and Logistics.

[126] Written response, ver.di, United Services Trade Union.

IV. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

IV.1. Constituent elements of the minimum rates of pay: the receiving country perspective

Q14: Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).

Q15: Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)

Q16: Which components (NB: use the indicative list above) are in the "grey area"? (= not clearly belonging or excluded for the calculation of the minimum pay rates). Explain your response and give examples. Describe concrete difficulties encountered per sector.

Authors note:

With view on the constituent elements of the minimum rates of pay, the situation in Germany is quite clear.[127] *The following information is taken from information provided by the federal government's authority responsible for the control of the application of minimum wage regulations, the German Customs. This information is regularly updated and provided in several languages.(http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Minimum-conditions-of-employment/minimum-conditions-of-employment_node.html)*

For the construction industry, employer organisations have referred to the special web-site for posted workers that was been established by the European sectoral social partners (www.posting-workers.eu). This website co-funded by the European Commission.

Calculation and payment of the minimum wage

Basic principle

The minimum wage is a minimum rate of remuneration within the meaning of Article 2, clause 1, of the German Posted Workers Act.

[127] The employer organisation BDA has stressed in this context that in regard to the question whether certain components are part of the minimum rate of pay, there however still exists legal uncertainty in particular in regard to the new statutory minimum wage.

Accordingly, calculation of the statutory minimum wage shall follow the principles for calculation of collectively agreed minimum wages pursuant to the PWA. (see the source mentioned above).

The minimum wage is an hourly gross wage that, because of the mandatory nature of Articles 1 and 20 MiLoG, must be calculated and disbursed as a monetary consideration. Remuneration in the form of payments in kind, that is, as benefits provided by the employer by way of consideration for the performance of work in a form other than money, is fundamentally not permitted. The sole exception to this principle concerns the remuneration of seasonal workers to the extent that their board and lodging may count towards the minimum wage. The option that non-monetary benefits provided by the employer may be included in the calculation is indeed given for seasonal workers, but only as concerns the MiLoG, not though in the context of the PWA or the Provision of AÜG

Other wage components

The following principles must be followed when determining the minimum wage:

Allowances and supplements

Allowances or supplements paid by the employer are considered to be elements of the minimum wage if their payment does not depend on an employee's performance exceeding the usual performance expected in the wage agreement. This is regularly the case where the allowances or supplements, together with other benefits from the employer, have the purpose of compensating an employee's performance for which at least a minimum wage must be paid (functional equivalence of the performances to be compared). In order to establish such functional equivalence, it is in particular the minimum wage collective agreement that must be consulted. Where such agreement sees the performance as compensated by the minimum wage in itself, the allowances or supplements must be taken into account as components of the minimum pay. Such scrutiny is required whenever the obligation to pay the corresponding allowances or supplements has not been provided for in the minimum wage collective agreement as such.

*Examples of allowances or supplements that is **always included** as components of the minimum wage:*

- The supplement for employees in the construction industry ("*Bauzuschlag*"),
- Allowances identified in the employment contract as the difference between the local wage and the applicable minimum wage.

*Examples of allowances or supplements that are **considered in certain circumstances**:*

- Overtime supplements, where the employer is obliged to pay overtime supplements on the basis of a wage agreement within the meaning of Article 3 PWA, or, in the care sector, on the basis of a legal ordinance according to Article 11 PWA. In this case it is sufficient that the actual wage paid, including the overtime supplements, is at least equal to the sum of the minimum wage and the overtime supplement as they are laid down in the collective wage agreement.

Clarification: Christmas bonus or additional holiday pay/vacation allowance and employers contributions to social insurance

Payments such as the Christmas bonus or additional holiday pay are regarded as part of the minimum wage if the employee is, in fact, irrevocably paid the proportional amount due for the period of the posting at each date for the minimum wage due (e.g. 15th of each month).

The calculation of the minimum wage does not include employer contributions to social insurance funds.

*Examples of allowances or supplements that are **not taken into account** as components of the minimum wage:*

- Supplements and allowances the payment of which is conditional on the following:
- more work per time unit (piecework premiums),
- above-average quality work results (quality premiums, premiums for accident-free driving in the transport sector),
- work at particular times (e.g. overtime, Sunday, holiday, or night work),
- work under difficult or dangerous conditions (e.g. dirt allowances, or danger allowances)

- Allowances which employers pay their workers to reimburse them the costs they actually incurred while working abroad (such as travel, board and lodging) and which are regulated by the relevant legislation in many countries.

Remuneration plus (flat) daily allowance

Where an employer domiciled abroad pays their workers a daily subsistence allowance in addition to the regular wage during their temporary posting to Germany, and where the amount of such allowance is not broken down and it is therefore not evident which part of the allowance serves to reimburse a worker's actual expenses and which part is meant to close out any additional disadvantages related to a deployment abroad or to balance the difference between a worker's wage in their country of provenance and the minimum pay under German legislation, it is necessary - for the purpose of calculating those portions of the allowance that count towards the minimum wage - to view the different uses of such payment separately. In order to break down the allowance accordingly, the following criteria should be applied:

- *Legal stipulation specifying the proportion between individual components of a daily allowance*: Where relevant legal provisions (such as the labour legislation in the country of provenance) clearly lay down how the daily allowance is structured and/or specify which portion of the allowance is allocated to the reimbursement of expenses and which portion is paid solely because of the deployment abroad, this allocation as stipulated by law shall be applied. For the purpose of determining whether the minimum wage requirement is complied with, the portion paid as reimbursement of actually incurred expenses shall be disregarded. Only the remaining portion will count towards the minimum wage entitlement.
- *Actual expenses*: In the absence of any rules governing the composition of the daily allowance the factual circumstances should be taken into account. It means that the expenses actually incurred by the employee as a result

of their posting abroad (such as the cost of travel, board and lodging) should be deducted from the full allowance amount. Where such costs make up or even exceed a worker's full subsistence, the payment does not count towards the national minimum wage pay at all. On the other hand, where the actual expenses of an employee fall short of the allowance paid, such difference may count towards the minimum pay.

- *Deduction for the provision of lodging and board pursuant to the Social Insurance Fees Ordinance*: If it is not (any more) possible to determine the expenses actually incurred by the employee, an amount equivalent to the lowest applicable rate for food and accommodation paid under the Social Insurance Fees Ordinance shall be deducted.[128] Only the amount remaining after such deduction shall be taken into account when determining whether the minimum wage is indeed being paid.

Clarification: Remuneration plus benefits in kind and all-inclusive amounts

Where the employer grants an employee, in addition to the wage, benefits in kind that have a monetary value, e.g. accommodation and/or meals, such monetary value shall not be taken into account as a wage component.

Where the employer deducts the cost of benefits in kind (e.g. the cost of employer provided accommodation) from the wage, then only the sum actually paid to the worker shall count towards the minimum wage.

In case the employer pays an overall wage that includes both the remuneration for work and some additional amounts for employees to cover expenses for accommodation and meals themselves and no further details (regarding the various components of such pay, the respective amounts where applicable, or the actual provision of board or lodging) are available, an amount equivalent to the lowest applicable rate for food and accommodation paid under the Social Insurance Fees Ordinance shall be deducted and only the remaining amount be taken into account for national minimum wage purposes.

Due date

The minimum wage shall be paid on the due date as agreed, but not later than on the last banking day of the month following that in which the relevant work was performed. An employer's principle obligations pursuant to Article 20 MiLoG include payment of the minimum wage by the last bank working day (Frankfurt am Main) of the month following the month in which the work was performed, at the latest, not though payment on the agreed due date.

Q17**: **In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?

No, not with view on contents, both the statutory minimum wages as well as sectoral minimum wages are covering both indigenous as well as foreign/posted workers. There are no explicit special rules in the collective agreements.

[128] Section 2 of the Social Insurance Fees Ordinance stipulates the following deductions with regard to expenses payments: To account for the portion covering the cost of board, a monthly amount of 229 Euro should be deducted from the overall allowance. The deduction with regard to the portion covering the cost of lodging should be 223 euros.

Q18**: **How do the differences in the definition of minimum rates of pay impact income levels of posted workers (also taking into account compensation of expenses)?

As differences in the definition of minimum rates of pay do not exist within the German PWA the question is not relevant.

Q19**: **In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with requirements of the host country on minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as listed above? If so, which ones?)

According to the assessment of the trade unions, the posting to Germany offers numerous possibilities of "wage formation". Often the intention is to save social security contributions and taxes and here there are several loopholes and special arrangements that can be utilized. Often, workers social rights, in particular pensions or unemployment insurance, are withheld. More "designs" arise by wages being paid in cash and accounts are not created. According to the DGB it should be clarified in the regulation that wages must be fully calculate contributions and a written statement should be provided in order to improve the transparency and non-cash payment.

According to the cross-sector employer organisation BDA, without having further information assumes that there might be perhaps individual misbehavior. Therefore the focus should be on guaranteeing a better implementation of rules and reduction of misusage and fraud.

The employer organisations in the construction sector (HDB and ZDB) state that no information is available on this question. However, ZDB in the written statement to our study made the following statement:

"It is a fact, that in practice companies, involved in the posting of workers in part try to circumvent minimum wages by various techniques. Our member companies in particular are facing the problem of an increase in bogus self-employment. In such a case, a solo-self-employed would formally establish a construction firm and thus would not be entitled to receive the minimum wage. In practice however, this person is a dependent worker. Furthermore, we would like to stress that we continuously receive information on cases where costs for lodging and food/subsistence is included in the minimum wage. Also, some companies are trying to circumvent the minimum wage, by extending the working time: While the correct minimum wage will be paid correctly for an eight hours day, the worker in fact is required to work up to 14 hours."

Also the representatives of the Federal Ministry of Labour and Social Affairs are aware of and concerned about these practices to circumvent legal regulations. With view on those posting companies that try to comply with the German minimum wage legislation the Ministry stated that these companies are matching the minimum rates of pay by paying posting allowances and other financial bonuses that can be included in the minimum wage.[129]

[129] Interview BMAS.

IV.2. Constituent elements of the minimum rates of pay: the sending country perspective

***Q20**: In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country on minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as listed above? If so, which ones?)*

Neither employer organisations, trade unions nor the Federal government and experts were able to provide any detailed information on this issue.

However, since the Posting of Workers Directive (PWD), the application of minimum rates of pay only becomes relevant when otherwise lower premium would be payable. Though exact data are missing it can be assumed that workers who are employed in Germany and are sent to another EU country temporarily in most cases are not in the low-wage sector but highly qualified professionals, often in wage groups outside/above the collective wage agreement (so-called '*außertarifliche Arbeitnehmer*').

With view on lower wage groups there seems to be quite a significant mobility of German workers in sectors such as hotel and restaurants, tourism, care and hospitals motivated by higher wages for example in Switzerland, Austria or the Scandinavian and the UK.

While according to most interview partners, it is rather unlikely that most of this labour migration is taking the form of posting the representatives of the BMAS highlighted that in the past there have been complaints from Switzerland about an influx of "cheap labour" from Germany under the posting regulation that also is applied in Switzerland under the mobility of workers agreement with the EU.[130]

[130] Interview BMAS.

Terms & Akronyms

English	German	Akronym
Posted Workers Act	Arbeitnehmer-Entsendegesetz	PWA / AentG
Act on Temporary Employment Business	Arbeitnehmerüberlassungsgesetz	AÜG
Minimum Wage Act	Mindestlohngesetz	MiLoG
Collective Agreements Act	Tarifvertragsgesetz	TVG
Minimum Wage	Mindestlohn	
Minimum Rates of Pay	Mindestentgeltsätze	
Minimum Wage Floor	Lohnuntergrenze	

List of interviews carried out and written statements received for this study

Organisation / Sector	Name of organisation	Date	Method of interview
a. Government	Federal Ministry of Labour and Social Affairs(BMAS)	06 Aug	Face-to-face/group
b. Goverment / Control Authority	Federal Ministry of Finance (BMF) /National Liaison Office for Posted Workers	16 Jul	Written statement
c. Cross-sectoral employer organisation	Bundesvereinigung der Deutschen Arbeitgeberverbände	29 Jul	Face-to-face/group
d. German Trade Union Federation	DGB	20 Jul 29.Jul	Written reply face-to-face
e. Employer organisation / Agency Work	Bundesverband Zeitarbeit	05 Aug	face to face
f. Trade union / Agency Work	IG Metall	13. Aug	Telephone interview
g. Trade union / agency work	Ver.di	17 Jul	Written statement
h. Employer organisation /Care sector	Arbeitgeberverband Pflege	03. Aug	Telephone interview
i. Trade union / care sector	Ver.di	17 Jul	Written statement
j. Employer organisations / Road Transport	DSLV Deutscher Speditions- und Logistikverband	27 Aug	face to face
k. Trade union / transport sector	Ver.di	17 Jul	Written statement
l. Employer organisation / Construction sector	Zentralverband Deutsches Baugewerbe (ZDB)	28 Aug	Written statement
m. Employer organisation / Construction sector	Hauptverband der Deutschen Bauindustrie (HDB)	26 Aug	Written statement
n. Trade union / construction sector	IG BAU	10 Jul	face-to-face
o. Research	University Duisburg-Essen	14 Jul	telephone
p. Research	Minimum Wage Commission	16 Jul	telephone

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DENMARK

I. BACKGROUND INFORMATION

The use of posted workers in the four sectors – an overview

In Denmark all foreign businesses providing temporary services have to register in the Register of Foreign Service Providers (*Registret for Udenlandske Tjenesteydelser*), also known as RUT[131]. The Danish Working Environment Authority can sanction companies who fail to register. The following types of businesses must register[132]:

- *A foreign company that posts workers to carry out temporary work in Denmark*
- *A Self-employed person who provides temporary services in Denmark*
- *A temporary agency that posts workers to carry out temporary work in Denmark*

In relation to posted workers, the register provides a sector-specific overview of the number of foreign businesses providing temporary services in Denmark and hence a good overview of sectors in which posted workers are engaged. The register shows that the total number of foreign companies providing temporary services in Denmark has increased significantly in recent years. Where in 2010 a total number of 1,490 foreign businesses were providing temporary services in Denmark, the number had increased in 2014 to 23,123.

RUT[133]: All sectors					
Year	2010	2011	2012	2013	2014
Number of foreign service providers	1,490	14,477	22,689	24,636	23,123

The table below shows all sectors, in which foreign companies provide temporary services, (and that had registered in RUT) in Denmark from 2010 to 2014. The construction sector is the sector where by far most foreign businesses provide services. The number has grown from 1,137 in 2010 to 15,368 in 2014. The transport sector is significantly smaller. Since 2010 it has grown from 19 companies to 1,388 in 2014, and is hence the fourth biggest sector of foreign businesses providing services in Denmark. The medical and care sector is one of the sectors where the fewest foreign businesses are providing services. In 2010 the total number was 0, in 2014 it was 13. A data extract from June 2015 shows that the number this year so far is 0.

[131] https://indberet.virk.dk/myndigheder/stat/ERST/Register_of_Foreign_Service_Providers_RUT#faq

[132] DANISH BUSINESS AUTHORITY, Business in Denmark, The Register of Foreign Service Providers (RUT), Who needs to Notify in RUT?: *http://businessindenmark.danishbusinessauthority.dk/rut*

[133] Register of Foreign Service Providers. Search criteria: all sectors

RUT[134]: All sectors					
	Number of foreign service providers/year				
Sector group/NACE	2010	2011	2012	2013	2014
Section A: Agriculture, forestry and fishing	112	1,165	1,005	646	548
Section B: Mining and quarrying	4	25	69	26	67
Section C: Manufacturing	82	1,076	1,958	2,320	2,201
Section D: Electricity, gas, steam and air conditioning supply	4	56	81	64	55
Section E: Water supply; sewerage; waste management and remediation activities	19	63	65	56	66
Section F: Construction	1,137	10,635	17,546	18,417	15,368
Section G: Wholesale and retail trade	19	95	113	207	162
Section H: Transporting and storage	19	82	226	561	1,388
Section I: Accommodation and food service activities	4	27	27	18	16
Section J: Information and communication	6	87	155	634	1,434
Section K: Financial and insurance activities	0	3	4	3	4
Section L: Real estate activities	0	4	2	0	0
Section M: Professional, scientific and technical activities	30	133	169	333	277
Section N: Administrative and support service activities (incl. temp. work agencies)	45	423	611	620	745
Section O: Public administration and defense	1	8	2	6	4
Section P: Education	0	5	6	5	9
Section Q: Human health and social work	0	27	22	2	13
Section R: Arts, entertainment and recreation	3	42	97	85	249
Section S: Other service activities	5	521	531	633	515

Temporary work agencies

As for temporary work agencies, these are not specified as an independent sector but are included in the sector for *administrative and support service activities*. A specified search in

RUT on temporary work agencies shows that only a few foreign businesses in Denmark from 2010 – 2014 registered as providing temporary work agency services. In 2010 the number was 15, in 2014 it had increased to 29.

RUT[135]: Sector search (NACE): 78.20 Temporary work agencies

[134] Register of Foreign Service Providers. Search criteria: all sectors groups

[135] Register of Foreign Service Providers. Search criteria: Branch code: 78.20 Temporary work agencies

Year	2010	2011	2012	2013	2014
Number of foreign service providers	15	17	20	11	29

Health and care services

Data from RUT shows that there have been very few foreign companies providing temporary services within the medical and care service sector in Denmark. In the period 2010 – 2014 the only services provided within the sectors concerned hospital activities (86.10) medical and dental practice activities (86.21, 86.22), other human health activities (86.9) and other social work activities without accommodation (88.90). The latest numbers for 2015[136] show that for the moment no foreign businesses are providing temporary services within the medical and care sector.

RUT[137]: Branch search on (NACE): (Section Q) 86.10, 86.21, 86.22, 86.23, 86.90, 87.10, 87.20, 87.30, 87.90, 88.10, 88.91, 88.99.					
	Year				
Branch code/NACE	2010	2011	2012	2013	2014
Section Q: 86.10 Hospital activities	0	26	21	1	1
Section Q: 86.21 General medical practice activities	0	0	0	0	1
Section Q: 86.22 Specialist medical practice activities	0	0	0	0	1
Section Q: 86.90 Other human health activities	0	1	1	1	9
Section Q: 88.99 Other social work activities without accommodation n.e.c.	0	0	0	0	1

Table: Data extract from RUT[138]. Numbers shown in the l column are NACE-numbers. The NACE-numbers are used both in this present study, but also by the RUT-register, and therefore the relevant sectors mentioned in the study are directly comparable to the RUT-data.

As shown in the table above, foreign businesses have mainly been providing temporary services within the area of hospital activities. However, the Danish Regions (Danske Regioner) - the employers' organisation for the hospital sector - is unable to provide specific information on which kind of temporary services foreign businesses have been performing. They note that most foreign workers are employed directly by the hospitals.

Since the overall number of foreign businesses in Denmark providing temporary services within the medical and care sector has been very limited - and for the moment according to RUT is entirely absent – no further attention is given to this sector in the present country report.

[136] Latest data extract from RUT on foreign business' providing services within the medical and care sector was done 18. June 2015.

[137] Register of Foreign Service Providers. Search criteria: Branch code: 86.10 (Hospital activities), 86.21 (General medical practice activities), 86.22 (Specialist medical practice activities), 86.23 (Dental practice activities), 86.90 (Other human health activities) 87.10 (Residental nursing care activities), 87.20 (Residental care activities for mental retardation, mental health and substance abuse), 87.30 (Residental care activities for the elderly and disabled), 87.90 (Other residental care activities), 88.10 (Social work activities without accomodation for the elderly and disabled), 88.91 (Child day-care activities), 88.99 (Other social work activities without accommodation n.e.c.). If the number does not appear in the table there have been no foreign companies who provide services in this area that have registered in RUT in the years 2010-2014.

[138] https://erst.virk.dk/rut3/public/forespoergsel/foretagForespoergsel?id=100006800

Construction

The table below shows a data extract from RUT on the distribution across the various professions within the construction sector of the foreign businesses providing temporary services.

RUT[139]: Branch search on (NACE): (Section F) 41.10, 41.20, 42.10, 42.11, 42.12, 42.13, 42.20, 42.21, 42.22, 42.90, 42.91, 42.99, 43.11, 43.12, 43.13, 43.21, 43.22, 43.29, 43.31, 43.32, 43.33, 43.34, 43.39, 43.91, 43.99.					
	Number of foreign service providers/year				
Branch code/NACE	2010	2011	2012	2013	2014
Section F: 41.10 Development of building projects	241	233	350	492	501
Section F: 41.20 Construction of residential and non-residential buildings	240	2,716	4,044	3,986	3,663
Section F: 42.10 Construction of roads and railways (discontinued)	22	192	158	218	32
Section F: 42.11 Construction of roads and motorways	0	0	0	0	12
Section F: 42.12 Construction of railways and underground railways	0	0	0	3	172
Section F: 42.13 Construction of bridges and tunnels	0	0	0	2	22
Section F: 42.20 Construction of utility projects (discontinued)	10	28	44	32	6
Section F: 42.21 Construction of utility projects for fluids	0	0	0	0	34
Section F: 42.22 Construction of utility projects for electricity and telecommunication	0	0	0	0	12
Section F: 42.90 Construction of other civil engineering projects (discontinued)	18	1304	2,868	2,850	172
Section F: 42.91 Construction of water projects	0	0	0	0	4
Section F: 42.99 Construction of other civil engineering projects n.e.c.	0	0	1	3	207
Section F: 43.11 Demolition	16	341	546	310	133
Section F: 43.12 Site preparation	3	31	48	82	51
Section F: 43.13 Test drilling and boring	1	2	9	2	5
Section F: 43.21 Electrical installation	49	92	273	318	213
Section F: 43.22 Plumbing, heat and air-conditioning installation	16	46	56	58	63
Section F: 43.29 Other construction installation	36	224	343	496	628
Section F: 43.31 Plastering	72	169	333	188	267
Section F: 43.32 Joinery installation	53	349	773	611	538

[139] Register of Foreign Service Providers. Search criteria: 41.10, 41.20, 42.10, 42.11, 42.12, 42.13, 42.20, 42.21, 42.22, 42.90, 42.91, 42.99, 43.11, 43.12, 43.13, 43.21, 43.22, 43.29, 43.31, 43.32, 43.33, 43.34, 43.39, 43.91, 43.99.

Section F: 43.33 Floor and wall covering	34	663	783	765	740
Section F: 43.34 Painting and glazing	63	594	966	883	798
Section F: 43.39 Other building completion and finishing	47	223	3,563	4,993	4,914
Section F: 43.91 Roofing activities	46	497	431	331	367
Section F: 43.99 Other specialised construction activities n.e.c.	170	919	1,957	1,794	1,814

Table: Data extract from RUT[140]. Numbers shown in the l column are NACE-numbers. The NACE-numbers are used both in this present study, but also by the RUT-register, therefore the relevant sectors mentioned in the study are directly comparable to the RUT-data.

Road transport

In regards to the transport sector, RUT shows that it is mainly freight transport by road that is provided as a temporary service by foreign businesses. The number of temporary services in this area has increased from 0 in 2010 to 1082 in 2014.

RUT[141]: Branch search on (NACE): 49.31, 49.39, 49.41, 49.42					
	Year				
Branch code/NACE:	2010	2011	2012	2013	2014
Section H: 49.31 Urban and suburban passenger land transport	0	0	1	1	4
Section H: 49.39 Other passenger land transport	0	1	4	2	27
Section H: 49.41 Freight transport by road	0	6	86	240	1082
Section H: 49.42 Removal services	1	13	9	3	1

General note

This study concerns wage-setting mechanisms and minimum rates of pay applicable to posted workers in the four sectors: construction, road transport, medical and care services and temporary work agencies. However, as previously described, the use of posted workers in the medical and care sector has been very limited - and is at the moment entirely absent – which is why no further attention will be given to this sector.

General question

Q1: **To what extent is the minimum wage amount connected to:**

- **(local) living costs?**
- **average salaries (general / sectoral)?**
- **social policies?**
- **fight against social dumping and protective measures? (e.g. fair competition at national or international level between companies?**
- **other national/international matters?**

[140] https://erst.virk.dk/rut3/public/forespoergsel/foretagForespoergsel?id=100006800

[141] Register of Foreign Service Providers. Search criteria: Branch code: 49.31, 49.39, 49.41, 49.42.

Denmark has no minimum wage set by law. Instead, minimum wages (as well as working conditions) are defined in collective agreements negotiated by the trade unions and employers' organisations.

The agreements are renegotiated every second or third year. The minimum wage levels negotiated in the agreements are connected to the - at the time - present economic situation in Denmark. In addition, Danish companies' increasing dependency on international markets also constitutes a strong influence on the wage setting structure as well as the minimum wages agreed. This is also one of the crucial elements in the development towards a more flexible decentralised wage setting structure[142]. Thus, the wage setting mechanism to some extent also reflects the international economic situation.

Questions in relation to posting

Q2: **How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?**

See Q3.

Q3: **In practice, what are the wage differences between posted workers and local workers? Provide an answer per sector. Is there evidence that posted workers earn (per sector) generally less/more than local workers?**

As noted, Denmark has no universal minimum wage. However, foreign companies that sign a collective agreement or an adoption agreement[143] with a trade union have to pay wages in accordance with the relevant agreement.

First this implies that Danish companies – as well as foreign companies – are not obliged to pay the minimum wages as set out in the collective agreements unless they have signed a collective agreement or an adoption agreement[144].

If a company chooses not to sign an agreement, the trade unions have the right to take industrial actions such as a strike. In Denmark, the law on posted workers (*udstationeringsloven*) Article 6a has been adopted to ensure the social partners' right to take industrial action to support a claim of getting a foreign business providing temporary services in Denmark to pay wages equal to the amount paid by Danish companies in the specific sector. It is a condition that the attention of the foreign business provider has been drawn to for the most representative collective agreements for the relevant sector, and to make sure that the wage level is clearly described[145].

[142] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, p. 761.

[143] An adoption agreement is an agreement, which refers to the terms in a collective agreement but specifies the relevant wages to be paid by a foreign service provider in order to meet the criteria on representativeness and clarity presented in European Court of Justice's Laval-ruling. The adoption agreements – or Laval Agreements or B Agreements as they are often referred to - can be signed by the foreign service provider without the company joining an employers' organisation.

[144] UDVALGET OM MODVIRKNING AF SOCIAL DUMPING (The Committee for the prevention of social dumping), "Rapport fra udvalget om modvirkning af social dumping" (*Report from the Committee for the prevention of social dumping*), 2012, p. 54.

[145] Udstationeringsloven Article 6a paragraph 1 and 2

A company that has signed a collective agreement is, on the other hand, obliged to live up to the provisions in the agreements. In Denmark, there are no official administrative institutions that help employees claiming their rights according to the agreements. However, the employees can – assisted by the relevant trade union - bring the case to court (Arbejdsretten)[146].

Secondly, it implies that there is not just one but several minimum wages defined in collective agreements for each relevant sector, and in many cases also negotiated at a decentralised company level. Depending on the specific sector, two different types of wage setting models are used in the collective agreements to define the minimum wage[147]:

1. *Normalløn* (Normal wage) [148]: A fixed rate negotiated centrally and specified in the collective agreements.
2. *Minimalløn* (Minimal wage) [149]: A minimal wage negotiated centrally supplemented by decentralised wage negotiations at company level. Wages negotiated at a decentralised level are traditionally much higher than the minimal wage set out in the agreements. This form of wage setting mechanism leaves much flexibility for wages to be adjusted according to socio-economic factors and the individual company's market situation[150].

Seen from an overall perspective it is the impression of the Central Danish Employers' Association Dansk Arbejdsgiverforening (DA) that posted workers today are covered by collective agreements to the same extent as Danish workers. While DA has no knowledge of wages received by posted workers not covered by a collective agreement it is the impression that the ones covered receive wages comparable to what Danish workers receive if they are posted either to a Danish company or to an undertaking by a foreign company in Denmark. An overall estimate by DA is that the wage difference between local workers and posted workers is 10-15 per cent[151].

At the Central Organisation of Trade Unions *Hovedorganisationen for fagforeninger* (LO) the impression is that posted workers receive wages below the average that Danish workers receive. LO notes, that since Danish wages are often much higher than in Eastern European countries, posted workers, especially from Eastern European countries, seem to worry less about being paid below average. Also, being far away from family and

[146] UDVALGET OM MODVIRKNING AF SOCIAL DUMPING (The Committee for the prevention of social dumping), "Rapport fra udvalget om modvirkning af social dumping" (*Report from the Committee for the prevention of social dumping*), 2012, p. 59.

[147] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, p. 93

[148] In the period 1989 – 1993 the share of workers on normalløn decreased from 35 per cent to 16 per cent.

[149] In the period 1989 – 1993 the share of workers on minimalløn increased from 65 per cent to 84 per cent.

[150] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, p. 76 and 527.

[151] This is mainly due to posted workers not receiving a decentralised negotiated wage element when working on minimal wage.

friends often leaves them with fewer obligations, and hence more flexibility in relation to working hours[152].

A Danish study from 2009 amongst Polish immigrants working in Copenhagen and the area around the capital of Denmark found that out of the total share of Polish employed immigrants 19 per cent worked as posted workers for a Polish registered company[153]. The study showed that posted workers were the ones having the lowest income and the highest amount of working hours amongst all the Polish workers[154]. The average wage for posted workers was DKK 103 (EUR 14) per hour and 37 per cent of the posted workers had 49 working hours or more per week[155].

The construction sector

Regarding documentation for wages received by posted workers both the organisation of trade unions within the construction sector *Bygge- og Anlægskartellet* (BAT) and the employers' organisation within the construction sector *Dansk Byggeri* (Danish Construction) mention the so-called *48-hour meetings*. At these meetings – initiated by the unions and stated in the collective agreements[156] - the employer has to provide documentation in the form of payslips, contracts etc. to prove that the posted workers receive wages according to the collective agreements. This implies that both BAT and Dansk Byggeri have an extensive insight into wages paid – and the challenges in this regard – to posted workers in Denmark.

The wage-setting model in the construction sector is minimalløn (minimal wage). A minimal wage is a centrally negotiated fixed rate supplemented by decentralised wage negotiations at company level – sometimes also amongst the different teams at company level. Wages negotiated at decentralised level are traditionally much higher than the minimal wage set out in the agreements[157] and there is an extensive use of work on agreement.

Since most work in the construction sector can be measured, wages are closely tied to the demand for services and hence the size/amount of the production. The wage setting structure in the construction sector can be seen as quite complex since it is not only based on a fixed hourly salary, but also depends on decentralised negotiations and pace of the production. The Danish employers' organisation for the construction sector, Dansk

[152] UDVALGET OM SOCIAL DUMPING (Committee on Social Dumping), "Rapport fra udvalget om social dumping" *(Report from the committee on social dumping),* LO, Hovedorganisation for fagforeninger (Central Organisation of Trade Unions) Udvalget om social dumping, February 2011, p. 37.

[153] The share of Polish workers posted to a foreign company to work in the Copenhagen area is only 14 per cent if the total number of Polish immigrants – and not just the ones employed – is taken into account.

[154] HANSEN, JENS ARNHOLTZ and HANSEN, NANA WESLEY, "Polonia i København. Et studie af polske arbejdsmigranters løn-, arbejds- og levevilkår i København." (*Polonia in Copenhagen. A study of Polish labor migrants' wages, working and living conditions in Copenhagen*), FAOS, LO-Dokumentation, 2009, p. 10, 11,20 and 78.

[155] HANSEN, JENS ARNHOLTZ and HANSEN, NANA WESLEY, "Polonia i København. Et studie af polske arbejdsmigranters løn-, arbejds- og levevilkår i København." (*Polonia in Copenhagen. A study of Polish labor migrants' wages, working and living conditions in Copenhagen*), FAOS, LO-Dokumentation, 2009, p. 10, 11,20 and 78.

[156] Overenskomsten for byggeriet (Collective agreement in the construction sector) Article 8(A).

[157] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, p. 76 and 527.

Byggeri, notes that posted workers rarely work on agreement but in some cases receive bonuses.

Article 21 in one of the larger current applicable collective agreements[158] in the construction sector between the trade union Fagligt Fælles Forbund (3F), which amongst others organise employees in the construction sector, and Dansk Byggeri, states that the minimal wage as of 2015 is DKK 118.35 (EUR 15.85) per hour.

A total average of the centralised agreed minimal wage and the decentralised negotiated wages and agreements is much higher. It is BAT's assessment that an average minimum wage for a Danish construction worker on a collective agreement is DKK 170 kr. (almost EUR 23) with an additional 30 per cent, which includes pension, public holidays in weekdays (SH) and holiday pay. Dansk Byggeri assess the minimum wage to be DKK 180 (close to EUR 24), also with an additional 30 per cent. They however underline that wages in the construction sector differ between regions and depend on the specific tasks performed and demand.

It is BAT's impression that almost all posted workers receive wages below the average minimum wage and that they are amongst the 10 per cent of all construction workers that receive the lowest wages. One of the reasons for this is that many posted workers are not able to negotiate a decentralised agreement. BAT stresses that foreign employers use the minimal wage as a normal wage and pay employees an amount equivalent to the minimal wage of DKK 118.35 (with an additional 30 per cent in pension, public holidays in weekdays and holiday pay). Dansk Byggeri assesses the average minimum wage to be a bit higher than the minimal wage (DKK 130-140, which is around EUR 17-19). They have noted a change within the last two years where posted workers make higher wage claims.

BAT and Dansk Byggeri agree that the difference in wages between a Danish construction worker and a posted worker on a collective agreement accounts to approximately DKK 50 (almost EUR 7) per hour.

For posted workers working for companies that have not joined an employees' organisation nor signed a collective agreement but, instead, have signed an adoption agreement (for an explanation please see note 13) the average wage is also lower than the average wage of a Danish construction worker. However, at DKK 136 (EUR 18) the wage is higher than the one posted workers covered by collective agreements most often receive if they have not negotiated wages decentralised at company level.

For posted workers working on adoption agreements the wage gap therefore seems a bit smaller in comparison to the wage gap under a normal collective agreement. Depending on whether the average wage is DKK 170 or DKK 180 the wage gap is DKK 34 (almost EUR 5) or DKK 44 (almost EUR 6).

It is BAT's and Dansk Byggeri's assessment that posted workers not covered by collective agreements in general earn DKK 60 (EUR 8) per hour. However, they stress that they have limited insight into this. Dansk Byggeri points out that a few specialised posted workers, not working under a collective agreement, receive rather large wages – sometimes up to several hundred kroners - because of their high expertise. These are however the exceptions.

[158] The collective agreement for the construction sector: Bygge- og anlægsoverenskomsten 2014

Both BAT and Dansk Byggeri assess that only a limited share of posted workers do not work under a collective agreement or an adoption agreement. The establishment of RUT and the trade union 3F's active role in visiting construction sites and negotiating with the foreign companies has resulted in the conclusion of a high number of agreements. In addition, the increasing use of clauses in contracts within the construction sector, specifying that employees should be paid according to the relevant collective agreement, has contributed to this development.

However, LO as well as BAT stress that a pressing challenge is that, in spite of an increase in the number of foreign businesses signing a collective agreement or an adoption agreement, such agreements are often not respected. It is their experience that many posted workers spend more hours on the construction site than the amount of hours appearing on their payslip and as a result, the actual hourly wages are lower. An example of this is the recent arbitration case from March 2015 where the Italian company Cipa was awarded a penalty of DKK 22 million (almost EUR 3 mill.) for underpayment of 39 workers from Romania, Poland, Italy and Portugal on the construction site of the Danish metro in Copenhagen[159].

Road Transport

In Denmark, there are three collective agreements on road transportation (concluded between different trade unions and employers' organisations):

- The employers' organisation *Dansk Transport og Logistik*, (DTL) and the trade union *3F's Transportgruppe* (3F)
- The employers' organisation *Arbejdsgiverforeningen for Transport og Logistik* (ATL) and the trade union *3F's Transportgruppe* (3F)
- The employers' organisation *Kristlig Arbejdsgiverforening* (KA) and the trade union *Kristlig Fagforening* (Krifa)

The road transport sector is one of the few sectors where collective agreements are supplemented by statutory law. The Law on Road Haulage (*Godskørselsloven*) Article 6(3) defines the rules on freight transport, which the haulier has to comply with in order to get a licence. The Law on Road Haulage states that holders of a licence have to follow provisions on wage and working conditions as laid down by the relevant collective agreements. Pursuant to Article 6(4) the holder of the licence should be able to provide documentation of this.

The Law on Road Haulage does not make the collective agreements universally applicable in the sense that the unions can rely on the law to claim collective agreements with companies who have not signed one. The trade unions have tried to achieve this, but the claim was rejected by the courts[160].

[159] HELTOFT, NIKOLAJ and PETERSEN, MATHIAS, "Metrofirma snød ansatte for 22 millioner i historisk sag" *(Metro Company cheated employees for 22 million in historical case)*, Politiken 10. March 2015: http://politiken.dk/oekonomi/arbejdsmarked/ECE2557289/metrofirma-snoed-ansatte-for-22-millioner-i-historisk-sag/

[160] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenstkomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – background and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 8.

All collective agreements in the sector set out a fixed normal wage (normalløn). In the collective agreement between DTL and 3F as well as ATL and 3F from 2014 the normal wage is (as of 1 March 2015) DKK 118.70 (about EUR 16). With a normal wage at DKK 124.75 (about EUR 17) the amount agreed by Krifa and KA is close to the ones made by DTL, ATL and 3F. These amounts are only the basic salary excluding any supplementary (mandatory) allowances.

If supplementary allowances are included, the average normal wage is - as calculated by DTL - DKK 143.06 (about EUR 19) and by 3F DKK 149.15 (about EUR 20). In addition to these supplementary allowances, there is a mandatory payment for overtime, working shifts, inconvenient hours, holiday pay and pension. According to 3F this makes up all together 28.7 additional per cent. Hence, the normal wage – all included – ads up to a total of DKK 192 per hour (about EUR 26) according to 3F and a total of DKK 193.01 (also about EUR 26) according to DTL.

Both DTL and 3F expressed an extensive uncertainty as to how the Posting Directive (PWD) should be interpreted and applied in regards to several aspects of road transport.

One of the main challenges mentioned by, amongst others, LO, 3F and DTL is the violations of the rules on road cabotage[161] laid down in Regulation (EC) No. 1072/2009 Article 8(2). The perception is that foreign companies regularly exceed the maximum amount of operations allowed[162]. When foreign companies wish to drive more than the maximum amount of cabotage operations in Denmark, they are subject to the PWD and should provide minimum rates of pay according to the terms and conditions of employment in Denmark cf. Directive 96/71/EC Article 3(1)(c).

This implies that the unions have the right to try to get such foreign companies to sign a collective (or an adoption) agreement. Nevertheless, as noted by the Committee on Counteracting Social Dumping established by the Danish government, this is in practice very difficult due to the very short period of time it takes to perform the relevant task in Denmark. This is also the reason why industrial action makes very little sense in this relation[163].

While road transport companies subject to the PWD should register in RUT, cabotage operations, which are in compliance with Regulation (EC) No. 1072/2009 Article 8(2) on International Road Haulage Market, are exempted from the requirements on notification, cf. statutory order no. 1517 of 16/12/2010 on the Register of Foreign Services[164].

Neither 3F nor DTL knew of any – *officially* - posted workers in the road transportation sector in Denmark. After a review of the companies registered with RUT it was 3F's assessment, that the companies listed in the register were primarily handling logistics

[161] UDVALGET OM MODVIRKNING AF SOCIAL DUMPING (The Committee for the prevention of social dumping), "Rapport fra udvalget om modvirkning af social dumping" (*Report from the Committee for the prevention of social dumping*), 2012, p. 140.

[162] A maximum of one to three road cabotage transports are allowed within seven days under specific circumstances cf. Regulation (EC) No. 1072/2009 Article 8(2).

[163] UDVALGET OM MODVIRKNING AF SOCIAL DUMPING (The Committee for the prevention of social dumping), "Rapport fra udvalget om modvirkning af social dumping" (*Report from the Committee for the prevention of social dumping*), 2012, p. 142.

[164] bekendtgørelse nr. 1517 af 16/12/2010 om Registret for Udenlandske Tjenesteydere Article 1(1)(7)

and communication in relation to international transportation. DTL was unaware of what kind of services the companies registered were performing.

In addition, it was 3F and DTL's impression that foreign transport companies driving to and from ports and rail terminals – in accordance with Directive 92/106/EC on Certain Types of Combined Transport of Goods between Member States – do not register in RUT, though they are obliged to do so according to statutory order no. 1517 of 16/12/2010. Both 3F and DTL therefore assess that it is most likely that these companies do not comply with Danish rules on wages and working conditions.

DTL believes that 5-8 per cent of domestic traffic in Denmark is cabotage and combined transportation performed by posted workers who are most likely not registered. Since it is the impression that many foreign companies in this sector do not register - and since the drivers work alone - gathering information on wages and working conditions is challenging and knowledge on the subject is limited. It is DTL's assessment that drivers, who in theory work as posted workers, receive an average pay on EUR 1200 – 1500 per month. However, DTL have heard of much lower wages, especially in cases of road transportation from Bulgaria using Macedonian drivers. 3F underlines that it does not have any precise knowledge of the wage posted workers receive, but that it had heard of wages at approximately EUR 1000 - 1500 per month[165].

While the fixed normal wage is DKK 118,70 – 124,74 per hour (excluding any supplementary payment and pension etc.), DTL has heard of minimum wages for posted workers at DKK 40-50 (about EUR 5-7) per hour. With the average wage calculated by DTL in mind at DKK 143,06 (about EUR 19) per hour and 3F's, which is DKK 149,15 (about EUR 20) per hour, the wage gap is up to 90 – 100 DKK (about EUR 12 – 13) per hour. This is excluding pension etc. which 3F notes is 28,7 per cent, and hence it adds up to a total of DKK 192 (about EUR 26) per hour according to 3F, and a total of DKK 193,01 (also about EUR 26) per hour according to DTL.

Temporary work agencies

The interviews in the relevant sectors left the impression that posted workers working for foreign temporary work agencies are no longer common in Denmark. Instead of foreign temporary work agencies sending temporary workers to Denmark, foreign temporary agency workers are either employed with a foreign temporary work agency registered in Denmark as a Danish agency, working (in theory) according to Danish rules, or they are affiliated with a Danish temporary work agency. In both cases, the EU workers are no longer posted in the sense of the PWD.

A large share of the interviewees indicated that this development was an indirect result of the introduction of strict rules on wages and working conditions on temporary agency work by the EU, Denmark and in the collective agreements. In addition, Danish tax rules adopted in 2012 enhanced the amount of tax to be paid by workers employed by a foreign company, who were performing a task for a Danish company to which the worker could as well be directly affiliated[166].

[165] DTL and 3F would not convert these monthly wages received by the drivers to pay per hour. These wages have no reference to the estimates of hours by DTL and 3F in the next section.

[166] Act to amend the Assessment Act, the Act on Withholding Tax and the Act on Personal Tax (Lov om ændring af ligningsloven, kildeskatteloven og personskatteloven).
http://www.ft.dk/samling/20111/lovforslag/L195/index.htm#dok

Road transport

Temporary work agencies working within the road transport sector have to obtain a licence in order to operate. This is also the case for foreign temporary work agencies. As noted previously, the road transport sector is one of the few areas in Denmark where collective agreements are supplemented by statutory law[167].

All temporary work agencies working within the road transportation sector in Denmark have to register, be approved by the public Traffic Agency (*Trafikstyrelsen*) and must pay wages and provide working conditions according to the relevant collective agreements[168]. As it can be seen from Trafikstyrelsen's web page there are at the moment 16 foreign temporary drivers work agencies registered[169].

It is DTL's impression that within the road transport sector it is mainly freight forwarders, who make use of temporary agency work. Since it is determined by law that minimum wages have to be in accordance with the collective agreements in the sector, and since the collective agreements sets out a normal wage - and not a minimal wage – wages for temporary posted agency workers are comparable to Danish wages.

However, there have been cases where foreign temporary work agencies within the sector have not provided such minimum wages[170]. It is 3F's impression that there are agencies, which do not pay wages according to the minimum wages in the collective agreements. 3F assesses that posted temporary agency workers driving in Danish registered vehicles often are paid 25-30 per cent less than the normal wage in the collective agreements.

DA notes that a challenge in the road transport sector is the increasing use of one-man companies[171] in Denmark referred to as 'arms-and-legs companies' or 'falsely self-employed'[172].

The Green sector

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[167] The Law on Road Haulage (godskørselsloven) Article 6(3).

[168] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – bagground and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 9.

[169] TRAFIK- OG BYGGESTYRELSEN (Traffic and Construction Authority), Godkendte chaufførvikarvirksomheder" *(Approved temporary driver agencies)*, 2015: http://www.trafikstyrelsen.dk/DA/Erhvervstransport/Godskoersel/Udlejning-af-chauffoervikarer/Godkendte_chauffoervikarvirksomheder.aspx

[170] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – bagground and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 9.

[171] Amongst others GLS and Nemlig.com has been accused of using one-man companies: JENSEN, KRISTINE and HOVGAARD, LAURIDS, "Dine julegaver bliver bragt ud til discountløn" *(Your gifts are delivered at a discount wage),* Fagbladet 3F, 15. December 2012: http://www.fagbladet3f.dk/temaer/pakkepost/372bbbd003344a4eb51838883724ffbf-20121215-dine-julegaver-bliver-bragt-ud-til-discountloen and DYRBERG, RIKKE, "Kritik: Nemlig.com bruger falske selvstændige", *(Criticism: Nemlig.com is using falsely self-employed)*, Avisen.dk, 10. November 2014: http://www.avisen.dk/kritik-nemligcom-bruger-falske-selvstaendige_280141.aspx

[172] In Danish: Arme og ben virksomheder og falske selvstændige.

A sector, mentioned by both LO and 3F's Green Group (3F), that has many posted temporary agency workers is the so called green sector, which includes gardening, plant nursery, forestry and agriculture. 3F assesses that two thirds of the 6000-7000 workers in this sector are employed under terms similar to temporary agency work. Though it is hard to prove, 3F notes that many of these companies deliberately circumvent rules by not registering in RUT. This is done by registering as a Danish company with the sole purpose of avoiding RUT so that it is harder for the trade unions to find such companies, or by systematically closing and restarting companies and changing the company name.
The employers' organisation in the green sector *Gartneri- Land- og Skovbrugets Arbejdsgivere* (GLS-A) does not agree on this. They acknowledge that there are posted workers (however, not working as posted temporary agency workers) and a large amount of small independent companies or enterprises, but GLS-A underlines that these should not be mistaken for temporary agency workers.
GLS-A notes that the important difference is that a company hiring a temporary agency worker has other responsibilities concerning wages and employment conditions than it has if it hires an enterprise. 3F does not believe in this dichotomy and stresses that they see it as a deliberate way for the companies to circumvent the rules on temporary agency work, which are more favourable to the worker.
The green sector is covered by three collective agreements between GLS-A and 3F:

- The Gardening and Nursery Agreement (*Gartneri og planteskoleoverenskomst*)
- The Forestry Agreement (*Skovbrugsoverenskomsten*)
- The Agricultural Agreement (*Jordbrugsoverenskomst*)

The collective agreements have a normal wage (normalløn) close to DKK 130 (EUR 17,41) per hour plus an additional 32,87 per cent. This includes pension, sick pay, maternity allowance, holiday pay, public holidays and a so called *'free choice pool'* (money set aside, which the workers once a year can choose to either have paid in cash or be included in their pension).

It is 3F's assessment that posted temporary agency workers in this sector are typically paid below the normal wage. 3F argues that it has proof of this through pay checks and notes that they have seen examples of posted temporary agency workers being paid as little as DKK 17 (EUR 2,28) per hour. 3F believes the average wage for posted temporary agency workers to be close to DKK 60 (EUR 8,05) per hour, but it is steadily decreasing. As mentioned, GLS-A does not know of any posted workers working for foreign temporary work agencies. However, they note that posted workers working under an enterprise are often paid 30-40 per cent below the minimum wage in the collective agreements.

According to 3F the pay gap between the normal wage in the collective agreements and the wages, which posted temporary agency workers receive, is close to DKK 70 (EUR 9,39) per hour.

Both 3F and GLS-A note that almost no posted workers are covered by collective agreements or adoption agreements in the green sector.

The construction sector
Both BAT and Dansk Byggeri mention that there are many temporary agency workers in the construction sector, but that only a few of them are posted workers. According to Dansk Byggeri one of the reasons for this is, as previously described, the Danish tax rules in relation to posted temporary agency workers. But, as with many other sectors,

the construction sector has also experienced a rise in the use of one-man companies, which Danish companies are often accused of orchestrating[173].

Private services
3F, that organises cleaning workers, stresses that, to its knowledge, the use of foreign temporary agency workers is very limited. It is underlined that it is almost exclusively Danish temporary agencies, which are used in the sector.

The industry
The trade union 3F's Industry Group also notes that posted temporary agency workers are used very rarely. Instead, the industry uses Danish temporary work agencies – which might employ workers from other EU Member States.

The reasons given are, among others, the strict rules on wages and working conditions when using temporary agency workers, which lessen the incitement to use foreign agencies. EU rules, Danish legislation and collective agreements are highlighted as the basis of this. In addition, the industry sector had already in the collective agreements from 1993 enrolled a provision on emergency procedures in relation to disputes on foreign workers wages and working conditions[174], which by both the employers' organisation *Dansk Industri* (DI) and 3F are seen as very useful[175].

Q4: **In the temporary work agencies sector, could you describe who the "final users" of posted workers are?**

In the interviews, the final users are described as:

- Road Transportation: freight forwarders and larger Danish transport companies.
- Construction: Larger construction sites without clauses on minimum wages.
- The green sector: Mainly forestry companies, gardening and packing.

Q5: **Is 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 (hereafter "PWD") implemented in your country so as to comply with minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers?**

[173] JENSEN, KLAUS BUSTER, "SKAT afslører ny østfidus", (Tax authorities reveals new East-scam), Fagbladet 3F, 19. June, 2012: http://www.fagbladet3f.dk/nyheder/fagligt/d728b70a92ac4a8a9c7565a9ebd4308d-20120619-skat-afsloerer-ny-oestfidus and ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – background and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 7.

[174] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – background and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 9.

[175] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – background and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 13.

Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?

PWD sets out in Article 3(1) that the Member States can regulate working and employment conditions mentioned in Article 3(1)(a-g) by law, regulation, administrative procedures or by collective agreements or arbitration awards, which have been declared universally applicable in relation to the activities mentioned in the annex to the directive.

However, PWD Article 3(8)(2) states that:

"In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on 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."

Hence, regulating wages does not have to be done by law or universally applicable collective agreements. Instead, Denmark can leave it to the social partners to regulate minimum wages by the use of collective agreements. After the European Court of Justices' (ECJ) ruling C-341/05 in 2007 (the Laval ruling), it was clear that in order for the Member States to apply PWD Article 3(8) the Member States had to *"decide"* to use collective agreements[176]. The Laval ruling also concluded that *"Member States (…) are not entitled (…) to impose on undertakings established in other Member States negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers."'*

In Denmark the Laval ruling led to the adoption of Article 6a paragraph 1 and 2 in the Posted Workers law (*udstationeringsloven*), that states that wages in Denmark are regulated by collective agreements and that industrial action against foreign service providers – as well as Danish – can be taken to conclude a collective agreement. The law specifies that it is a prerequisite for initiating industrial action that the foreign service provider has been *"referred to the provisions of the collective agreements concluded by the most representative employers in Denmark",* and that these collective agreements provide the necessary clarity on which specific wages the foreign service provider should pay.

In order to meet the criteria on representativeness and clarity the trade unions in all sectors have designed adoption agreements referring to the relevant collective agreements. In sectors using the minimum wage, a fixed wage is noted in adoption agreements. Adoption agreements can be signed by the foreign service provider without the company joining an employers' organisation.

Hence, the Law on Posted Workers (*udstationeringsloven*) ensures that the use of collective agreements in relation to posted workers is in compliance with the PWD.

[176] ECJ C-341/05 paragraph 66.

For further elaboration on disputes on components to be included in the minimum wage please see the section concerning constituent elements of the minimum rates of pay for posted workers.

The procedure described above is applicable to all situations in which a foreign service provider post workers to Denmark (Udstationeringslovens § 1). Denmark has thus used the possibility in PWD Article 3(10) to extend the minimum protection of posted workers to other activities than those referred to in the Annex, hence providing a broader protection to posted workers.

Q6: **To what extent is the subject of the minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.**

The issue of minimum wages for posted workers has been receiving much attention in Denmark since the accession of the Eastern European countries to the EU. The debate on minimum wages for posted workers is part of an ongoing discussion on social dumping and its consequences for the Danish Model and welfare state.

Already in the period from 2004 – 2009 when the Eastern Agreement (Østaftalen) was still in force it became evident that posted workers and temporary agency workers experienced far more challenges in regards to wages and working conditions than EU workers employed directly by Danish companies[177].

These new challenges to the Danish Model have sparked an ongoing debate, which most often has peaked in the process prior to the negotiations of the collective agreement concluded in 2007, 2010, 2012 and 2014, but also in relation to the latest election to the national parliament (*Folketinget*).

The trade unions often initiate the debates in which they express concern that the use of posted workers contributes to be a downward pressure on wages. The main purpose of the debates has been to put pressure on the employers' organisations to get them to agree to a number of initiatives aiming at curbing what the unions see as an increase in the exploitation of posted workers. Hence, since 2007 a number of initiatives to prevent social dumping have been introduced in the collective agreements.

Already in 2010 at the run-up to the negotiations on the agreements both the chairman of 3F's construction group and the chairman of 3F's transport group said that it was an issue of great concern amongst the union members, which should be given top priority at the negotiations on the collective agreements[178].

[177] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – background og perspektiver" (*Social dumping. Collective Agreements and statutory law – background and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 4.

[178] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – background and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 3.

The social partners in Denmark support the Employment Relations Research Centre at the Department of Sociology at University of Copenhagen, that provide in depth surveys on The Danish Model, including studies on wage and working conditions for posted workers.

As for the Danish government, there is a widespread support for The Danish Model and an understanding of the challenge posted workers constitute. This spring – just before the Danish election to the national parliament (*Folketinget*) the Social Democratic Party, (*Socialdemokraterne*) – at the time the leading party in government - launched a campaign called 'Danish wages for Danish work' (*Dansk løn for dansk arbejde*), which presented new initiatives to prevent 'wage pressure' and 'social dumping'. Some of the top priorities were new initiatives on illegal cabotage, prevention of illegal work and continuing financial support for the fight against social dumping[179].

II. WAGE-SETTING MECHANISMS

II.1. A better understanding of minimum wage-setting mechanisms

Q7: **Which types of legal instruments/practices are used to set minimum wages? Describe in details the mechanism(s) used.**
○ **Statutory provisions** ○ **Law, regulations or administrative provisions** ○ **other administrative practices (e.g. "social clauses" in public procurement rules)** ○ **Collective agreements** ○ **collective agreement with "statutory" value (e.g. procedure of extension)** ○ **cross-industry** ○ **multi-sectoral, sectoral** ○ **local (regional, community…)** ○ **company or infra-company (e.g. establishment level)** ○ **management unilateral rules** ○ **arbitration awards** ○ **other mechanisms/practices**
Which collective agreement are (or may be) universally applicable within the meaning of Article 3(8) PWD?

In Denmark the wage setting system is set up by collective agreements between trade unions and employer's organisations; a system typically referred to as 'The Danish Model' (*Den danske model*)[180].

The Danish Model is based on a long tradition of negotiations between the Danish social partners and is legitimised by strong labour market organisations with high membership

[179] THE SOCIAL DEMOCRATS (The Danish Social Democratic Party), "Dansk løn for dansk arbejde" *(Danish wages for Danish work)*, Socialdemokraterne, 2015.

[180] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – bagground and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 6.

rates (around 67 per cent of the Danish labour force are members of a trade union[181]). The high density in the bargaining coverage implies that practically all of the Danish labour force (80 per cent[182]) is covered by an agreement[183]. Only in areas where workers traditionally have not been covered by collective agreements - e.g. white-collar workers - and in some cases related to EU regulated areas, statutory provisions have been introduced[184].

A total number of 565 collective agreements are negotiated, some at sector level (about 100) but most at company level. The 30 biggest agreements cover 75 per cent of the workers in the private sector.

Collective agreements are negotiated centrally at national level for each sector and contain elements of both centralised and decentralised structures. While in some sectors the negotiations solely take place at central level, most of the agreements contain top-down regulation combined with decentralised wage bargaining[185]. The agreements are renegotiated every second, third or fourth year depending on the national economic situation[186]. It has been argued that companies generally have an interest in longer agreements providing a more predictable environment, while employees prefer shorter agreements, which are easier to adjust[187].

Some believe that the system, to some extent, is moving towards a multi-level regulation based on collective agreements, individual agreements and legislation as well as centralised and decentralised bargaining and an increasing internationalisation – mainly coming from the EU[188].

In line with The Danish Model, most EU regulation that touches upon remuneration of workers is in Denmark implemented through collectively bargained agreements between Danish trade unions and employee organisations. However, this implementation strategy presupposes that the two parties are able to reach agreements. If they fail to, the Danish

[181]DANISH BUSINESS AUTHORITY, Business in Denmark, The Danish Labour Market Model: *http://businessindenmark.danishbusinessauthority.dk/danish-labour-market-model*

[182] DANISH BUSINESS AUTHORITY, Business in Denmark, The Danish Labour Market Model: *http://businessindenmark.danishbusinessauthority.dk/danish-labour-market-model*

[183] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, p. 28-29.

[184] THE DANISH MINISTRY OF EMPLOYMENT, "The Danish Labour Market": *http://uk.bm.dk/en/Themes/The%20Danish%20Labour%20Market.aspx*

[185] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, p. 28-29.

[186] BJERREGAARD, JAKOB KRARUP, "Derfor gælder ny overenskomst tre år" (The reason why the new collective agreement is valid for three years), Ugebrevet A4, 21. February 2014: http://www.ugebreveta4.dk/derfor-gaelder-ny-overenskomst-i-tre-aar_19430.aspx

[187] RITZAUS BUREAU, "Industrioverenskomsten er på plads: Aftalen er treårig", (Collective agreement for the industry is in place: the agreement covers a period of three years), Information, 9. February 2009: http://www.information.dk/telegram/487542

[188] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, pp. 45-68.

politicians must interfere and find a political solution to ensure that the directive is rightfully implemented[189].

As previously described, the road transport sector is one of the few areas in Denmark where collective agreements are supplemented by statutory law, cf. The Law on Road Haulage (*godskørselsloven*), Article 6(3). However, this law does not make the collective agreements universally applicable in the sense that the unions can rely on the law to claim collective agreements with companies who have not signed one.

Denmark has adopted the ILO 94 on Labour Clauses but interprets it in the light of EU regulation[190].

Q8: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)**

There are not several layers of minimum wage-setting mechanisms. However, as previously described, two types of wage setting models are used in the collective agreements to define the minimum wage[191]: *Normalløn* (Normal wage)[192], which is a fixed rate negotiated centrally and specified in the collective agreements and *Minimalløn* (Minimal wage)[193], which is a minimal wage negotiated centrally supplemented by decentralised wage negotiations at company level.

When collective agreements are bargained, it is the tradition within the private sector that the two largest parties on respectively the minimal wage and normal wage area complete their negotiations first on the so called 'break through agreements' (*gennembruds-overenskomsterne*), which set out the overall guidelines for the LO-DA area. For the minimal wage area, this is the employers' organisation *Dansk Industri* (DI) and on behalf of the trade unions, it is *CO-Industri*. For the normal wage area the negotiations are between DI and the trade union *3F Transport*[194].

The 'breakthrough agreements' set out the wage level for the rest of the negotiations on the collective agreements. Traditionally the rest of the collective agreements do not exceed the level set out by the 'breakthrough agreements', but adjust to the current

[189]MADSEN, JØRGEN STEEN; ANDERSEN, SØREN KAJ and DUE, JESPER, "Fra centraliseret decentralisering til multiniveau regulering. Danske arbejdsmarkedsrelationer mellem kontinuitet og forandring" (*From decentralization to multi-level regulation. Danish industrial relations between continuity and change*), 2001 and DUE, JESPER and MADSEN, JØRGEN STEEN, "20 år med den danske model" *(20 years with the Danish model)*, Tidsskrift for arbejdsliv, 15. årg., nr. 1, 2013.

[190]UDBUDSPORTALEN (Public portal for public tenders), "Kan en kommune stille krav om at følge danske overenskomster?" (Can a municipality require that Danish collective agreements are followed?), Notat, April 2011: *http://www.udbudsportalen.dk/Documents/Udbudsportalen/Medarbejderh%C3%A5ndtering%202/Kan%20en%20kommune%20stille%20krav%20om%20at%20f%C3%B8lge%20danske%20overenskomster.pdf*

[191] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, p. 93

[192] In the period 1989 – 1993 the share of workers on normalløn decreased from 35 per cent to 16 per cent.

[193] In the period 1989 – 1993 the share of workers on minimalløn increased from 65 per cent to 84 per cent.

[194] DANSK INDUSTRI (Danish Industry) (DI), Negotiations on OK2014 (Negotiations on the collective agreements 2014): http://di.dk/Personale/Personalejura/OK2014/Forhandling/Pages/Forhandling.aspx

situation on the market. This implies that most collective agreements in this area are negotiated within the same period of time and for the same period of time. This ensures a rather stabile situation in the labour market; either no one is in peace or everyone is at peace.

Q9: **To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wages? What groups/what share of workers do not receive the minimum wages, and what reasons can be identified?**

Since Denmark has no statutory law on minimum wages, and collective agreements are not mandatory, there is no guarantee for posted workers to receive a minimum wage. However, the establishment of the RUT register, which provides the trade unions with access to information on foreign companies providing services in Denmark[195], and the trade unions right to take industrial action in order to get companies to sign an agreement has - to some degree - proven effective.

Both the employers' organisations and trade unions mention posted workers as the most vulnerable group with the lowest wages. The social partners describe that posted workers in general receive below the minimum wages set out by the collective agreements and below wages received by EU workers directly employed in Danish companies[196]. A Danish study from 2009 found that a large part of the Polish posted workers working in the Copenhagen area had an informal relation to the labour market, or were in 'the grey area'. This meant that their employment, in various degrees, did not involve elements such as receiving their payment in a bank account or having a contract with a company[197]. Another study concludes that Eastern European workers[198], in comparison to Danish workers, in general receive lower wages and have worse working conditions[199].

It is DA's impression that workers posted for a company to an establishment or undertaking owned by this company receive wages similar to Danish employees working at the same company receive. As for posted workers working for an enterprise, DA believes it depends on whether the worker is covered by a collective agreement or an adoption agreement. DA assesses that the ones covered by a collective agreement or an

[195] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – background and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 7.

[196] ARNHOLTZ HANSEN, J. and KAJ ANDERSEN, S., "Østeuropæiske arbejdere i bygge- og anlægsbranchen. Rekrutteringsstrategier og konsekvenser for løn-, ansættelses- og aftaleforhold" (*Eastern European workers in the construction industry. Recruitment strategies and consequences for wages, employment and contractual conditions*), Faos, Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2008, chapter 4.

[197] HANSEN, JENS ARNHOLTZ and HANSEN, NANA WESLEY, "Polonia i København. Et studie af polske arbejdsmigranters løn-, arbejds- og levevilkår i København." (*Polonia in Copenhagen. A study of Polish labor migrants' wages, working and living conditions in Copenhagen*), FAOS, LO-Dokumentation, 2009, p. 54-56 og 67.

[198] Not posted workers but migrants from Eastern European countries.

[199] LARSEN, TRINE P., "Insidere og outsidere. Den danske models rækkevidde", *(Insidere and outsidere. The scope of the Danish model)*, Jurist- og Økonomforbundets Forlag, 2011, p. 128.

adoption agreement receive the relevant normal wage or a wage close to the minimal wage – depending on the sector.

A study from 2011 on Eastern European migrants[200] concludes that migrants covered by a collective agreement in general receive higher wages and have better working conditions than those not covered[201]. In addition, it found that in some ways the Danish collective agreements are made in ways which improve the Eastern European migrants' working conditions.

LO underlines that a big challenge is that foreign companies often do not comply with the collective agreements (both normal and adoption agreements) they have signed. The Danish study from 2009 on Polish posted workers showed that the experience amongst posted workers was that they were often not paid for the work they performed[202] and that many – both posted and not posted Polish workers who were covered by a collective agreement – did not receive the minimum wage[203]. This was, as described previously, the case at the construction site at the Danish metro.

LO, 3F and BAT have seen examples of foreign companies including highly priced food, transport and accommodation as part of the wages. Others, they say, provide payslips with the correct amount but request either that the posted workers work more hours than noted on their payslip, or that they return part of the wage in cash.

The unions have not succeeded in recruiting posted workers[204] to the extent they wished for - though BAT notes that in some areas of the sector it has improved. A study estimated that only 2-4 per cent of Eastern European workers[205] are members of a union[206]. One of the reasons for this is that posted workers in many cases do not make the same wage claims as workers employed by Danish companies, but also that many of them find it hard to understand The Danish Model. However, BAT stresses that it is also their impression that many posted workers do not join a union, because they fear it will get them fired.

Neither the trade unions nor the employers' organisations are aware of the number of posted workers, who are not covered by a collective agreement or an adoption agreement, and hence do not receive minimum wages according to the agreements. A

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[200] Not posted workers but migrants from Eastern European countries.

[201] LARSEN, TRINE P., "Insidere og outsidere. Den danske models rækkevidde", *(Insidere and outsidere. The scope of the Danish model)*, Jurist- og Økonomforbundets Forlag, 2011, p. 128 and 129.

[202] HANSEN, JENS ARNHOLTZ and HANSEN, NANA WESLEY, "Polonia i København. Et studie af polske arbejdsmigranters løn-, arbejds- og levevilkår i København." (*Polonia in Copenhagen. A study of Polish labor migrants' wages, working and living conditions in Copenhagen*), FAOS, LO-Dokumentation, 2009, p. 80 and 83.

[203] HANSEN, JENS ARNHOLTZ and HANSEN, NANA WESLEY, "Polonia i København. Et studie af polske arbejdsmigranters løn-, arbejds- og levevilkår i København." (*Polonia in Copenhagen. A study of Polish labor migrants' wages, working and living conditions in Copenhagen*), FAOS, LO-Dokumentation, 2009, p. 91.

[204] LARSEN, TRINE P., "Insidere og outsidere. Den danske models rækkevidde", *(Insidere and outsidere. The scope of the Danish model)*, Jurist- og Økonomforbundets Forlag, 2011, p. 128 and 221.

[205] Not posted workers but migrants from Eastern European countries.

[206] KLINKEN, JENS ANTON TINGSTRØM, "Ekspert: Ny lov kan modvirke løntrykkeri", *(Expert: New law may discourage sweating system)*, Politiken, 11. August 2010: http://politiken.dk/oekonomi/ECE1033480/ekspert-ny-lov-kan-modvirke-loentrykkeri/

study from 2011 shows that among Polish workers 38 per cent answered that they were covered by a collective agreement, 13 per cent said they were not, 28 per cent said they were not aware of whether they were covered and 19 per cent noted that they were unaware of what a collective agreement is. The study underlined that it was hard to say if Polish workers were actually covered or not to the same degree as Danish workers. However, being unaware of whether they were covered by a collective agreement or not, could indicate that they did not know what wages and working conditions they were entitled to[207].

As for the road transport sector 3F notes, that it has never signed a collective agreement or adoption agreement with a foreign company.

In the green sector 3F explains, that getting foreign temporary work agencies to sign collective agreements or adoption agreements is extremely difficult. Their experience is that companies, with whom they have initiated a dialog, simply disappear and start up with a new name, but the same employees are assigned. GLS-A also notes, that within the green sector almost no foreign companies sign collective agreements. However, they stress that this is mainly because very few foreign temporary work agencies provide services within this area. Instead, foreign companies register in Denmark. LO argues, that this is often done deliberately to circumvent rules on temporary agency work, which are seen as more strict – both when it comes to EU rules and national rules.

Another challenge mentioned both by 3F, LO and BAT is that many posted workers are encouraged to register as small one-man-companies by their employer, and are hired in, while they actually continue to work in the same position as they did as an employee. This is done with the sole purpose of circumventing Danish rules on temporary agency work and to avoid signing collective agreements[208], they note.

Dansk Byggeri and GLS-A's impression is that the unions are twisting the facts since they cannot sign collective or adoption agreements with one-man enterprises, and hence presents them as frauds. Instead, they argue that these companies to their knowledge are genuine enterprises.

As previously noted, it is the impression at LO that many posted workers do not object to wages lower than the minimum wages in the collective agreements, since th wages they receive is still much higher than the wages in their country of residence. Assistant professor Jens Arnholtz Hansen, who has done research on posted workers in Denmark, assessed in 2010 that many EU workers from Eastern European countries were satisfied with only DKK 50 (EUR 6,7) an hour[209].

Hence the interviews leaves the impression that while some posted workers are paid according to the minimum wages in the collective agreements it is still a challenge in

[207] LARSEN, TRINE P., "Insidere og outsidere. Den danske models rækkevidde", *(Insidere and outsidere. The scope of the Danish model)*, Jurist- og Økonomforbundets Forlag, 2011, p.112-114

[208] UDVALGET OM MODVIRKNING AF SOCIAL DUMPING (The Committee for the prevention of social dumping), "Rapport fra udvalget om modvirkning af social dumping" (*Report from the Committee for the prevention of social dumping*), 2012, p. 27.

[209] KLINKEN, JENS ANTON TINGSTRØM, "Ekspert: Ny lov kan modvirke løntrykkeri", *(Expert: New law may discourage sweating system)*, Politiken, 11. August 2010: http://politiken.dk/oekonomi/ECE1033480/ekspert-ny-lov-kan-modvirke-loentrykkeri/

many sectors to get the foreign companies to either sign a collective agreement or an adoption agreement or pay wages according to these.

From the interviews with the trade unions it seems that it is particularly posted workers in the sectors with collective agreements on normal wage, that are exposed; this includes the road transport sector and temporary agency work in the green sector. One of the reasons given for this is that both sectors are characterised by work places with fewer people employed and a greater amount of tasks performed alone by the posted worker without colleagues. The trade unions note that this makes it more difficult for other employees to demand equal terms, collective agreements or report violations of wages or working conditions.

A challenge for the trade unions is to get the companies to actually comply with the rules since the companies are often only in the country for a short period. In addition, when foreign companies do not pay the rightful wages the unions have great trouble in securing the correct wages back for the posted workers[210].

Q10: **To what extent do the wage-setting mechanisms differentiate rules on minimum wage according to:**

- **Employee's conventional classification,**
- **Employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.),**
- **Employment policies: type of working contract (e.g. low number of hours /week), person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc.**
- **Other criteria**

Construction

BAT and Dansk Byggeri note that there are very few seniority provisions in the collective agreements in the constructions sector. Instead, the agreements allow the workers to negotiate higher wages if they have skills that are in demand.

Road transport

In the road transport sector wage-setting mechanisms differentiate rules on minimum wage according to:

- The size of the truck and whether it has a trailer.
- Seniority: After 9 months of employment there is a supplementary allowance
- Skills
- Age: triggered under or above age 17 and at 18 or above. Pension from 20 years.

Temporary agency work/The green sector

In the green sector wage-setting mechanisms differentiate rules on the minimum wage according to:

[210] UDVALGET OM MODVIRKNING AF SOCIAL DUMPING (The Committee for the prevention of social dumping), "Rapport fra udvalget om modvirkning af social dumping" (*Report from the Committee for the prevention of social dumping*), 2012, p. 28.

- Seniority: triggered after one, three or five years of employment (3F notes, that this is never used in relation to posted workers due to their short period of employment)
- Part-time/fulltime
- Skills
- Age: triggered under or above age 17 and at 18 or above. Pension from 20 years.
- Part-time (less than 30 hours a week): DKK 88 øre (EUR 0.12) per hour.

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

Denmark has what is typically called centralised decentralisation. As described previously it has been argued by some that the system - to some extent – is moving towards multi-level regulation[211].

Most of the interviewees found that within the last 20 years there had been no change with regards to centralised agreements within the private sector. DA notes that a move towards minimal wages instead of a normal wage has taken place and hence a move towards more decentralisation. This development is mainly due to increasing international competition, which has particularly accelerated in the sectors using normal wages. In order for businesses in these sectors to stay competitive many have introduced the use of agreement.

Q12: How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce minimum wage?) Is there an automatic indexation rule? Which criteria are taken into account when deciding on changes of the minimum wage level?

Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

As previously described, minimum wages are established through collective agreements usually negotiated every second or third year. The last negotiations were in 2014, and the next will be in 2017. The current collective agreements cover the period 1 March 2014 – 28 February 2017.

The level of minimum wages negotiated in the agreements is connected to the present economic situation in Denmark. In addition, Danish companies' increasing dependency on international markets also constitutes a strong influence on the minimum wages agreed and has been one of the crucial factors in the development towards a more flexible

[211] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, pp. 45-68.

decentralised wage setting structure[212]. Thus, the wage setting mechanism to some extent also reflects the international economic situation.

As previously described, it is the tradition within the private sector that the two largest parties with regards the minimal wage and normal wage area complete their negotiations first on the so called 'breakthrough agreements' (*gennembruds-overenskomsterne*), which set out the overall guidelines for the LO-DA area. These 'breakthrough agreements' set out the wage level for the rest of the negotiations on the collective agreements. Traditionally the rest of the collective agreements do not exceed the level set out by the 'breakthrough agreements', but adjust to the current situation in the market.

II.2. Minimum wage-setting mechanisms in the context of posting of workers

Q13: What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of the minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?

- **To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?**
- **To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?**
- **To what extent would the extension be easy to implement (and to control) from an administrative point of view?**
- **To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?**
- **To what extent would it reduce the displacement effect on local undertakings and labour force?**

PWD Article 3(8) allows for the use of collective agreements. As previously described, Denmark has used the possibility in PWD Article 3(10) to extend the minimum protection of posted workers to other activities than those referred to in the Annex, hence providing a broader protection to posted workers. Hence, the collective agreements apply to posted workers to the same extent as workers employed by companies in Denmark. Since most sectors in which posted workers are predominately employed are covered by collective agreements or adoption agreements, an extension of the scope of Article 3(1) would have very little (if any) effect on the number of posted workers covered by the minimum rates of pay, and is neither expected to lead to an increase or decrease of the minimum rates of pay. Since the situation in relation to an extension would remain the same, additional costs, challenges in relation to implementation and control, effects on companies competitiveness and impact on displacement effect is not expected.

[212] DUE, JESPER and MADSEN, JØRGEN STEEN, "Fra storkonflikt til barselsfond. Den danske model under afvikling eller fornyelse" (*From major conflict to maternity fund. The Danish model for settlement or renewal*), 2006, p. 761.

Since all sectors are already covered by the PWD, none of the interviewees could imagine what an extension – in a Danish context – could look like. If the scope of the collective agreements are extended to cover all posted workers, and hence all foreign service providers posting workers to Denmark, it would be discriminatory, since Danish companies are not obliged to sign a collective agreement or provide minimum rates of pay according to these.

III. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

III.1. Constituent elements of the minimum rates of pay: the host country perspective

Q14: **Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).**

All of the components listed below for each sector are included in the determination of the minimum rates of pay of posted workers.

Construction sector:

The construction sector uses minimal wage supplemented by decentralised wage bargaining. The minimum wage includes:

- **Basic salary:** per month DKK (differs according to specific collective agreements) + DKK 1.5 (2014) + DKK 1,65 (2015).
- **Extra payment for overtime**
- **In addition**: Priskuranter (Pay schedule): + 1.3 per cent (2014), + 1.4 per cent (2015), Minut factor: + 0.04 in 2014 and 2015.
- **Additional remuneration based on working conditions (genebetaling): +** DKK 1.5 per cent (2014), + DKK 1,60 (2015)
- **Social protection related advantages - including:**
- Fritvalgskonto/opsparingsordning (special saving scheme): + 0.3 per cent points (2014) + 0.4 per cent points (2015).
- Uddannelses- og samarbejdsfond (education and cooperation fund): + DKK 0.05/hour per year.
- Barsel- ekstra pensionsbidrag (maternity and pension contributions): AG-/AT-contribution: DKK +1.5/+0.75 kr. per hour. AG-contribution per hour/per month: DKK 8.50/1.360. AT-contribution per hour/per month: DKK 4.25/680. (Total: contribution per hour/per month: DKK 12.75/2040).
- Parent leave: + 2 weeks (in total 13 weeks): per month DKK (differs according to specific collective agreement).

Pay during sickness: DKK +1.5 per year.

When the posted worker is covered by a collective agreement the employer pays an extra 0.15 per cent of the gross salary which covers public holiday allowance (*søgnehelligdagsbetaling/SH*), holiday allowances, private health insurance, DA-LO

education fond, cooperation and development fund, and a fund to educate union representatives.

When the posted worker is covered by an adoption agreement, the employer pays maternity contribution, holiday allowance, public holiday allowance, and pension contribution.

The holiday fund (covering an additional 12.5 per cent in holiday allowance and public holiday allowance) negotiated by Dansk Byggeri and 3F in relation to the collective agreements in 2007, was established to ensure posted worker higher wages, and was also an attempt to control if the correct wages were paid to posted workers by the companies[213].

Road transport and the green sector

Both the green sector and the road transport sector use normal wages. The normal wage includes:

- **Basic salary:**
- *The green sector:* DKK 119.90 +DKK 2.10 (2014) + DKK 2.25 (2015).
- *Road transport:* DKK 121.10 + DKK 2.10 (2014) + DKK 2.25 (2015).
- **Basic salary (under the age of 18):**
- *The green sector:* (under the age of 18): 17 years: 80 per cent. of the full adult basic salary. Under the age of 17 years: 60 per cent of the full adult basic salary.
- *Road transport:* (under the age of 18): 17 years: 80 per cent. of the full adult basic salary. Under the age of 17 years: 60 per cent of the full adult basic salary.
- **Extra payment for overtime**
- *Road transport:* Depends on the amount of extra hours of work and the exact time of the day. As an example, rates for driving at night are higher than daytime.
- **Additional remuneration based on working conditions (genebetaling):**
- *The green sector:* +1.50 per cent (2014) + 1.60 per cent (2015).
- *Road transport:* +1.50 per cent (2014) + 1.60 per cent (2015).
- **Social protection related advantages - including:**
- *The green sector:*
- Fritvalgskonto/opsparingsordning (special saving scheme): + 0.3 per cent points (2014) + 0,4 per cent points (2015).
- Uddannelses- og samarbejdsfond (education and coorperation fund): + DKK 0.05/hour per year.
- Barsel- ekstra pensionsbidrag (maternity and pension contributions): AG-/AT-contribution: DKK +1.5/+0,75 kr. per hour. AG-contribution per hour/per month: DKK 8.50/1,360. AT-contribution per hour/per month: DKK 4,25/680. (Total: contribution per hour/per month: DKK 12.75/2,040).
- Parent leave: + 2 weeks (in total 13 weeks): per month DKK 23,248.

[213] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – background and perspectives*), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 10.

- *Road transport:*
- Fritvalgskonto/opsparingsordning (special saving scheme) (money set aside and paid once a year either directly to the worker or included in the pension): + 0.3 per cent points (2014) + 0.4 per cent points (2015).
- Uddannelses- og samarbejdsfond (education and coorperation fund): + DKK 0.05/hour per year.
- Barsel- ekstra pensionsbidrag (maternity and pension contributions): AG-/AT-contribution: DKK +1.5/+0.75 kr. per hour. AG-contribution per hour/per month: DKK 8.50/1,360. AT-contribution per hour/per month: DKK 4,25/680. (Total: contribution per hour/per month: DKK 12.75/2,040).
- Parent leave: + 2 weeks (in total 13 weeks): per month DKK 23,248.

In total this constitutes an additional 32.87 per cent to the normal wage.

The road transport sector also has allowances specific to the posting. When driving internationally a road transport tax allowance is part of the wage. 3F notes that sickness allowances are higher than normal sickness benefits *(sygedagpenge*) and that after a certain period of employment the driver is entitled to receive an amount equal to the full wage for a period up to seven weeks.

For both the green sector and road transport, maternity allowances constitute 14 weeks of full pay for women and two weeks for men and parenting leave for up to 11 weeks with full pay.

There is also dismissal compensation after three years of employment at DKK 5,000 (EUR 670), 5 years of employment at DKK 10,000 (EUR 1,340) and 8 years of employment at DKK 15,000 (EUR 2.010).

Q15: **Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)**

LO underlines that in light of the European Court of Justice ruling in the case C-396/13 (Sähköalojen ammattiliitto) there are no components, which they see as clearly excluded from the calculation of the minimum rates of pay applicable to posted workers. DA disagrees on this. They argue that since Finland has made their collective agreements universally applicable they cannot be compared to the Danish model. In Denmark it is only possible to include the components laid down in the collective agreements, since all other areas are regulated by law.

Below is a review of what the sectors exclude from what is currently seen as a part of the minimum rates of pay applicable to posted workers.

<u>Construction sector:</u>
In the construction sector both BAT and Dansk Byggeri clearly excludes the following components from the calculation of the minimum rates of pay applicable to a posted worker:

- Bonus granted on a regular basis
- Bonus based on individual/collective objectives

- Allowances specific to the posting
- Additional remuneration based on working conditions
- Social advantages
- Other advantages in kind
- Social security contributions
- Income tax deduction
- Cost reimbursements
- Per diem/flat rate compensation for working abroad
- Dismissal compensations

While Dansk Byggeri excludes bonuses granted as a one-time flat rate sum, BAT underlines that it in a few cases it has been used e.g. at the construction of the Øresund Bridge (Øresundsbroen) and DR Byen.

Road transport

The following components are not included in the calculation of the minimum rates of pay:

- Bonus granted as a one-time flat rate sum
- Bonus granted on a regular basis
- Bonus based on individual/collective objectives
- Additional remuneration based on working conditions
- Social advantages
- Other advantages in kind
- Social security contributions
- Income tax deduction
- Holiday fund
- Cost reimbursements
- Per diem/flat rate compensation for working abroad

Temporary agency work/The green sector

The following components are not included in the calculation of the minimum rates of pay:

- Bonus granted as a one-time flat rate sum
- Bonus granted on a regular basis
- Bonus based on individual/collective objectives
- Allowances specific to the posting
- Additional remuneration based on working conditions
- Social advantages
- Other advantages in kind
- Social security contributions
- Income tax deduction
- Holiday fund
- Cost reimbursements
- Per diem/flat rate compensation for working abroad

Q16: **Which components (NB: use the indicative list above) are in the "grey area"? (not clearly belonging or excluded for the calculation of the minimum pay rates)**
Explain your response and give examples. Describe concrete difficulties encountered per sector.

When a posted worker is covered by a collective agreement, the pension is paid to the largest pension corporation in Denmark, PensionDenmark (PensionDanmark), which is owned by the Danish social partners.

When the posted worker is covered by an adoption agreement all employer contributions to pensions, holidays, public holidays and maternity is paid directly to 3F's Holiday Fund. These contributions are then given directly to the posted worker at the end of the posting. This arrangement is found to be in accordance with the PWD by the trade unions. The arrangement leaves the trade unions with extensive means to ensure that the employer pays the right wage to the posted worker, which has proven to be one of the biggest challenges.

DA argues, that since holiday allowances in PWD Article 3(1)(b) are noted separately it cannot be included as part of the minimum wage. Instead, DA notes that Danish law already regulates holiday allowances.

It is also DA's assessment that a pension should not be included as part of the minimum wage, since the PWD explicitly excludes labour market pensions from the minimum wage requirements in art. 3, 1. c. In light of the PWD and the Laval ruling (though the Laval ruling does not specifically mention pension), DA notes that components which lay beyond the scope of the PWD – such as pensions - can only be required of companies if they voluntarily have agreed to it. DA finds it unclear whether companies can always be said to have entered collective agreements freely in such a way, when the trade unions can impose industrial action if they refuse to.

A case is to be brought before the Danish courts by the Italian company Trevi, that works as a subcontractor at the construction of the Danish Metro. The company argues that pensions according to the PWD cannot be included as part of the minimum wage and withheld in the way done by 3F's 'Holiday Fund'. The argument is that Trevi already pays pensions to the Italian fund Cassa Edile, and therefore should not also pay to a Danish fund. 3F however notes that they have still not received documentation showing that the company has actually paid an amount resembling the one paid to 3F[214].

Q17: In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?

The Danish trade unions have made adoption agreements directed at foreign companies posting workers to Denmark. For sectors covered by the normal wage these agreements refer to the fixed wages in the relevant collective agreements. In light of the Laval ruling a fixed wage has also been calculated for the adoption agreements in sectors using minimal wages.

During the negotiations on the collective agreements in 2010 (OK 2010) the trade unions demanded that the minimum wage set out in the adoption agreement had to reflect that the minimal wage is not meant as a minimum wage. The unions hence introduced a supplement to the minimal wage called 'deprivation of agreement' covering the posted workers loss of wages which are normally negotiated de-centrally at company level[215].

[214] BRØNDUM, RIKKE, "Italiensk metrofirma til angreb på 3F", (*Italian metro company attacked by 3F*), Berlingske Tidende, 19. August 2014: http://www.business.dk/transport/italiensk-metrofirma-til-angreb-paa-3f

[215] ANDERSEN, SØREN KAJ and PEDERSEN, KLAUS, "Social dumping. Overenskomster og lovregulering – baggrund og perspektiver" (*Social dumping. Collective Agreements and statutory law – bagground and*

Q18: How do the differences in the definition of minimum rates of pay impact income levels of posted workers (also taking into account compensation of expenses)?

Q19: **In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

As described previously it is the trade unions experience that rather many of the foreign companies, that post workers to Denmark, do not comply with the collective agreements or adoption agreements, which they have signed; the posted workers are paid for fewer hours than they actually work.

DA notes that the Danish courts have ruled that foreign companies posting workers in some cases can make use of allowances specific to the posting to meet the minimum wage requirements.

While LO acknowledges that some elements specific to the posting are allowed, they argue that arbitrary components are often added – e.g. posted workers travel expenses in connection to the posting. Both BAT and 3F report examples of foreign companies including unreasonably high expenses for housing and transportation as a part of the allowances specific to the postings, which are then deducted from the posted workers' minimum wage.

III.2. Constituent elements of the minimum rates of pay: the sending country perspective

Q20: **In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

There was widespread agreement among the interviewees that since Danish wages in general are much higher than in other EU Member States, this is not an issue of concern. DA notes that Danish companies in general live up to rules and agreements on wages and working conditions. However, it is possible that disagreements arise in relation to documentation and administrative procedures.

perspectives), Faos Employment Relations Research Centre, Department of Sociology, University of Copenhagen, 2010, p. 10.

FRANCE

I. BACKGROUND INFORMATION

Q1: To what extent is the minimum wage amount connected to:

- **(local) living costs?**
- **average salaries (general / sectoral)?**
- **social policies?**
- **fight against social dumping and protective measures? (e.g. fair competition at national or international level between companies?**
- **other national/international matters?**

Since 2 January 1970 there is a minimum wage in France called "salaire minimum interprofessionnel de croissance" (SMIC: inter-sectoral growth minimum wage also called the National Minimum Wage). According to Article L3231-2 of the Labour Code, this minimum wage guaranties to workers whose wages are the most tenuous: 1- their purchasing power and 2- their participation to the economic growth of the Nation.

Every worker (manual or non-manual) working in the private sector and all workers working in the public sector under private working conditions are entitled to the National Minimum Wage. According to Article D3231-5 of the Labour Code, when the hourly wage of an adult worker (over 18) becomes inferior to the National Minimum Wage, the worker is entitled to a supplement in order to reach the minimum hourly wage. In addition to that, according to the Supreme Court's case law (Cour de cassation, Social Chamber 29 June 2011, n° 10-12.884), the non-payment of the National Minimum Wage, causes prejudice to the worker. As a result, the latter can claim compensation without suffering the burden of proof.

Until July 2009 the National Minimum Wage was re-evaluated on 1 July of each year. Since 2010, re-evaluation takes place on 1st of January.

According to Article L3231-4 of the Labour Code, the purchasing power of the aforementioned workers (the most vulnerable ones) is guaranteed by the indexation of the national minimum wage to the national consumer price index. When the national consumer price index is increased at a rate of 2 per cent or more by comparison to the date of establishment of the minimum wage, the latter is automatically risen in accordance (Article L3231-5 of the Labour Code). According to Article L3231-8 of the Labour Code, the annual increase of the purchasing power of the National Minimum Wage cannot be inferior to half of the purchasing power of medium hourly wages.

Since 2013, the inter-sectoral minimum wage is calculated[216] per year (every January) taking into account:
Price inflation within the 20 per cent of the less wealthy households (cost of living) (R*3231-2) and half of the increase of the purchasing power of manual and non-manual

[216] According to Statute 2008-1258, 3 December 2008, a group of experts makes an annual report on the evolution of the National Minimum Wage. The aforementioned report is submitted to the Government and to the National Commission for Collective Bargaining. This national Commission issues accordingly, a motivated opinion that is submitted to the Government. It is the Government who decides the level of the National Minimum Wage by means of a Decree.

workers calculated on the basis of medium hourly pay (cost of living and average salaries)(R*3231-2-1).
Before that, the SMIC was calculated by adding up the progress (growth) of the consumer price index of urban households whose head used to be a non-manual worker (employee) and half of the increase of the purchasing power of the hourly pay of manual workers.

The French Minimum Wage was last re-evaluated by decree[217] in January 2015. Since that day, the French minimum salary (SMIC) is equal to 9.61€ gross (including employee social security contributions and income tax) per hour of work (by comparison to 9.53€ in 2014), which implies an increase of 0.8% in one year. When calculated on a monthly basis, SMIC is equal to 1,457.52 € gross (1136€ net) per month on a basis of 151.67 hours per month (35 hours per week).

Questions in relation to posting

Q2: How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?

Preliminary remarks

We should already mention from the very beginning that we did not find any evidence of posting in the broad area of the health and care services sector. Interviewees (Guy Fontaine FNAAFP employer's organisation), especially Labour Inspection/Inspectors (Akkaoui, Bayle, Oster, Estienne) do not exclude the presence of posted workers in this sector but they did not have any specific evidence/information of a rising phenomenon. However, it seems that there is evidence of illegal work in the aforementioned sector. Guillaume Richard (Group O2, employer organisation, that we haven't interviewed) stated in an article that 50 percent of residential care activities amount to illegal work[218]. Mrs Claire Perrault (FNAAFP employer's organization, non-profit making employer Association) pointed out that there is already a lot of internal competition that does not leave a lot of space for competition from abroad especially from foreign undertakings established outside the French territory. There are not only nonprofit making employer associations, but also services providers/ private employers and individual employers. According to her there is no place left for posting operations. Mrs Parrault also pointed out that minimum wages in the health and care sector are comparatively low (because they require the approval of the parent Ministry). As a result they do not represent a challenge to foreign competition as they are already very low. She also said that health and care services at home involve a great deal of intimacy. As a result most of the families involved are reluctant to engage foreign workers.

We should then proceed to a second preliminary remark according to which: there is neither evidence, nor any statistics regarding actual earnings (take-home salary) of posted workers in any of the sectors concerned. The reason is that actual earnings can only be established by systematical controls as they do not result from posting declarations. In effect, on the one hand, posting is not always declared in practice

[217] Decree 2014-1569, 22 December 2014.

[218] Le Figaro Journal, 23 September 2013 http://www.lefigaro.fr/emploi/2013/09/23/09005-20130923ARTFIG00421-le-travail-a-domicile-gangrene-par-le-travail-au-noir.php

(although there is a substantial increase in posting declarations: 3,942 posting declarations in 2004, 38,790 in 2010 and 67,096 in 2013). On the other hand, posting declarations although they are supposed to mention the posted worker's salary/wage, they do not always correspond (as we shall see latter on) to the actual earnings of posted workers. As a result, although the Ministry of Labour (Direction Générale du Travail) has recently published (November 2014) a survey and analysis on posting declarations[219], this survey does not include any specific data on the actual earnings (wages) of posted workers. As a result, we have only estimations based on the professional experience of the interviewees.

A - Construction sector

Taking into account the results of the Labour Ministry' survey on formal posting declarations, posting in the broader construction sector represented 42 per cent of all posting declarations in 2012 and 48 per cent in 2013. As a result, it seems that the construction sector is responsible in France for almost half of the declared postings.

Most labour inspections/Inspectors I have interviewed (Ch. Akkaoui, L. De Taillac, P. Oster, E. Bayle) told me that the actual earnings of posted workers (take-home salary) vary substantially in the broad construction sector. Sometimes the salary, which is mentioned on the declaration form, appears to be comparable/compatible to that paid of local workers. At other times, it is obvious from the declaration form, thus from the very beginning, that wages are substantially lower than those paid to local workers since working time formally indicated on the declaration form is substantially higher than 35 hours per week (example, 800 € for 40 hours per week, P. Oster Direccte Lorraine).

Eric Bayle (Uracti Rhône-Alpes) gave me some examples of Portuguese workers in the plumbing sector whose pay slips and declarations forms seemed to be regular, but whose actual pay (after a regular control operation) proved to be no more than 6 to 7€ per hour. He also told me that he was "convinced" that posted workers receive actual earnings which are 50 per cent lower than those of local workers, and gave me the example of Romanian workers in the construction sector who received 500€ per month although they used to work full time.

Mrs P. Dessen (FFB employers' organisation) told me that she had heard of some extreme cases of posted workers from Bulgaria who were being paid something like 2 to 4€ per hour.

B - Temporary Agency Work

According to the Labour Ministry's survey, posting declarations in the Temporary agency work sector represented 19 per cent of the total number of posting declarations in 2012 and 16 per cent in 2013. As a result, posting by Temporary work agencies established in another Member State stands in second position just behind the construction sector and just before the Industrial sector (15 per cent in 2012 and 16 per cent in 2013).

According to Mathilde Bonnichon (PRISME Employer's organisation in the Temporary agency work sector) posted workers by Temporary work agencies established in another

[219] Direction Générale du travail, Analyse des déclarations de détachements des entreprises prestataires de services en France en 2013 (General Labour Directorate, Posting workers' declaration analysis 2013), November 2014.

Member State, receive the same salary as local workers permanently occupied in the relevant sector. In order to justify this equal treatment principle Mrs Bonnichon pointed out that according to Article L1262-4 4° of the French Labour Code, during their posting, posted workers are entitled to all rights and guarantees offered to local temporary workers. In addition to that, Article L1251-43 of the Labour Code, provides that temporary workers receive the same salary as permanent workers of the same qualification after probationary period permanently working for the user undertaking. According to the aforementioned statutory law (L1251-43 6° Labour Code) this salary includes bonuses as well as other benefits owed to the permanent workers of the user undertaking in the relevant sector. As a result, temporary workers while posted in France, are entitled to the same salary as local workers and not only to minimum rates of pay in the sense of Article 3(1)(c) of the Posted workers Directive (PWD) 96/71/EC.

Mrs Bonnichon's estimation seems to be corroborated by a journal article[220] stating the case of two Polish workers posted to France through a Temporary Work Agency (Job Networks Europ). The aforementioned workers were working for a user undertaking in the industrial sector and stated that they were treated in the same way as French workers. They received a monthly salary above 1,500 € and a daily meal allowance.

In contrast Mr Fadda (CGT, employee's organization) told me that in many working sites (both construction and industrial sites) the salary mentioned in the contract of employment of temporary posted workers (contrat de mission) is no higher than the National Minimum Wage or the lowest conventional wage, although some of the temporary workers concerned dispose of special skills and qualifications. He also said that in most cases posted temporary workers (by contrast to local temporary workers) work overtime (between 20 to 25 hours per week) without receiving overtime increments. As a result although in theory they appear to be treated equally to local temporary workers[221], in practice, they receive a salary which is no more than 6 to 6,5€ per hour.

Last but not least, Mr Fadda pointed out that although temporary workers are entitled to annual leave as well as to an end-of-contract payment (indemnité de fin de contract), in practice, he has never seen a posted worker's contract of employment including such elements.

In the famous case of Flamanville (a construction site of a Nuclear power station), the user company (Bouygues) and the temporary work agencies (Atlanco, registered in Cyprus and BTP Elco, registered in Romania) were recently convicted by the Tribunal of Cherbourg (7 July 2015) for illegal work which took the form of a subcontracting agreement (although Atlanco had no permanent activity in Cyprus) including posting. According to a left wing journal[222] the aforementioned undertakings are supposed to have infringed other legal provisions, such as providing posted workers with pay slips or abiding by the National Minimum Wage. It seems that they were also paying "posted"

[220] Le Monde, 19 December 2013 ; http://www.lemonde.fr/emploi/article/2013/12/19/les-travailleurs-detaches-rentables-et-malleables_4334146_1698637.html

[221] Mr Fadda explained that since 2008 local temporary workers suffer from pressure to meet the National Minimum Wage. In effect, in practice, classification grids do not apply to them even when they are highly qualified. They are paid wages corresponding to the lowest level of the classification grid (equivalent to the National Minimum Wage), although they have seniority, skills and experience. In that sense, posted workers are treated equally to them.

[222] L'Humanité, 16 mars 2015, http://www.humanite.fr/epr-de-flamanville-le-proces-du-dumping-social-568389

workers cash and reduced their salary up to 30 per cent for income tax and social security[223]. They also made deductions for expenses due to the purchase of working clothes.

C - Road Transport Sector

Posting declarations in the road transport sector do not appear as a separate category in the survey of the Labour Ministry. In the aforementioned survey only the following appear as separate categories: the construction sector, temporary work agencies, the industrial sector, intra-group posting: 7 per cent in 2012 and 9 per cent in 2013, agriculture, entertainment, hotels and restaurants and "others": 6 per cent in 2012 and 5 per cent of declarations in 2013. As a result, posting in the Road Transport Sector should be situated, either in the category called intra-group posting and/or "others" along with posting in the health and care sector.

In order to appreciate these apparently low figures we should point out that according to Article R1331-1 of the Transport Code, Road transport undertakings situated in another Member State are exempted from the declaration obligation during cabotage operations of up to 7 days. Of course, exemption from the declaration obligation during cabotage operations does not necessarily mean that posted truck drivers should also be excluded from the application of the French core working conditions and sector wide collective agreement (PDW). Quite the opposite, according to Recital 17 of the EC Regulation 1072/2009, 21 October 2009 on common rules for access to the international road haulage market (L300/72, 14 November 2009) the PWD applies during cabotage operations. However the absence of any posting declarations makes controls inconsistent[224].

As a result, the posting declaration obligation or the posting certificate and PWD application concerns: 1- the provision of services by Temporary Work agencies established in other Member States providing track drivers to French haulers; 2- intra-group mobility: where track drivers habitually working for a subsidiary established in another Member State are temporarily posted to the parent undertaking in the French territory, and 3- provision of services of a Transport undertaking situated in another Member State where the client/recipient is situated in the French territory and 4- cabotage operations for 8 or more days in the French territory (Article R1331-2 of the Transport Code).

We should also bear in mind that given the geographical position of France, two thirds of the European cabotage operations take place within the French territory. As a result, it is important to the French road transport sector that haulers established in other Member States are subject to equivalent rules (minimum rates of pay) when operating within the French territory.

[223] Les Echos 6 Mars 2012, http://www.lesechos.fr/06/03/2012/lesechos.fr/0201934150473_interim---les-pratiques-europeennes-du-btp-mises-en-cause.htm

[224] According to article L1331-1 of the Transport Code, recently modified by Statute n°2015-990, 6 August 2015, posting declarations in the Transport sector will be replaced by posting certificates issued by the sending undertaking. The implementation of this certification principle instead of declaration requires however a decree. It seems that the decree will provide that the posted driver must curry the certificate in the vehicle.

Although theoretically, the PWD is applicable to the Road transport sector, even in the case of cabotage[225] (maximum three operations in a period of seven days, Article 3421-4 of the Transport Code), most of the interviewees, especially employers' but also employees' representatives, such as Mrs. Berthelot, (Fédération nationale des transports Routiers (FNTR), employer's organisation) and Mr. David (Fédération nationale des chauffeurs routiers (FNCR), employee organisation) seem to think that in practice it is almost impossible to enforce the application of the PWD to professional truck drivers. Quite surprisingly Mr David (FNCR employees' organisation) seemed to deny the presence of posted truck drivers in France. As a result, I have the impression that truck drivers are often remunerated at the rate of pay of the sending Member State.

Mr Jean-Michel Crandal (Ministry of Ecology and sustainable development) pointed out that one of the four biggest haulers in France has started-up subsidiaries in Poland, Romania and Portugal and sub-contracts to those subsidiaries substantial parts of his transportation activity in France. The truck drivers of those subsidiaries have contracts of employment under Polish, Romanian or Portuguese law and receive a salary under Polish, Romanian or Portuguese law. According to Mr Crandal, from a legal point of view, these operations do not amount to "posting" because the 1,200 drivers are permanently occupied in France although they drive trucks registered/licensed in Poland, Romania or Portugal. As a result they should have been subject to the French labour law legislation.

Mr Crandal also pointed out that none of the aforementioned drivers, posted in France, receive the French minimum wage which is currently 9.79 € per hour for a truck driver engaged in an international transport operation[226]. Mrs Berthelot (FNTR, employers' organisation) also mentions in one of her articles that Spanish and Romanian truck drivers earn 5€ per hour[227]

Mrs Nancy Noël of the TLF (employer's organization) provided us with information from the National Committee for Haulers (Comité national des Routiers). According to this information, which does not mention posting but compares earnings in different European Union Member States, International truck drivers earned in 2013-14, 11,318€ gross per year in Portugal, 30,116€ gross per year in Italy, 5,760€ gross per year in Lithuania, 11,340€ gross per year in Slovenia and 28,740€ gross per year in France. As a result, if we consider that the PWD does not apply in practice in the sector concerned, even where it should have been applied, we should conclude that French haulers may suffer competition from their Slovenian, Lithuanian and Portuguese colleagues, although they seem to be more competitive by comparison to their Italian colleagues.

Q3: In practice, what are the wage differences between posted workers and local workers? Provide an answer per sector. Is there evidence that posted workers earn (per sector) generally less/more than local workers?

As we have explained before (see **Q2**) there are no official figures as to how much they posted workers actually earn in any of the sectors concerned. The only figures we have are based on the professional experience of the interviewees. As a result these figures

[225] See above, Recital 17 of the EC Regulation 1072/2009, 21 October 2009 on common rules for access to the international road haulage market (L300/72, 14 November 2009) the PWD applies during cabotage operations

[226] There is an international transport operation when the truck driver remains more then six nights per month away from home.

[227] Barthelot F., La loi sociale applicable au conducteur routier de marchandises à l'international (the applicable social legislation to the truck driver in international merchandise transport), Collegiales Droit, 2015.

shouldn't be taken for granted. Taken that we only have a vague idea of what are posted workers' actual earnings, it is difficult to establish the wage differences between posted and local workers.

A - Construction Sector

As we have mentioned before, Eric Bayle (Direccte, Labour Inspection,) appreciated that posted workers receive wages approximately 50 per cent lower than local workers. Of course this estimation, which has been corroborated by P. Oster (Labour Inspection) and P. Dessen (Fédération Française du Bâtiment (FFB), employer organisation), is based on specific examples of fraudulent evasion of the law, and rely - at least some of them - on extreme cases (see above).

Jean-Michel Gillet (Fédération nationale des salariés de la Construction et du bois CFDT, Employees' organization) told me that he has known of cases where the posted workers received a regular salary, compatible with the French legislation, but had to reimburse part of it as soon as they reached the sending Member State (they have been expected at the airport). This kind of data presupposes that posted workers denounce unfair practices. However, given minimum wage levels in some Member States (Bulgaria: 184€; Romania 218€; Poland 410€; Portugal: 589€) it will be rare in practice that posted workers who already earn in the receiving Member State more than what they would earn in the sending State will complain. For this reason it is difficult to appreciate in practice the differences between the actual earnings of posted and local workers.

P. Dessen (FFB, employer's organization) confirmed that these substantial differences in wages would disappear if the relevant undertakings abode by the law (meaning Article 3(1)(c) of Directive 96/71/EC). According to Mrs. Dessen, if this were the case there would hardly be any difference in wages between local workers and posted workers in the construction industry.

B - Temporary work agency

According to Mrs Bonnichon (PRISME, Employer's Organisation) there is no difference in the minimum rates of pay between local temporary workers and temporary workers posted by Temporary work Agencies established in other Member States, because of the equal treatment principle in the Temporary Work Agency Sector. However, we have the impression that what Mrs Bonnichon is talking about, is legal principles and not practice. By contrast, Mr Fadda stated that, in theory[228], posted workers receive the minimum conventional wage even though they dispose of skills and certification. However, taking into account that they work overtime (20 to 25 hours per week) without compensation, their hourly pay is substantially lower than the National Minimum Wage.

Labour Inspectors (such as E. Bayle, Ch. Estienne) told me that when they control temporarily posted workers they do not compare systematically the wages appearing on the declaration form to the applicable national wide collective agreement applicable to the relevant sector. The comparison is made with the National Minimum Wage (SMIC, 9.61€ per hour). As a result, even if they get the National Minimum Wage (SMIC) they may still receive lower wages than the local workforce.

[228] In theory means here, according to the provisions of their written contract of employment (contract of employment). Mr Fadda also made reference to a case where the temporary workers disposed of two different contracts. One that they were supposed to show in case of Labour inspection and one which was provided for their own use. He also said that sometimes working times and minimum rates of pay provided for by the posting declarations and contracts of employment differ.

C - Road transport Sector

Substantial differences seem to exist between "posted" transport workers and local track drivers. The reason is once again fraudulent evasion of law. According to Mr Crandal (Ministère de l'écologie, du développement durable, Public Authority, Ministry) instead of applying the PWD in the case of temporary posting between the mother company and its subsidiaries (intra-group posting), or during cabotage operations, or French legislation where "posting" is permanent in nature, it seems that the parent company and his/her subsidiaries or the foreign transport service provider and his/her local clients evade the law and apply the wage legislation of the sending Member State. In these cases "posted" truck drivers receive salaries equal to those of Portugal, Slovenia, or Lithuania (see above **Q2**) even though they are engaged in operations subject to the PWD.

Q4: **In the temporary work agencies sector, could you describe who the "final users" of posted workers are?**

According to employers' and employees' organizations (M. Bonnichon, PRISME; A. Wagmann, CGT), Labour Inspection (E. Bayle), Labour Ministry (Akkaoui, De Taillac), the final users of posted temporary workers are: Construction undertakings and Public works, Industrial plants and undertakings, agriculture, road transport (J-M. Crandal), food processing plants (M.Bonnichon), restaurants and hotels, shipbuilding (A. Fadda).

Q5: **Is 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 (hereafter "PWD") implemented in your country so as to comply with minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers?**

Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?

The posted workers' directive was implemented in French law so as to comply with minimum protection set by Article 3(1)(c). According to the initial implementing provisions, (article L1262-4 of the Labour Code) sending employers were under a legal obligation to apply to the relevant posted workers the minimum rates of pay provided for by the relevant extended sector wide collective agreement. This means that according to French law Article 3(1)(c) posted workers are entitled to the minimum wage corresponding to their position within the relevant classification grid. Nevertheless, up until Statute n°2015-990, 6 August 2015, it was uncertain whether posted workers were also entitled to conventionally or legally established increments, allowances and/or bonuses. Thanks to article 280 of the previously mentioned Statute, - which seems to have taken into account recent CJEU case law in *Sähköalojen ammattilitto ry* case (C-396/13), 12 February 2015), - posted workers are, from now on, also entitled to conventional or statutory allowances/bonuses. As a result it seems that French law has not only implemented the PDW in the first place, but keeps implementation up to date, taking into account interpretation of the directive by the CJEU.

Directive 96/71/EC is not implemented equally (to the same extend) in each of the relevant sectors.

A - Temporary Work Sector

As we have seen before, in the Temporary Agency Work Sector, the equality of treatment principle supposes that posted workers are not only entitled to the minimum rates of pay as the result from the generally applicable collective agreements of the relevant sectors, but they are also entitled to (exactly) the same wages as local workers when they are permanently occupied by the same user company (see, Articles L1251-43 and L1262-4 4°of the French Labour Code). As a result, French Statutory law goes further than the PWD, Article 3(1)(c) and wholly implements the Temporary Agency Work Directive (TAW) article 5(1), because it guarantees equality of treatment to temporary workers while they are posted in the French territory[229].

B - Construction Sector

By contrast, in the Construction sector the equality of treatment principle is non-applicable. Posted workers are entitled to the generally applicable collective agreement of the construction sector (Article R1261-2 of the French Labour Code). However, this minimum requirement corresponds to the requirements of the PWD. Although in recent times Labour Inspection has intensified controls taken, so that posting has become a priority target, it seems, according to the relevant stakeholders (Couderette, Dessen, Gilette, Oster), that there is substantial evidence of fraudulent evasion of law. In effect, a substantial proportion of sending undertakings do not comply by the minimum requirements of the PWD Article 3(1)(c).

C - Road Transport Sector

Although we have interviewed all relevant stakeholders (J-M Crandal: Ministry of Ecology and Sustainable Development, L. David: CNCR employee's organization; F. Berthelot: FNTR et N. Noël: TLF employers' organization) and although none of them explicitly denied the effectiveness of the PDW in the relevant sector, we have the overall impression that the PDW Article 3(1)(c) is relatively ineffective in practice even in those cases that should have been identified as posting, such as: 1- the provision of services by Temporary Work Agencies established in other Member State providing track drivers to French haulers; 2- intra-group mobility: where track drivers habitually working for a subsidiary hauler established in another Member State are temporarily posted to the parent undertaking in the French territory, 3- in the case of the execution of a contract of services by a hauler established in another Member State where the client/recipient is situated in the French territory and 4- in case of a cabotage operation for 8 or more days within the French territory and in relation to an international transportation contract (Article R1331-2 of the Transport Code). As a result posted workers do not seem to enjoy minimum protection set by Article 3(1)(c).

The only development worthy to be mentioned, is the amendment of article L1331-1 of the French Transport Code by Statute n°2015-990, 6 August 2015, which replaces posting declarations in the Transport sector by posting certificates issued by the sending undertaking and which are supposed to be kept in the vehicle. The question is, what will be the scope of this new legal obligation taken that its effectiveness depends on a Decree which is not adopted yet? Will this certificate apply to cabotage operations over or under 8 days? In addition to this first question it is worth wondering whether it will apply as

[229] The equality of treatment principle, with regard to temporary agency workers, is established by directive 2008/104/EC Article 5(1). As a result, when imposing equality of treatment the French Statutory law implements the aforementioned directive. Nevertheless, paragraphs (2) to (4) of the same article/Directive provide for derogations from the equality of treatment principle, it is worth mentioning that the French legislator has never made use of these derogation opportunities.

well to international transport during transit as it is the case according to German legislation. It seems to me that in order to avoid reactions such as those encountered by Germany it is the former solution that will prevail. However I have the impression that the Ministry of Transport has the intention to extend the legal obligation to issue and curry a posting certificate to all cabotage operations, therefore even to those whose duration is less than 8 days.

Q6: **To what extent is the subject of the minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.**

I wouldn't say that the minimum wage for posted workers is an issue of particular concern in France. Posting of workers towards France is an issue as a whole. In recent years the French Senate and National Assembly have generated several reports on posting. See for instance: GROMMERCH, A., Rapport d'information déposé par la Commission des affaires européennes sur le détachement des travailleurs (Information report of the European affairs commission of the National Assembly on posting of workers), Assemblée nationale, Paris 2011 ; BOCQUET, E., Information report of the European affairs' commission of the French Senate on the European legislation regarding posting of workers), Sénat, 18 avril 2013 ; SAVARY, G., GUITTET Ch., PIRON M., Rapport d'information déposé par la commission des affaires européennes sur la proposition de directive relative à l'exécution de la directive sur le détachement des travailleurs (Information report of European affairs commission on the proposal of a directive relative to the enforcement of the PWD), Assemblée Nationale, 29 mai 2013 ; SAVARY, G., GUITTET Ch., PIRON M., Rapport d'information n°1087, Le détachement des travailleurs : cheval de Troie du travailleur low cost, Propositions pour une politique européenne contre le dumping social, (Information report n° 1087, Posting of Workers : the Trojan horse of the low cost worker, Proposals for a European Policy against social dumping), Assemblée Nationale juin 2013 ; SAVARY, G, Rapport d'information au nom de la Commission des Affaires sociales de l'Assemblée nationale sur les propositions de loi visant à renforcer la responsabilité des maîtres d'ouvrage et des donneurs d'ordre dans le cadre de la sous-traitance et à lutter contre le dumping social et la concurrence déloyale (Information report for the Commission of social Affairs on the Statutory Bill tending to reinforce liability of the client in sub-contracting processes and to fight against social dumping and unfair competition Assemblé Nationale), n°1686, 11 February 2014.

What seems to be of particular concern in France is "Labour costs" as opposed to minimum rates of pay.

"Labour costs" is a broader concept that includes minimum rates of pay and social security contributions. Many of the relevant stakeholders (P. Dessen, M. Bonnichon, L. De Taillac) objected that the current research was out of focus as they believe that if posting is still inducing or suspected of inducing "unfair competition", it is not always, or not in as much, because of lower wages but because in some Member States posting incurs substantially lower employer/employee social security contributions.

One example which may be able to offer a demonstration of why labour costs as a whole are much more relevant than minimum rates of pay, is that of Temporary Work Agencies established in Luxembourg. Although minimum wages are higher in Luxembourg, Temporary Work Agencies established in that Member State remain competitive and post

numerous temporary workers to France thanks to lower employer social security contributions[230]. In effect, employer contributions represent 49 per cent of the Labour costs in France; but only 19.175 per cent in Germany; 14.9 per cent in Luxembourg; 22.67 per cent in Poland; 28.45 in Romania; 27.84 in Bulgaria. In addition to that, according to Mr P. Vignal (Ministry of labour) the bases for social security contributions are substantially narrower in some Member States. Mr Vignal pointed out that Portugal, Romania or Poland exonerate specific posting allowances from social security contributions. According to Mrs. Bonnichon (PRISME, employer's organisation) employer contributions represent 45 per cent of the Labour costs in France but only 15 per cent in Luxembourg. This is why PRISME proposes, among other things, the creation of a cross-border social fund and some kind of harmonisation of social security contributions.

Having said that, the Supreme Court (Cour de cassation) has recently released a decision, 13 November 2014 (n° 13-19095 13-19096 13-19097 13-19098 13-19099) closely related to the issue of posted workers' minimum rates of pay in the Construction industry. This decision was related to Portuguese workers who were posted in France until 2005. These workers claimed that flat rate compensation for working abroad (specific posting allowance) should not have been included within the minimum rates of pay guaranteed by the PDW, article 3(1)(c), taken that according to them, this allowance was granted as reimbursement of costs. The Supreme Court (Social Chamber) found for the defendants (employers) and confirmed the previous Court of Appeal decision. The Supreme Court assumed that this flat rate allowance was part of the constituent elements of the minimum rates of pay.

This Court decision is being largely commented. See among others ; ICARD, J., "Détermination de la base de comparaison pour l'application aux travailleurs détaches du salaire minimum du pays d'accueil" Commentaire de l'arrêt de la Ch. Soc. 13 nov. 2014, n°13-19.095, (Determination of the basis of comparison for the enforcement of the receiving country's minimum rates of pay for the benefit of posted workers, Commentary of the French Supreme Court decision n°13-19.095 13th November 2014) *CSBP, 01/03/2015, N°272, P.157 ;* LHERNOULD, J.-P., "Détachement transnational vers la France : comment calculer le salaire minimal dû au salarié détaché »? Commentaire de l'arrêt de la Ch. Soc. 13 nov. 2014, n°13-19.095 (Transnational posting of workers towards France : how is the posted worker's minimum rates of pay calculated ? A commentary of the French Supreme Court's Decision 13 November 2014, n°13-19.095, *Droit Social* 2015, 91-93 ; LIFFRAN, H. Droits des salariés détachés en France dans le cadre d'une prestation de services. Notion de salaire minimal, Commentaire de l'arrêt Cass. soc. 13 novembre 2014, n°13-19 .095 (The rights of posted workers in the context of a transnational provision of services. The concept of minimum rates of pay. Commentary on a French Supreme Court Decision 13 November 2014, n°13-19 .095), *Revue Jurisprudence sociale*, 2015, 9-11.

Social partners are very sensitive on the broader issue of posting. G. Letort (CGT, Construction employees' organisation) talked to me about a project called "For an equitable and responsible posting" whose participants are workers' representatives from Finland, Poland, Portugal, Spain, Belgium Russia, Italy and France. This project seeks to disseminate information on the working conditions of each of the participating Member States.
We are unaware of any sociological or any economic research on this topic.

230. See, http://www.robert-schuman.eu/fr/questions-d-europe/0300-l-encadrement-du-detachement-des-travailleurs-au-sein-de-l-union-europeenne

II. WAGE-SETTING MECHANISMS

II.1. A better understanding of minimum wage-setting mechanisms

Q7: **Which types of legal instruments/practices are used to set minimum wages? Describe in details the mechanism(s) used.**
○ **Statutory provisions** ○ **Law, regulations or administrative provisions** ○ **other administrative practices (e.g. "social clauses" in public procurement rules)** ○ **Collective agreements** ○ **collective agreement with "statutory" value (e.g. procedure of extension)** ○ **cross-industry** ○ **multi-sectoral, sectoral** ○ **local (regional, community…)** ○ **company or infra-company (e.g. establishment level)** ○ **management unilateral rules** ○ **arbitration awards** ○ **other mechanisms/practices**
Which collective agreement are (or may be) universally applicable within the meaning of Article 3(8) PWD?

Statutory Provisions

As I have already mentioned before, there is a National Minimum Wage that is applicable to all adult workers (manual and non-manual, working for private or public undertakings under private law conditions). The National Minimum Wage's (SMIC) basis is to be found under Article L3231-1 of the Labour Code.

The National Minimum Wage (SMIC) is re-evaluated every January and was last re-evaluated by Decree n°2014-1569, 22 December 2014 (JORF n°0297 24 December 2014, p.22159) increasing the national growth minimum wage to 9,61€ per hour and 1457,52€ per month (gross) on the basis of 35 hours per week. As a result, all posted workers – with some exceptions - are entitled to the aforementioned National Minimum Wage (9,61€ per hour and 1457,52€ per month) for the whole duration of their posting to the French territory.

Collective agreements

A - Cross-industry

Cross-industry collective agreements are recognised by law (Article L2232-2 of the Labour Code). They can be national, regional or local. However, these agreements do not establish in principle cross-industry minimum wages different from the one we have mentioned above. The reason is that the cross-industry minimum wage is set in France by a statutory instrument (Decree) and not by the social partners through collective

bargaining. As a result, cross-industry collective agreements play no significant role in the determination of posted workers' minimum rates of pay.

B - Sector wide/Industry collective agreements

By contrast, industry wide and/ or professional collective agreements play a significant role in the determination of posted workers' minimum rates of pay. According to Article L1262-4 of the Labour Code, (modified by Statute n°2015-990, 6 August 2015), posted workers are entitled to statutory provisions as well *as to collective agreements applicable to all the workers occupied by undertakings of the same sector established* in France, with regard to:… (among other things)…°8 minimum wage and payment of wages including overtime increments and to statutorily or conventionally established wage supplements (See *Rüffert*, (C-346/06)).

It is obvious that Article L1262-4 of the Labour Code is referring to sector (industry) wide collective agreements. Sector collective agreements (accords de branche) can be national, regional or local, (Article L2232-5 Labour Code). According to Article L4221-1 of the Labour Code when there is an industry wide collective agreement on wages and wage grids, social partners examine minimum wages on a yearly basis. By contrast, classification grids and pay scales are negotiated every five years (Article L.4221-7 of the Labour Code).

The question is whether these industry wide or professional agreements are universally applicable within the meaning of Article 3(8) of the PDW?

The answer to this question is yes, provided that these collective agreements have been extended. In effect, according to Article L2261-15 of the Labour Code, the provisions of a sector (industry) wide collective agreement or of a professional or cross-industry collective agreement become applicable (obligatoire) to all workers and employers within the scope of the aforementioned agreement (professional, national, regional, local), provided that they have been extended by ministerial order following the opinion of the Collective Bargaining National Commission. The relevant Minister may also extend the application of subsequent amendments and appendices (Article L2261-16 Labour Code).

Article L2261-22 of the Labour Code provides that in order to be extended by ministerial order, a collective agreement (sector wide, professional, cross-industry) must have been negotiated by a representative Joint Commission and provide for …(among other things) : 4° the National Minimum Professional Wage of workers without specific qualification and *all the constituent elements required for the determination of the wage corresponding to each job description* (classification), as well as the relevant revision procedure and frequency.

As a result, the "extension" procedure may render a sector (industry) wide or a professional collective agreement universally applicable in the sense of Article 3(8)PDW, within its scope (territorial and professional), irrespective of whether the employers concerned have signed it or adhered to the signatory employers' organisations.

With regard to the 4 sectors concerned there are several relevant collective agreements and numerous appendices and amendments providing for minimum wages and wage supplements. Most of them are extended, with the exception of the national collective agreement applicable to executives (cadres) in Public works (1 June 2004).

1 - Construction industry

- National collective agreement of manual workers employed by construction undertakings of more than 10 workers, 8 October 1990, extended 8 February 1991, JORF 12 February 1991.
- National collective agreement of manual workers employed by construction undertakings of 10 or less workers, 8 October 1990, IDCC 1596, extended 15 December 1992, JORF 26 December 1992.
- National collective agreement applicable to employees, foremen and engineers in the construction sector, 12 July 2006, extended.
- Collective agreement of the manual workers in public works, 15 December 1992, IDCC 1702.
- Collective agreement applicable to employees, foremen and engineers in public works, 12 July 2006, extended.
- National collective agreement applicable to the executives (cadres) in Public works (1 June 2004) non-extended.

2 - Road transport

Collective agreement of the road transport and transport ancillary activities, 21 December 1950, IDCC 16, extended.

3 - Temporary Agency Work

Collective agreement relative to the posting conditions of temporary workers abroad, 2 December 1986, extended 22 June 1987, JORF 3 July 1987.

4 - Health and care services sector

National sectoral collective agreement on support, personal assistance care and home based services, 21 Mai 2010, IDCC 2941. Last amendment of wage grids n°8-2013, 17 January 2013, extended.

C - Regional industry wide collective agreements

In the Construction sector there are not only the previously mentioned national wide collective agreements. There are also supplementary regional collective agreements (eg. Aquitaine, Alsace etc) that deal specifically with minimum wages and wage supplements. Not all of them are extended. This means that, at least theoretically, not all of them are applicable to posted workers *(Rüffert*, (C-346/06)).

D - Companywide collective agreements

Companywide (Article L2232-11 of the Labour Code) and group collective agreements (Article L2232-30 of the Labour Code) are both recognised by French law. According to Article L2242-1 of the Labour Code, plants and undertakings disposing affiliates of representative trade unions are bound to engage every year in collective bargaining in order to determine actual wages (article L2242-8). As a result, a companywide collective agreement may increase minimum wages provided for by a national or regional industrywide collective agreement and augment or introduce new wage supplements. According to Article L2253-1 of the Labour Code a company collective agreement may contain more favorable provisions than the industry collective agreement. If there is a company collective agreement providing for higher minimum wages and/or new or increased wage supplements by comparison to the sectoral collective agreement, it is the

company collective agreement that will apply (principle of the most favorable provision). A company collective agreement cannot undermine (reduce) minimum wages provided for by the relevant sector wide collective agreement (L2253-3).

Generally speaking, companywide collective agreements do not play a significant role in the determination of wages in the relevant sectors, with the exception of public works.
In effect, according to J-M Gillet (Fédération nationale des salariés de la Construction et du Bois CFDT, employees' organisation), there are a few big construction companies such as Eiffage, Bouygues etc. in the Public works sector that have companywide collective agreements providing for actual wages up to 20 per cent more favorable than the national and/or regional minimum wages. None of the other stake-holders made reference to company collective agreements as a means of determination of wages.

Q8: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)**

According to Article L2251-1 of the Labour Code, collective agreements may contain more favorable provisions than the existing statutory law provisions. As a result according to French law a collective agreement (irrespective of whether it is cross-industry, industry, professional or companywide) may provide for higher minimum wages and wage supplements than the statutory minimum wage described above.

I have also mentioned before that according to Article L2253-1 of the Labour Code a companywide collective agreement may contain more favourable provisions than the industrywide collective agreement. By contrast, companywide collective agreements are not allowed to "derogate" from minimum wages established by cross-industry, industry or professional collective agreements (Article L.2253-3 of the Labour code). This means that a company collective agreement cannot reduce minimum wages established by industrywide collective agreements.

In case of more than one simultaneously applicable collective agreement (national, regional industrywide and/or company agreement) it is the most favorable that will apply. In order to decide which is the most favorable we should proceed to an analytical comparison of the relevant provisions separately for each advantage (See French Supreme Court decision, 17 January 1996, n°93-20066).

Q9: **To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wage? What groups/what share of workers do not receive the minimum wage, and what reasons can be identified?**

National Minimum Wage

According to Eurostat (2015), the national minimum wage in France (1,457.52€) is to be found in 6th position among the 22 Member States having a minimum wage setting mechanism (behind Luxembourg: 1,922.96€, the Netherlands 1,501.80€, Belgium 1,501.82€, Germany 1,473€, Ireland 1,461.85€ and in front of Great Britain: 1,378.87€). As a result, the national minimum wage is already comparatively high if we take into account that it is universally applicable and that working time reference for full time employment is relatively low (35 hours per week) by comparison to most of the other

Member States. The impact of the National Minimum Wage in the determination of minimum wages is very important in France. In 2014, 10.8% of the working population saw their wages augmented thanks to the re-evaluation of the National Minimum Wage[231].

Influence of sector wide collective agreements

According to INSEE (National Institute for statistics and economic analysis) in 2012 the total workforce in France was 28.6 million, including 25,8 million people employed and 2,8 million unemployed over 15[232].

At the end of 2011, 15.4 million dependent workers were covered by 720 industry wide collective agreements. Among them, 6.4% received a wage which was 1 to 1.05 X SMIC (close to the Smic) [233]. By contrast, in the year 2011 the medium salary of workers covered by an industrywide collective agreement was 2140€ net (after deduction of workers' social security contributions). Of course, there are substantial disparities within sectors as well as between categories of employment (such as executives, employees, manual workers). We shall provide some elements in order to appreciate these disparities within the relevant sectors:

Construction and public works, (1,473,800 workers in 2011).
Executives (cadres) received a medium wage of 3,680€ net;
Temporary workers, 2,280€ net;
Employees, 1,790€ net;
Manual workers, 1,750€ net.

Road Transport, (655,600 workers in 2011)
Executives received a medium wage of 3,740€ net;
Temporary workers 2,170€ net;
Employees 1,620€ net;
Manual workers (drivers) 1,670€ net.

Health and social sector, (1,933,600 in 2011)
Executives received a medium wage of 3,480€ net;
Temporary workers 1,960€ net;
Employees 1,440€ net;
Manual workers 1,280€ net.

It is worth noticing that according to the same survey, 5.7% of the total workers working in the construction sector received a salary between 1 and 1.05 X SMIC; 4,1% in the road transport and 10,1% in the health and social sector[234].
In addition to that, the fact that successive governments seek to encourage employment by exonerating employer contributions when they recruit on low (close to the National Minimum Wage) salaries, seems to encourage recruitment under low salaries. These

[231] http://travail-emploi.gouv.fr/IMG/pdf/Smic_et_eventails_de_salaires_elements_statistiques_Dares.pdf

[232] www.insee.fr/fr/themes/document.asp?ref_id=T14F041

[233] Cette G., Chourad V., Vertugo G. The effect of the National Minimum Wage increase on the medium wages, Economy and Statistics, n°448-449, 2011, http://www.insee.fr/fr/ffc/docs_ffc/ES448A.pdf .

[234] These data result from, DARES, Statistical Portray of the principal sector wide collective agreements in 2011, June 2014, n°046, http://travail-emploi.gouv.fr/IMG/pdf/2014-046.pdf

policies bring medium salaries down closer to the national minimum wage (See A. Fadda **Q.2**, p.4, footnote n°6, with regard to temporary workers).

Groups that do not receive the National Minimum Wage

Although in principle every single worker is entitled to the National Minimum Wage, there are some notable exceptions depending on age and working status. In effect, minors under 17, may receive a minimum salary 20 per cent lower than the SMIC. Minors over 17 receive a minimum wage that may be 10 per cent lower than the SMIC (Article D3231-3 of the Labour Code). The reason for this reduction is the lack of experience as well as the willingness to encourage the employment of adolescents over 16.

Apprentices also may receive a wage lower than the SMIC according to their age and experience (from one to three years). Apprentices under 18, receive 25 per cent of the SMIC (364,38€ per month) during their first year of work experience; 37 per cent of the SMIC (539,28€ per month) during their second year of experience and 53 per cent of the SMIC (772,49€ per month) during their third year of experience. Apprentices between 18 and 20 years of age, receive 41 per cent of the SMIC (597.58€ per month) during their first year of experience; 49 per cent of the SMIC (714.18 € per month) during their second year of work experience and 65 per cent of the SMIC (947,38€ per month) during their third year of experience. Apprentices over 21, are entitled to 53 per cent (772.48€ per month) of the SMIC during their first year of experience, 61 per cent (889.09 € per month) during their second year of experience and 78 per cent (1,136.87€ per month) during their third year of experience (Article D.6222-26 of the Labour Code).

Apprentices are not ordinary workers. They receive training and work experience in exchange for work. This is the reason why they are entitled to a fraction of the National Minimum Wage.

Since July 2015 small undertakings, with less than 11 employees, do not have to pay apprentices the minimum wage (25 per cent of the SMIC) and employer social security contributions during the first year of employment. It is the State that takes over in order to encourage training and therefore professional qualification.

Young people under a contract of professionalisation[235] also receive a fraction of the National Minimum Wage (SMIC). This fraction can be no less than 55 per cent of the SMIC if the beneficiary is less than 21 years of age or 70 per cent of the SMIC if the beneficiary is over 21. In case the beneficiaries have already acquired a degree such as a Baccalaureate or another equivalent degree, the fraction of the SMIC to which they are entitled to cannot be lower than 65 per cent of the SMIC if they are under 21, and 80 per cent if they are over 21.
The same principal (payment of a minimum wage lower than the SMIC) applies to Interns. In effect, Interns may also receive a minimum wage inferior to SMIC or no minimum wage at all, during the first two months of their employment. After two months they receive a fraction of the SMIC which cannot be lower than 508.20€ (since January 2015) and 554.40 € (from September 2015) per month on a basis of 151.67 hours (35 hours per week). The duration of an Internship cannot exceed 6 months during the same academic year. The reason for this exemption is once again employability enhancement.

[235] The professionalization contract seeks to help young people over 16 and under 26 to acquire a new professional qualification or to complete their initial training.

Disabled people may also receive a minimum wage inferior to SMIC when they are working for an ESAT. ESAT is an undertaking that provides disabled people with services and assistance through work. This minimum wage may not be inferior to 55 per cent of the SMIC.
In the Department of Mayotte the hourly minimum wage is 7.26€, which amounts to 63 per cent of the National Minimum Wage.

The SMIC does not apply to travailing salesmen (VRP) taken that it is practically impossible to control their working hours[236].

It does not apply either to childcare or family assistants[237] (assistants maternels et familiaux) who are entitled to a minimum salary of 2.70€ gross per hour and 24.30€ per day (9 hours a day or 45 hours a week)[238]. The reason is that during the exercise of their duties they are at home and their activity includes periods of inactivity.

In 2010, 17 per cent of the working population received less than the National Minimum Wage[239].

In April 2015 the employers' organization MEDEF made a proposal to lower the adult minimum wage (SMIC) for young people up to 25. MEDEF proposed to bring it up to 80 per cent of the SMIC for a period from 18 to 24 months, provided they would receive training in return.

Q10: **To what extent do the wage-setting mechanisms differentiate rules on the minimum wage according to:**

- **Employee's conventional classification,**
- **Employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.),**
- **Employment policies: type of working contract (e.g. low number of hours /week), person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc.**
- **Other criteria**

A - National Minimum Wage

We have already pointed out that the National Minimum Wage takes into account inflation, medium wage level and purchasing power in order to establish a common Minimum Wage applicable to all regions with a rather insignificant exception. As we have seen before, the National Minimum Wage takes into account age, since it establishes a lower wage for minors under 18.

[236] There are around 500.000 travelling salesmen in France.

[237] There are 316.000 childcare assistants in France.

[238] http://www.senat.fr/rap/l03-298/l03-2987.html

[239] Toutlemonde F., Smic et éventail des salaires: éléments statistiques, Dares, 24 November 2014 http://travail-emploi.gouv.fr/IMG/pdf/Smic_et_eventails_de_salaires_elements_statistiques_Dares.pdf

Specific working conditions may also play a significant role in the determination of minimum wages, taken that childcare and family assistants only receive a small fraction of the National Minimum Wage because the workers involved exercise their duties from home and their activity includes periods of time relatively inactive. Travelling salesmen are explicitly excluded from the scope of the National Minimum Wage because their working time is practically impossible to establish. Disabled people may also receive a fraction of SMIC according to the status and nature of their employer.

Employment status is also taken into account. This is the reason why, apprentices, during three years; young people under professionalisation contracts and trainees/internes after two months, only receive a varying fraction of the National Minimum Wage. These exemptions stem not only from the recognition of the training component but also from unemployment rates.

B - Collective agreements

1- Construction sector

In the Construction sector there are six collective agreements whose supplements determine minimum wages for manual workers, employees, foremen and engineers (See **Q.7**, p.13). All of them are extended and therefore applicable to posted workers with the exception of the National collective agreement for Public works executives (cadres) (1 June 2004). The remaining five, distinguish earnings according to the employment status. There are two collective agreements for manual workers that differentiate earnings according to the size of the workforce (more or less than ten workers); one for manual workers in Public works (which does not distinguish according to the size of the workforce) and two collective agreements for employees, foremen and engineers: one for the construction sector and one for Public works.

Each of the aforementioned collective agreements establishes a job classification grid taking into account four components (criteria): 1- tasks and duties (distinguishing between simple and complex tasks); 2- Autonomy or initiative in the performance of these tasks; 3- Degree of required technicality; 4- Level of training, adaptability and experience. According to these 4 criteria, jobs are divided into seven categories for manual workers (category 150 to 270 in the construction sector and category 100 to 180 in Public works) and to eight categories for employees, foremen and engineers (category A to H both in the Construction sector and in Public works).

It is worth noting that unlike the National Minimum Wage, minimum wages in the Construction sector and Public works are not unique for each job description. Minimum wages are established at the level of the Region and therefore vary from one region to another (for example the minimum wage for the second job description (coéf.170) of manual workers in the Construction sector is 1,480.84€ in Aquitaine and 1,472.60€ in Rhône-Alpes). Normally, these regional collective agreements are regarded as appendices to the national agreements and are extended as such. However, if one or more regional collective agreements were not being extended for some reason, then posted workers in these particular regions would not be entitled to the sector-wide collective agreement taking into account that the national sector-wide collective agreement only establishes the job classification grid but leaves the actual earnings to the region level.

2 - Temporary Work

There are two collective agreements that are worth mentioning. The first one deals with permanent workers (by contrast to temporary workers) working for a Temporary Work Agency established in France (23 January 1986, extended and applicable since 1 July 1986). The second one, which is the most relevant: deals with temporary workers when posted abroad (2 December 1986, extended 22 June 1987, JORF 3 July 1987).

According to the first collective agreement (last revision 15 February 2013, extended 25 February 2013) permanent workers are split into six general divisions including (the Commercial division, Recruitment, Employment, Management, Governance and Support). Each one of these divisions is further divided into one or more (up to five) job descriptions and each one of these job descriptions is divided into 13 levels (classification grid) taking into account experience and training, autonomy, complexity, decision impact and responsibility, communication and coordination qualities. This collective agreement is relatively irrelevant with our topic, taken that posted workers are not permanent workers of the Temporary Work Agency.

a) Sending country perspective

1- According to the second collective agreement (article 4), when the services of a temporary worker are provided to a user undertaking that already posts one or more permanent workers abroad, then the temporary worker is entitled to the remuneration of the relevant worker of the same qualification working permanently for the user undertaking following the probationary period.

2- If the user undertaking does not post any permanent workers abroad, then the temporary worker's remuneration will result from the applicable collective agreement to the permanent workers of the user undertaking, and if there is no such agreement, remuneration will result from an individual agreement between the relevant parties.

3- If the temporary worker is being put at the disposal of a user undertaking established abroad, then the temporary worker's remuneration/wage will result from an individual agreement between the worker and the temporary work agency without prejudice of the National Minimum Wage.

b) Receiving country perspective

If the temporary worker is put by a Temporary Work Agency established in another Member State at the disposal of a user undertaking established in France, then the temporary posted worker will be entitled to the minimum wage and to all allowances and wage supplements provided for by the relevant collective agreement applicable to the permanent workers of the user undertaking of the same qualification occupying the same job position following probationary period (see **Q2** and Articles L1262-4 4° and L1251-43 6° of the Labour Code). Taking into account that the final users of posted temporary workers are building and construction undertakings, public works, industrial plants and undertakings, agriculture, road transport, food processing operatives, restaurants and hotels, shipbuilding etc. the relevant collective agreements are those applicable to the aforementioned branches.

3 - Road Transport Sector

The applicable collective agreement is the national collective agreement for road transport and ancillary activities (21 December 1950) supplemented by a salary agreement signed on 19 December 2012, applicable from 1 January 2013.

Taking into account that working time is extremely important in this sector (as working time does not only include driving but also waiting time and sometimes loading and un-loading), the classification grid takes into account not only working time (151.67 hours per month equivalent to 35 hours a week, 169 hours per week or 200 hours a week) but also seniority (at the time of the recruitment; after two years of employment; after 5, 10 and 15 years of seniority). These combinations give three separate classification grids for manual workers (drivers, coéf. 110M to 150M) including 4 different job descriptions, one classification grid for employees (including 5 different job-descriptions), one for foremen (including 8 different job descriptions) and one for engineers and executives (including 6 different job descriptions).

4 - Health and care services sector

National sectoral collective agreement on support, personal assistance care and home-based services, 21 Mai 2010, IDCC 2941 was supplemented in January 2013 by an extended collective agreement on wage grids n°8-2013.

The relevant collective agreement provides for a classification grid divided into 9 categories (from A to I) that takes into account 5 criteria (complexity, autonomy, decision impact, relations and competence). Each one of these categories is further divided into a varying number of job descriptions. For instance, category A (Home based agents) is divided into 4 different job descriptions, category C (care assistants) is divided into 7 job descriptions, while category E is divided into 11 job descriptions including nurses, special educators, occupational therapists etc. Categories A to D are assimilated to employees, category E to supervisors and technicians and categories F to I, (including psychologists and doctors), are assimilated to executives.

The relevant collective agreement introduces a point system according to which, a worker is entitled to a number of points on the basis of: a) the position occupied within the classification grid (A to I) and b) seniority. For example, a home based agent (category A) is entitled to 270 points the first year of employment while the same worker is entitled to 306 points after 30 years of employment.

According to a supplementary agreement n°19-2014, 27 November 2014, applicable from 1 July 2014, the value of one point is equal to 5,355€. As a result, the minimum salary of a home based agent category A with one year of experience results from the multiplication of the number of the previously mentioned points (270 to which the agent is entitled according to the grid) by the value of the point (5,355€) which is equivalent to 1,445.85€ (gross) per month for 151.67 hours of work. The same worker is entitled to 1,638.63€ (gross) per month after 30 years of employment.

The same collective agreement provides for bonuses such as the complexity bonus, consisting in extra points (0 to 98) where the workers engage in multiple (complex) activities (more than 1 and maximum 7). Nurses are also entitled to a bonus of 25 points per month.

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

The National Minimum Wage's confrontation to the 35 hours week

The most significant change in the past 20 years is the reduction of the working time from 39 to 35 hours per week (Loi Aubry, 461-98, 13 June 1998, JORF n°136, 14 June 1998) without a subsequent reduction to the minimum wage. The principle of the 35 hours working week paid 39, brought about an increase of 11,4 per cent of the minimum wage. In order to absorb distortions to the Labour market the government put in place a re-evaluation of the SMIC in July (in addition to that in January) until July 2002. This measure resulted in the creation of five different National Minimum Rates of pay until 2002, unified in 2005 (8.05€ gross per hour of work). The working time reduction was thought to be a sign of social progress as well as a means for job creation. In order to avoid distortions of the employment market because of the sudden wage increase the State lowered employers' contributions.

In addition to the previous, Statute 2004-391, 4 May 2004 (loi Fillon) modified the interaction between sector/industrywide collective agreements and company or undertaking collective agreements in favor of the latter. Nevertheless, as far as minimum wages and job classification grids are concerned, companywide collective agreements are not allowed to "derogate" and therefore provide for lower salaries than those of sector-wide collective agreements (Article L2253-3 of the Labour Code). As a result, sector wide-minimum wages and job classification grids constitute a floor and not a ceiling.

Construction Sector

According to Mrs. N. Couderette (FNTP, Public works employer's Organisation) the most significant evolution in the past 20 years in the Public work is the annualisation of minimum wages following the reduction of minimum working time and the progressive abandonment of departmentwide collective agreements in favor of regional collective agreements.

Road Transport Sector

According to Mr L. David (CNCR, employees' organization) the most significant change in the past 20 years is the liberalisation of international transport and cabotage thanks to European regulations (Council Regulation (EEC) n°3118/93, 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage within a Member State) and at the same the framing of the driving periods (Regulation (EEC) n°3820, 20 December 1985 on the harmonization of certain social legislation related to road transport L370/1, 31 December 1985).

These regulations did not provide however for the applicable law during neither international transport operations nor during cabotage operations. Mrs Bertehlot (FNTR employer's organization) pointed out that according to recital 17 of the EC Regulation 1072/2009 21 October 2009 on common rules for access to the international road haulage market (L300/72, 14 November 2009) the PWD applies during cabotage operations.

Q12: **How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce the minimum wage?) Is there an automatic indexation rule?**

Which criteria are taken into account when deciding on changes to the minimum wage level?

Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

National Minimum Wage

We have already seen before that until July 2009 the National Minimum Wage was re-evaluated on 1 July of each year. Since 2010, re-evaluation takes place on 1 January.
The National Minimum Wage is dependent on the national consumer price index. Since 2013, the SMIC augmentation rate results from the aggregation of the price inflation within the 20 per cent of the less wealthy households (+0.2 per cent in 2014) and half of the increase of the purchasing power of manual and non-manual workers calculated on the basis of medium hourly pay (+0,6 per cent in 2014)= 0,8 per cent in 2014.

In case the national consumer price index increases by 2 per cent or more, the National Minimum Wage is automatically augmented in accordance (Article L3231-5 of the Labour Code). In addition to the previous, the Ministry of Labour may decide to boost the SMIC's augmentation rate during the relevant period provided that the economic conditions and revenues permit it (Articles L3231-9 and L3231-10 of the Labour Code). The SMIC was last boosted in July 2012 when it was augmented by 2 per cent instead of 1.4 per cent which resulted from the previously described calculation.

According to Article L3231-3 of the Labour Code, it is prohibited to index (for the future) collective agreements' minimum wages to the National Minimum Wage. This kind of provision is deemed to be void.

According to Article L2241-1 of the Labour Code, social partners having signed a sectoral collective agreement are under the legal obligation to negotiate wages every year. More precisely, Article L2242-2-1 of the Labour Code provides that when the national "professional" minimum wage becomes lower than the national inter-sectoral wage (SMIC), the social partners having signed a sectoral or a professional collective agreement should meet in order to negotiate the wage progress in accordance. However in practice sector wide national/regional collective agreements often provide for minimum wages which are lower than the National Minimum Wage either because subsequent negotiations failed or because there was no negotiation at all.

Article 4bis of the National collective agreement for road transport and ancillary activities, 21 December 1950, provides that *"according to statutory provisions, social partners having signed the present collective agreement shall meet each other at least once a year in order to engage in collective bargaining on minimum professional wages guaranteed by agreements and appendices of the present collective agreement. This negotiation on the levels of minimum wages will be the opportunity to examine employment perspectives and economic growth within the sector"*.

According to the national collective agreement applicable to manual workers in the construction industry with less than 10 workers, 8 October 1990, article 1-4 *"regional trade unions adhering to the national representative trade unions, shall meet once a year to study the consequences of the economic situation on the pay scale".*

In the absence of collective bargaining mechanisms, Article D.3231-5 of the Labour Code provides that individual workers receiving a wage inferior to the National Minimum Wage are entitled to a supplement in order to reach the National Minimum Wage's level. In addition to this, according to Article L3232-1 of the Labour Code, adult workers whose working time is equal to 35 hours a week are also entitled to the National Minimum Wage.

II.2. Minimum wage-setting mechanisms in the context of posting of workers

Q13: **What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of the minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?**

- **To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?**
- **To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?**
- **To what extent would the extension be easy to implement (and to control) from an administrative point of view?**
- **To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?**
- **To what extent would it reduce the displacement effect on local undertakings and labour force?**

Non-extended sector-wide collective agreements

The extension of the scope of Article 3(1) PWD to sector-wide collective agreements which do not meet the criteria laid down in Article 3(8) (second subparagraph first and second indent PWD) would not substantially alter in practice the number of posted workers covered by the minimum rates of pay. The reason is that among the relevant collective agreements only the national collective agreement for executives (cadres) in the Public works sector (1 June 2004) is not extended by ministerial order. According to Mrs Couderette, (FNTP employers' organization) although it is common to meet foremen and supervisors among the posted workers (who are by the way covered by an extended collective agreement) it is rare in practice, to meet executives (e.g. higher engineers).

Nevertheless, if the relevant collective agreement were to be extended then posted engineers would be entitled to a basic salary of 1,780 € minimum to 4,721€ maximum[240] which is of course much higher than the National Minimum Wage to which they are otherwise entitled to.

Companywide collective agreements

What if companywide collective agreements were applicable to posted workers?

[240] Supplementary agreement n°66, 15 January 2014, non-extended.

I have already mentioned before that posted workers are entitled to the National Minimum Wage as well as to the extended national and/or regional industry/sector-wide minimum sectoral wage (with the exception of executives). Taken that companywide collective agreements do not play, in the four relevant sectors, a substantial role in the determination of minimum wages and wage supplements (See **Q7**) it follows that the extension of the scope of Article 3(1) PWD to company/undertaking collective agreements would not substantially alter the income of posted workers'..

There is an exception though regarding Public works (See **Q7,** J-M Gillet) where leading entrepreneurs such as Eiffage and Bouygues dispose of companywide collective agreements providing for actual wages up to 20 per cent higher than regional industrywide collective agreements, in all other sectors (transport, construction, temporary work, health and care services), sector-wide national or regional collective agreements remain the main reference as companywide collective agreements are non-existing or do not provide for substantially higher wages.

Moreover, companywide collective agreements already apply, at least theoretically, to temporary posted workers because of the equality of treatment principle (see Articles L1251-43 and L1262-4 4°of the French Labour Code). In that sense, the extension of the scope of Article 3(1) PWD to companywide collective agreements would have a positive effect only in case of intra-group posting. In this case the change would substantially impact the posted workers income (up to 20 per cent in the Public works sector). By contrast, if posted workers were not temporary workers or weren't posted within a group (intra-group), but were posted by one of the subcontractors of the previously mentioned construction magnates, then they would not be entitled, anyway, to the companywide collective agreement which would apply only to direct employees of the aforementioned construction entrepreneurs. As a result the proposed extension would be of no particular use.

The extension would definitely make it harder to monitor and control the implementation and enforcement of the companywide collective agreements as Labour Inspectors should ensure compliance not only with the National Minimum Wage, which they already do in practice, but also with national and regional industrywide collective agreements as well as company collective agreements. Most of the Labour Inspectors we have questioned (E. Bayle, P. Oster) told as that majority of the PWD violations they encounter are much more basic than the violation of conventional rates of pay (such as substantial violations of working time limits, very low wages, substantially lower than the National Minimum Wage, poor or inhuman accommodation or working conditions). One of the Labour Inspectors (Ch. Estienne) pointed out bitterly that he would have been happy if the only trouble was to ensure posted workers higher wages than the National Minimum Wage.

As we have said before, for most of the relevant sectors (with the exception of Public Works), companywide collective agreements will neither augment the number of posted workers covered by a collective agreement nor will substantially augment their income. As a result, with the exception of intra-group posting within Public works, the extension of the scope of Article 3(1) PWD to companywide collective agreements would not substantially augment Labour costs for the sending companies, nor would affect their competitiveness.

According to employer representatives, (Mrs Berthelot, FNTR road transport and Mrs Bonnichon Temporary Work Agency), the extension of the scope of Article 3(1) PWD would have no substantial displacement effect in favour of local undertakings and the local workforce. According to them, the competitive argument in favour of sending

companies is to be found within Labour costs as a whole and more specifically within social security employer contributions. In effect, Mrs Bonnichon (PRISME, employer's organisation) insisted on the fact that social security contributions in France are 30% higher than those of some other Member States (eg. Luxembourg). As a result, even if the equality of treatment were applied with regard to rates of pay, recourse to posted workers would still represent a competitive argument especially in sectors, such as temporary work, construction or road transport, where Labour costs represent a substantial part of employer costs. Mrs P. Dessen (FFB, construction sector, employer's organisation) told us that according to an internal report of the FFB, if the existing rules with regard to the minimum rates of pay were being complied by, there would be no unfair competition with regard to the minimum rates of pay. As a result, it is not posted workers' actual pay but social contributions that create distortions of the Labour market.

III. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

III.1. Constituent elements of the minimum rates of pay: the host country perspective

Q14: Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).

It is worth mentioning that the term/phrase "minimum rates of pay" ("taux de salaire minimal": in the French translation of the PDV directive) does not appear as such in the French law provisions transposing the PDV directive into French law.

Instead, according to article L1262-4 of the Labour Code, posted workers are entitled (I would translate:) to the "minimum wage" (salaire *minimum* in French)[241] and to wage payment including overtime increments as well as wage supplements (accessoires de salaires) established by statutory provisions or collective agreements.

By contrast, article R1262-8 of the Labour Code specifies that allowances specific to posting are to be looked at as components of (once again I would translate as:) the "minimum wage" (salaire *minimal* in French).

From the comparison of these two provisions results that in French law the meaning of the phrases: "salaire *minimum"* as opposed to "salaire *minimal*" is dual, although I would spontaneously tend to translate them, both, by: "minimum wage". Therefore, within article L1262-4, "minimum wage" (salaire *minimum*) seems to be synonymous to "basic salary" and/or "minimum wage", while within article R1262-8 "minimum wage" (salaire *minimal)* is synonymous to "minimum rates of pay".

[241] "Minimum wage" is obviously not synonymous to "basic salary" and "minimum rates of pay". Basic salary is a component

It seems however that in order to complicate things even more, the term "salaire minimum" (minimum wage in English) has another, broader signification, as I will explain soon.

1 - Basic salary and minimum wage

It is worth noting from the very beginning that posted workers are undoubtedly entitled to "basic salary" and to the French "minimum wage" applicable to the relevant sector.

The employee's/worker's basic salary is normally determined by the employment contract.
The INSEE[242] defines the basic salary as a monthly gross wage that does not include bonuses or overtime increments but which includes employee social security contributions as well as employee income tax.
The basic salary is a component of the "minimum wage" (salaire minimum) owed to any worker employed within the French territory.
This minimum wage is at least equal to the National Minimum Wage or to the conventional minimum wage where this is higher.
Ministerial circular 2008/17, 5 October 2008 relative to posting of workers in the context of a transnational provision of services[243] provides (page 12) that *"posted workers are entitled to the **minimum wage (salaire minimum** in French**)** just like French workers. As a result the sending undertaking must comply by the minimum wage provided for by the applicable extended collective agreement, under the condition that this is more favourable than the National Minimum Wage".*

According to Article D3231-6 of the Labour Code, the minimum hourly wage includes, besides basic salary (gross), *advantages in kind* and diverse increments having *de facto* the nature of a wage.

According to the Ministry of Labour[244], constituent elements of the minimum wage include:
- Basic salary,
- Advantages in nature, such as accommodation and food[245];
- Other increments having *de facto* the nature of a wage supplement such as "reimbursement of expenses" not corresponding to an actual expense: such as meal allowances;
- Tips (within restaurants, and hotels);
- Performance awards, individual or collective;
- Productivity bonuses provided they constitute a predictable component of the minimum pay;
- Christmas allowances/bonuses for the month they have actually been paid (treizième mois);
- Holiday Bonuses for the month they have actually been paid;

[242] National Institute for Statistics and Economic Studies.

[243] http://travail-emploi.gouv.fr/IMG/pdf/circ_Detachement_2008.pdf .

[244] http://travail-emploi.gouv.fr/informations-pratiques,89/les-fiches-pratiques-du-droit-du,91/remuneration,113/le-smic,1027.html

[245] According to the previously mentioned circular " advantages in kind must be clearly distinguished from reimbursement of professional expenses".

It follows from the previous that posted workers are undoubtedly entitled to the above-mentioned elements of pay, as these are taken into account in order to establish the French minimum wage to which posted workers are entitled.

2 - Overtime rates/increments

Article L1262-4 of the Labour Code explicitly states that posted workers are entitled to overtime rates irrespective of whether these are statutory rates or resulting from an extended collective agreement. According to Statutory law (Article L3121-22 of the Labour Code) workers are entitled to an increase of 25 per cent of their hourly wage for the first eight hours of overtime (from 36 to 43 hours per week) and to 50 per cent for the rest, unless the applicable collective agreement (sectoral or companywide) replaces these increments by an equivalent rest period or provides for a different increment that can be no less than 10 per cent of the worker's hourly wage. Of course, if the replacement is being made by a companywide collective agreement, it will not apply to posted workers.

3 - Posting allowance

As we have already mentioned before, according to article R1262-8 of the Labour Code allowances specific to posting are to be looked at as components of the "minimum wage", meaning here, of the posted workers' minimum rates of pay.

Article R1264-8, opposes allowances specific to posting, integrated to the posted worker's minimum rates of pay, or to reimbursement of actual expenses.

According to the aforementioned circular (2008/17, 5 October 2008) *"The sending undertaking must comply with expatriation allowances owed by the sending undertaking to the posted worker because of posting*. *An expatriation allowance is undoubtedly part of the minimum rates of pay. By contrast, reimbursement of actual expenses caused by posting, such as travel or accommodation expenses are not taken into account for the calculation of the minimum rates of pay".*

The French Supreme Court has recently corroborated this interpretation in a decision on 13 November 2014 (n°13-19095 13-19096 13-19097 13-19098 13-19099). This decision had to deal with Portuguese workers posted in the Public works sector. The question was whether «deslocaçoes estrangeiro » were allowances specific to posting and therefore integrated to the minimum rates of pay or mere reimbursement of expenses in which case they should be excluded from the calculation of the conventional minimum rates of pay. The Supreme Court decided for the defendants: the aforementioned allowance was specific to posting and integrated into the minimum rates of pay.

In the recent case *Sähköalojen ammattilitto ry* (C-396/13), 12 February 2015 paragraph 48, the Court of Justice has decided that the daily allowance is intended to ensure the *"social protection"* of the workers concerned, *"making up for the disadvantages entailed by the posting as a result of the workers being removed from their usual environment"*.

Although the meaning of "allowance specific to posting" seems to have been substantially clarified by recent case law and ministerial circulars, we did not find any provisions in the relevant collective agreements regarding posted workers in the receiving country perspective.

4 - Wage supplements (accessoires de salaire)

On 6 August 2015 entered into force an amendment of article L1262-4 of the Labour Code by Statute n°2015-990, providing that posted workers are entitled not only to basic salary and overtime rates (which was already the case before) but also (this is the new element of the definition) to wage supplements established by statutory law and/ or collective agreements.
It is worth noticing that the previously mentioned amendment seems to be directly inspired by the recent CJEU case law in *Sähköalojen ammattilitto ry* case (C-396/13), 12 February 2015). The question arising however from the amendment is to determine the meaning of "wage supplements" (accessoires de salaire in French).

According to Mrs Akkaoui of the Labour Ministry the aforementioned revised statutory provision will be soon clarified by regulations and by a ministerial circular. In the meanwhile I think that the following may be aimed at by the amendment:
- Transport and meal allowances as long as they do not correspond to reimbursement of actual expenses[246];
- Sunday or night work increments[247]
- Public holiday supplements[248];
- Bonuses related to the geographical position of the working site
(insularity, construction site, dam etc.)
- Bonuses related to the particular conditions of work:
dangerous, unhealthy, thermally challenging environment
-Seniority Bonuses

The relevant sector-wide collective agreements have no specific provisions with regard to posted workers. It seems that in the absence of specific provisions and in the light of the aforementioned amendment, the above-mentioned elements of pay should apply to posted workers as well.

5 - Holiday pay

Article L1262-4 6° of the Labour Code states explicitly, among other things, that posted workers are entitled to annual paid holiday. According to Statutory law, workers are entitled to 2,5 days of paid holiday per month of work and up to a maximum of 5 weeks per year, provided that they have worked the relevant period which starts on 1 June of a given year and terminates on 31 May of the following year. Collective agreements may provide for additional holidays.

Local workers, and therefore posted workers as well, are entitled to a holiday increment which is either 10 per cent of the worker's annual earnings or equivalent to the wage that the worker would have earned if he had continued to work during the annual holiday. If the posting period corresponds to only part of the reference period (1 June to 31 May) then the posted worker will be entitled to a fraction of the holiday pay that will be proportional to his working period.

[246] It is worth noticing however that the transport allowance is, according to article D3231-6, excluded from the calculation of the minimum wage. It is however a wage supplement and seems to form part of the posted workers minimum rates of pay unless it a reimbursement of actual expenses.

[247] Article L1262-4, 4° explicitly provides that working time, therefore night work increments, apply to posted workers.

[248] Article L1262-4 of the Labour Code, explicitly provides that posted workers are entitled to public holidays.

It is worth noticing, that according to article L1262-4 4° posted temporary workers, are entitled to guaranties due to temporary workers by local temporary work agencies. This includes equality of treatment and the 10 per cent increment of the worker's earnings as compensation for the termination of contract.

Last but not least article L1262-4 7° provides that posted workers are entitled to the same conditions of access (as local workers) to holiday funds as well as to holidays due to bad weather conditions. The latter seems to have a social nature.

Q15: **Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)**

1 - Reimbursement of expenses

Article R1262-8 of the Labour Code explicitly excludes from the posted workers' minimum rates of pay the actual travelling, accommodation and meal expenses. Reimbursement of expenses is not an element of pay but a mere obligation of the sending undertaking (see the aforementioned case law of the French Supreme Court, 13 November 2014, n°13-19095 13-19096 13-19097 13-19098 13-19099).

2 - Supplementary occupational retirement pension schemes

According to article 3(1) (c) of the PWD, posted workers are not entitled to supplementary occupational retirement pension schemes because of its social protection nature. This is an explicit exclusion which has been corroborated and enhanced by the CJEU case-law when it held that *« allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return for that service, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind* "(*Commission v Germany (*C-341/02), paragraph 39). This was the case of capital formation contribution that seems, in view of its objective and its characteristics (…), to alter the relationship between the service provided by the worker and the consideration that he/she receives by way of remuneration for that service[249].

French law does not exclude explicitly supplementary occupational retirement pension schemes from the scope of the posted workers' rights while posted in the French territory. It seems however that in practice posted workers are excluded from the benefit this kind of scheme.

The National collective agreement for road transport and ancillary activities is supplemented by an agreement on supplementary occupational pension scheme and health care (Collective agreement 5 March 1958). According to article 1 all employees

[249] *Tevflik Isbir* C-522/12 7 November 2013, paragraph 44 Even if such a contribution is not separable from the work done, it is distinguishable from the salary itself. Since its aim, by the formation of a capital amount that the worker will benefit from in the longer term, is to achieve an objective of social policy supported, in particular, by a financial contribution from the public authorities, it cannot be regarded, for the application of Directive 96/71, as forming part of the usual relationship between the work done and the financial consideration for that work from the employer. It is for the national court, however, to verify whether that is indeed the case in the proceedings before it.

involved in road transport of merchandises are compulsorily insured to the aforementioned supplementary occupational pension scheme and health care, provided they have one-year seniority under full time employment conditions. Although there is no particular mention in the agreement to posted workers, this supplementary insurance does not seem to apply to posted workers and does not form part of their minimum rates of pay. The reason is that it alters the relation between the worker's service and consideration provided by the employer.

3 - Activity Bonus

Statute n°2015-994, 17 August 2015, introduced recently an "activity bonus" (article L842-1 of the Social Security Code) with the objective to encourage workers, residing in France on a stable basis and who receive modest revenues from a professional activity (subordinate or not) to take up a new professional activity.

The Supreme administrative Court (Conseil d'Etat) estimated that posted workers, are not entitled to the aforementioned bonus given that it alters the relation between the worker's service and the consideration provided in exchange (Conseil d'Etat 16 April 2015).

Q16: **Which components (NB: use the indicative list above) are in the "grey area"? (not clearly belonging or excluded for the calculation of the minimum pay rates)**

Explain your response and give examples. Describe concrete difficulties encountered per sector.

1 - Incentive Bonus

According to Mrs Berthelot (FNTR employer's organization) an incentive scheme (intéressement) should be excluded from the posted workers' minimum rates of pay as it alters the relationship between the service provided by the worker and the consideration which the worker receives by way of remuneration for that service. It seems however that incentive schemes in the road transport sector result from companywide collective agreements. As a result, they do not apply to posted workers with the exception of temporary workers because of the equality of treatment principle. The recent legal reform (n°2015-990, 6 August 2015) obliges social partners to engage in the negotiation of incentive schemes (participation-intéressement) within sectors until the end of 2017 (Article L3312-9 of the Labour Code). As a result, there are going to be sector-wide collective agreements providing for incentive bonuses.

2 - Displacement bonus

The national collective agreement of the Construction sector, supplemented by regional collective agreements, provides that manual workers are entitled to an increment called small displacement bonus when the working site is situated less than fifty kilometres from the administrative office of the undertaking. This increment, which includes a meal allowance, compensation for transportation time as well as transportation costs, is rather important. To give a concrete example, in Burgundy small displacement bonus is equal to 11€ per day and to 524.58€ per month when the distance between the administrative office and the working site is 25 km or less, or 691,95€ when the distance is more than 25 km and less or equal to 50 km). It seems, that following the recent decision in

Sähköalojen ammattilitto ry (C-396/13), 12 February 2015, the displacement bonus, which in my opinion does not alter the relation between the worker's service and its consideration, should form part of the minimum rates of pay (*Tevflic Isbir* 522/2012, 7 November 2013). One of the difficulties we might however encounter with the application of this provision is that the sending undertaking does not have an administrative office in the French territory. Is that a reason to deprive posted workers from the aforementioned supplement? It is worth noting that the Labour Ministry makes an explicit reference to the small displacement bonus as a case of exclusion from the minimum wage.

Similarly, the National collective agreement for road transport and ancillary activities, addendum n°60, 19 December 2012, provides for an allowance for travelling expenses including a meal allowance. When drivers are engaged in an international transport operation, which includes sleeping away from home, they are entitled to an allowance called long displacement bonus. This allowance is equal to 41.76 € per day if the worker takes only one meal away from home and 54.83€ per day if they take two meals away from home. The question is similar to the previous: are these allowances part of the posted workers' minimum rates of pay? The collective agreement does not include the answer.

3 - Seniority supplement/bonus

Another controversial issue may occur from the application of the collective agreement, 19 December 2012, on annual remuneration for road transport workers (drivers), supplementing the national collective agreement for road transport and ancillary activities. According to this collective agreement, remuneration within the same job description (for instance 150M) alter/augment with seniority from 0 to 15 years or more. The question is to know whether posted workers will be entitled to the minimum wage provided for workers with no seniority at all or whether seniority within the sending undertaking shall be taken into account to establish the applicable wage. The difference may be substantial in practice taken that a worker grade 150M receives 9.73€ gross per working hour at the date of recruitment and 10.57 € with 15 years seniority which corresponds to 18,352.74€ annual salary without seniority and 19,820.96€ after 15 years seniority. Although the CJEU decided in the recent *Sähköalojen ammattilitto ry* case (C-396/13), 12 February 2015) that Article 3(1) and (7) of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that it does not preclude a calculation of the minimum wage for hourly work and/or for piecework which is based on the categorisation of employees into pay groups, as provided for by the relevant collective agreements of the host Member State, provided that that calculation and categorisation are carried out in accordance with rules that are binding and transparent. It seems to me that the application of the seniority criterion may be problematic in practice.

Q17: **In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?**

With the exception of statutory law and regulations - such as Article L1262-4 of the Labour Code which provides that posted workers are entitled to both the minimum wage and wage supplements according to the generally applicable sector-wide collective agreements including overtime pay and Article R1262-8 of the Labour Code which states that allowances specific to posting should be taken into account to appreciate compliance with the minimum rates of pay principle -, the other wage-setting mechanisms do not

establish specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay. Although the relevant stakeholders (employer's and employees' organisations) recognise that posting is a major issue, they haven't seized the opportunity to bargain on posted workers' working conditions. The reason is, on the one hand, that social partners in France, and employer organisations in particular, are not representative of the sending undertakings in order to bargain on their behalf. As a result, even if they decided to negotiate and bargain a collective agreement on working conditions and minimum rates of pay during posting, this negotiated instrument wouldn't have any chance to become extended through ministerial order and apply to the sending undertakings. On the other hand, it doesn't seem to me that local stakeholders have any interest at all in bargaining specific working conditions and minimum rates of pay on behalf of posted workers. Local employer's /employees' organisations reasonably wish to see sending undertakings providing their services under the same conditions as they do[250].

In the absence of any specific rules applicable to posted workers, the determination of the constituent elements of the minimum rates of pay is going to be a matter of interpretation by the Courts (see previously mentioned case law: Supreme Court decision, 13 November 2014, n°13-19095 13-19096 13-19097 13-19098 13-19099), whether national sector-wide as well as regional collective agreements apply and to what extend they determine posted workers' minimum rates of pay during their posting to the French territory.

Q18: How do the differences in the definition of the minimum rates of pay impact income levels of posted workers (also taking into account compensation of expenses)?

The fact that there is a rather high National Minimum Wage, applicable to every worker (manual or non-manual) in the French territory is of major importance with regard to posted workers taken that the SMIC (the National Minimum Wage) constitutes a rather straightforward, easy to access reference. We have seen however that the National Minimum Wage is not always respected in practice regarding posted workers who tend to work overtime without compensation (See **Q3,** Construction sector, temporary work**).**
By contrast, industry wide collective agreements are harder to find and to interpret. Some of the relevant stakeholders (particularly employer representatives) gave me evidence of sending undertakings seeking information on the applicable collective agreements. However, they seemed to imply that this was rather an exception to the rule.
As we have seen before, (see **Q14**) although it is clear that generally applicable collective agreements (sector/industrywide, national and/or regional collective agreements extended by ministerial order) apply to posted workers, it is rather unclear which elements of pay included in the relevant collective agreement actually apply to posted workers. Are posted workers entitled to all relevant components including allowances and bonuses? It seems that in the best-case scenario the relevant stakeholders make a restrictive interpretation of the relevant provisions limited to the basic salary when this is higher than the National Minimum Wage. This interpretation is nevertheless due to change, at least in theory, taken that the recent amendment indicates that posted

[250] Although this is not always the case. We have already mentioned that in the road transport sector, hauliers established in France start up subsidiaries in other Member States in order to take advantage of differences in Labour costs.

workers are entitled not only to the basic salary but also to wage supplements established by the relevant collective agreements and statutory instruments.
However, (see **Q.14,15,16**) unless this amendment is supplemented by clear-cut interpretation by means of regulations and/or Ministerial circular, interpretation of sector-wide collective agreements will still remain an issue and will require Court intervention/interpretation (national/European). In effect, some of the sector/regionalwide collective agreements, especially that of the Construction sector as well as that of the road transport and ancillary activities are supplemented by numerous addendums and appendices which make it difficult in practice to be confident about the way they should be interpreted and applied to posted workers, as there are no specific provisions dealing with that issue.

In practice, some of the Labour inspectors we have questioned told us that when they make controls in working sites or vehicles they just try to make sure that posted workers receive a wage that is at least equal to the National Minimum Wage irrespective of the relevant sector.
In order to establish respect of the National Minimum Wage, Labour inspectors try to make sure that the sending employer does not include within the calculation of the worker's minimum wage neither reimbursement of expenses (travel, accommodation) nor overtime pay. These are the most common irregularities they find with regard to pay. They have also told me that they do not insist on the payment of overtime rates as it is difficult to establish overtime in most of the cases. They also mention that the workers themselves are not, in general, inclined to introduce claims and provoke Court decisions with regard to pay, because, on the one hand, they already receive a salary which is much higher to the one they would have had if they had stayed in the sending Member State, and on the other hand because they know that if they bring such a claim they will no longer be engaged in posting operations. I would like to point out once again that I have the impression regarding road transport that the PWD and adjacent legislation rarely seem to apply in practice to the relevant truck drivers.

Q19: **In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

In order to be able to comply by the French legislation on minimum rates of pay, sending undertakings need first to identify the applicable sector-wide (national and/or regional collective agreement). As I have already pointed out this sectoral collective agreement is not always easy to identify, interpret and apply (unless foreign undertakings regularly post workers to the French territory). Sectoral collective agreements are to be found thanks to an official website called Legifrance, which is normally easily accessible to French speakers (see below). It is worth mentioning however, that collective agreements especially those of the relevant sectors have a rather complex structure given that they are supplemented by numerous successive amendments and appendices. Moreover, collective agreements are only provided in French. I did not find at the time of writing any translation to English or any other "useful" language such as Portuguese, Polish or Romanian[251]. Some of the sending undertakings autonomously seek information on the

[251] According to the Labour Ministry's data and analysis on posting declarations: 18 per cent of the posting declarations for 2013 concerned Polish workers, 16 per cent concerned Portuguese workers and 13 percent Rumanian workers. As a result, the translation and updated information on minimum rates of pay of the relevant sector-wide collective agreements in these three languages seems to be relevant. Direction Générale

applicable rates of pay either from local employers' organisations or from the Labour Inspection. Social partners are prepared, as I have experienced myself, to provide summarised information on the main applicable rules regarding minimum rates of pay. In the temporary work sector there is also an observatory (Observatoire des metiers et de l'emploi[252]) whose purpose, among other things, is to provide information about specific conditions of posting, including the minimum rates of pay in the relevant sectors (A. Wagmann, Union syndicale de l'Interim CGT).

Nevertheless, I have the impression that in the great majority of posting situations, sending undertakings, encouraged by limited inspection controls, use as a reference the National Minimum Wage instead of the sectoral (national and/or regional) applicable collective agreements. In effect, Labour Inspectors told me that they first control compliance with the National Minimum Wage. They are particularly vigilant in making sure that the National Minimum Wage is being complied with after deduction of expense reimbursement and overtime increments. If they are satisfied that the National Minimum Wage is being complied with, then at a second stage they may pursue controls and appreciate compliance to the national/sectoral collective agreement. But then the control seems to be quite limited. From our discussions I got the impression that minimum rates of pay are not to their mind as significant as the lack of declaration or poor accommodation and working conditions. As a result when they are making controls what they are really looking for to track down is undeclared posting, very poor (inhuman) accommodation, extremely low salaries, and dangerous and/or unhealthy working and living conditions. By contrast, they do not seem to be as eager to make sure that posted workers are not deprived of allowances/bonuses such as seniority allowances. Yet, as I have already pointed out, in the road transport sector for example within the same job description pay increases with seniority from 0 to 15 years. Labour inspectors told me that they systematically take as a reference the lowest minimum salary of the pay scale. By contrast, in the construction sector, they seem to require the payment of short displacement allowances and in the road transport sector long displacement bonus.

Most of the interviewed Labour inspectors (such as E. Bayle, P. Oster, Ch. Estienne) replied to question 19 that the sending undertakings complete their national or sectoral wage with a specific daily or weekly posting allowance in order to reach the level of the French minimum wage or the sectoral minimum wage. As long as this daily or weekly allowance is not provided for as a means of reimbursement of costs but seeks for instance to compensate discomfort arising from posting, it should be taking into account in order to appreciate compliance with French minimum rates of pay. Labour inspectors did not seem however to be able to tell what the other components of "home salary" that they take into account are, in order to make sure the posted worker receives a salary that is equivalent to the French minimum rates of pay. It seems to me however, that they should include:

- one flat rate sum, as long as they are reduced to the duration of the posting in France;
- Advantages in kind such as food and accommodation;
- Productivity bonuses provided they constitute a predictable component of minimum pay
- Increments compensating conditions of work such as night or dangerous/hazardous work

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du travail, Analyse des déclarations de détachements des entreprises prestataires de services en France en 2013 (General Labour Directorate, Posting workers' declaration analysis 2013), November 2014.

[252] http://www.observatoire-travail-temporaire.com

- A per diem/ flat rate compensation for working abroad as long as this does not account for reimbursement of expenses but serves other purposes such as compensating inconvenience arising from posting and residing away from home

By contrast,: social protection related advantages, such as premiums for supplementary health coverage; overtime increments and incentive bonuses that bare no direct relation with work provision, paid to the posted worker by the sending employer should not be taken into account for the calculation of the minimum rates of pay according to French law.

III.2. Constituent elements of the minimum rates of pay: the sending country perspective

Q20: In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)

Taking into account that the National Minimum Wage in France is rather high by comparison to many other EU Member States, it is not always necessary to augment the posted worker's salary in order to reach the minimum salary of the receiving Member State. Only in Luxembourg (1,923€), the Netherlands (1,501.80€), Belgium (1,501.82€), Germany (1,473€) and Ireland (1,461.85€) minimum wages are higher than the French minimum Wage. Although France is not only a receiving country but also a sending country in almost the same proportion (Sending country: 133,896 individuals in 2010; 123,580 in 2013, Receiving country: 160,532 individuals in 2010 and 182,219 in 2013[253]) most interviewees seemed to believe that the posting of French/local workers to another Member State does not concern, at least in general, low wage earners but highly qualified/expert workers earning higher wages. As a result the level of earnings and minimum wage is not an issue. Mrs Bonnichon gave us the example of highly qualified engineers posted to oil drilling platforms.

Nevertheless, when there is a difference between the posted workers' wage level in France and in the host Member State, at the expense of the former, interviewees told me that this gap is covered by an increment taking the form of a specific posting allowance usually called expatriation allowance (although expatriation is a separate concept, supposing a rather permanent displacement of the worker). The question is, once again: what does this increment include? The answers given by the interviewees were similar (M. Bonnichon, PRISME, employers' organisation): the expatriation allowance covers the difference between the cost of leaving in France and that of the host Member State, as well as compensation for the discomfort caused by the workers' displacement during posting. None of the interviewees mentioned specific provisions (bonuses/allowances) of the relevant wage setting mechanisms applicable to the host Member State. Mrs Bonnichon told me that Italy and Spain do not have updated websites providing information on the temporary workers' conditions of posting in their territory. She also

[253] Pacolet. J. and De Wispelaere. F. (2014). HIVA – KU Leuven. Posting of workers. Report on A1 portable documents issued in 2012 and 2013. Prepared under framework of Contract No VC/2013/030.

said that the European Union should preferably invest in the construction of a website whose objective would be the dissemination of updated information on posting conditions and minimum rates of pay in all the relevant sectors (construction, road transport, temporary work, agriculture).

In a recent case brought before the French Supreme Court in February 2015 it was found that a flat rate payment of 55,000 € (expatriation allowance paid to an expert posted by Areva in Italy for the benefit of the European Commission) was not reimbursement of expenses but a constituent element of the worker's rates of pay and should therefore be taken into account in order to calculate the worker's entitlement to annual paid leave (Cass. Soc. 12 February 2015, n°13-19866).

ITALY

I. BACKGROUND INFORMATION

Q1: **To what extent is the minimum wage amount connected to:**

- **(local) living costs?**
- **average salaries (general / sectoral)?**
- **social policies?**
- **fight against social dumping and protective measures? (e.g. fair competition at national or international level between companies?**
- **other national/international matters?**

The Italian labour law regime does not fix a minimum wage. The minimum wage is determined by National Collective Bargaining Agreements (hereinafter also "NCBAs") which set out minimum standards for the sector covered by the relevant NCBA throughout the country. In the absence of an agreement or mutual consent between the employer and the employee, wages and salaries may be determined by courts according to precedents and practices found in related activities or NCBAs. Local company-level agreements may improve these standards through provisions on rates, performance bonuses and bonuses on productivity etc. Wages and salaries of all workers are normally paid on a monthly basis. Employees may receive various additional wage elements: additional monthly salaries (13th and 14th monthly salaries when provided for by NCBAs); special rates for overtime, night, and holiday work; performance bonuses and productivity bonuses; and various other fringe benefits and bonuses. On 22 January 2009 the Government and social partners (with the exception of Cgil) signed a cross-sectoral collective agreement that established a new reference indicator – the Harmonised Index of Consumer Prices for EU Member States (Indice dei prezzi al consumo armonizzato per i Paesi membri dell'Unione europea, IPCA) for the protection of purchasing power of wages, which is based on the European Harmonised Index of Consumer Prices (HICP), excluding imported energy. The new indicator is calculated by the National Institute of Statistics (Istituto Nazionale di Statistica, Istat).

NCBAs can be unilaterally implemented by the employer or by introducing a clause in the individual employment contract. Extension mechanisms refer to provisions concerning remuneration. NCBAs provide a minimum wage for employees in the sector they refer to. Article 36 of the Italian Constitution states that workers must be guaranteed a wage consistent with their work, and sufficient to ensure that they and their families have a free and decent life. Case law stated that wages established in NCBAs signed by the most representative social partners met the requirements outlined in the Constitution. Therefore, wage provisions contained in NCBAs represent the criterion to assess wages set in individual contracts. Workers can sue their employers in front of labour courts in order to gain wages established by NCBAs.

Through the Framework Agreement signed on 22 January 2009 (Accordo Quadro, hereinafter also the "AQ 2009") the government, Confindustria, the Italian Confederation of Workers' Trade Unions (Confederazione Italiana Sindacati Lavoratori, CISL) and the Italian Labour Union (Unione Italiana del Lavoro, UIL) have set a new industrial relations system. The agreement strengthened the role of second level bargaining, giving it the

possibility to derogate in a pejorative way provisions settled by NCBAs. AQ 2009 also changed the duration of NCBAs to 3 years, whereas the normative part and the retributive part were previously to be renewed every 4 and 2 years respectively. AQ 2009 replaced the target inflation rate as reference for the wage increases established at sectoral level with the Harmonised Index of Consumer Prices (HIPC) without including the dynamic of imported energy products. Furthermore, the AQ 2009 strengthened the role of 'company/local level', linking wage bonuses for workers with productivity targets and instruments aimed at achieving them. These provisions were supported by minor income taxation and social security contribution reliefs granted by the government to a portion of wages settled in second-level agreements. Quotas are linked to the achievement of productivity targets set by local or company level agreements and/or with the adoption of measures aimed at increasing productivity (affecting working time and organisations or workers' occupations). The AQ 2009 was implemented on an experimental basis for duration of 4 years. Theoretically HIPC and the provisions entailed by the AQ 2009 could no longer be used in the forthcoming national collective bargaining. In line with this orientation, the role of second level bargaining was further strengthened by the 2012 'Guidelines to increase productivity and competitiveness in Italy' (Linee programmatiche per la crescita della produttività e della competitività in Italia), where social partners specified topics (i.e. flexibility in working hours, flexibility in employee's duties, flexibility in internal organisation, etc.) and scope of the second-level bargaining asking the government to reduce taxes affecting labour costs and to stabilise the productivity wages tax and social security contribution reliefs. Neither of the agreements were signed by the Italian General Confederation of Labour (Confederazione Generale Italiana del Lavoro, CGIL), that declared that derogations could weaken the NCBAs and that the adoption of the HIPC could have regressive effects on the wage levels. This divergence has led to several cases of collective agreements not being signed by one or more representative trade unions, or to the presence of overlapping collective agreements signed by different unions. The enforceability of such contracts to workers members of not-signatory parts is questioned by academicians and case law, especially in aspects modifying the employment relation in a pejorative way.

As to the main facts and figures related to the Italian Industrial Relations system please see below.

Industrial relations characteristics, pay and working time

Trade union density (%) (2011) (Trade union members as a percentage of all employees in dependent employment)	36.1 (a)
Employer organisation density (%) (2008) (Percentage of employees employed by companies that are members of an employer organisation)	58.0 (b)
Collective bargaining coverage (%) (Percentage of employees covered by collective agreements) (2009)	80 (b)
Number of working days lost through industrial action per 1,000 employees (2011)	37.46 (2008)
Collectively agreed pay increase (%) (annual average 2010–2011)	2.0% (d)
Actual pay increase (%) (annual average 2010–2011)	2.0 (e)
Collectively agreed weekly working hours	38.0% (f)
Actual weekly working hours	38.5 (f)

Sources: Eurostat 2014

Q2: **How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?**

According to the Decree n. 72 of 2000 (hereinafter "DL 72/2000") that implemented Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 ("PWD") concerning the posting of workers in the framework of the provision of services, the posted workers would earn at least the minimum wage set forth by the NCBAs applicable to the workers who perform similar services in Italy (hereinafter also "local workers").

The Italian legal system does not have minimum wage legislation and this problem has been recurrently under discussion. However, Article 36 of the Italian Constitution entitles an employee to receive a wage 'proportionate to the quality and quantity of his work and in any case sufficient to guarantee a free and decent life for him/her and to his/her family', and a long established jurisprudential opinion has interpreted this norm as immediately effective, so as to grant indirectly any employee the right to a minimum wage determined by the courts, normally equal to prevailing collective tariffs.

Please note that

a. in relation to the local workers, the minimum wage is fixed by the NCBAs, and the minimum rates of pay is the total remuneration, including arrangements and/or bonus etc.
b. in relation to the posted workers, the minimum wage can be fixed in accordance to the NCBA (the so called "similarity" in conditions, see below) but there is no rule of law/NCBA concerning the minimum rates of pay. This implies that for the posted workers the two concepts of minimum wage and minimum rates of pay are basically synonymous.

Such a minimum wage must also include the additional compensation due in the case of overtime work. Furthermore the posted workers are entitled to the "same" minimum labour protection applicable to the local workers in terms of paid holidays, working time, and health and safety in the workplace.

Article 2099 of the Civil Code does not give details of remuneration, but simply states that it can be determined in different forms (payment according to time, at piece rate, profit sharing or product sharing, commissions, payment in cash and in kind), paid in the measure determined by collective agreement, on the customary terms and conditions of the place of work.

In fact there is no uniform legal definition of remuneration, and many controversies have arisen in the courts as to its scope, particularly with respect to:

- the various fringe or accessory benefits established either by law or by agreement in addition to basic pay (e.g. overtime pay, productivity bonuses, thirteenth and fourteenth month's pay, indemnities for special heavy or unhealthy jobs, for transport, seniority allowance, cost of living bonus);
- payments made by an employer in addition to or in substitution for social security benefits (e.g. payments in case of illness, work accidents, family allowances, annual vacations), usually not related to the actual work performed or paid even if no work is performed.

The notion of similarity ("same conditions") is under examination. Case law and scholars indicated a way to interpret the notion. Unfortunately there is currently no evidence of

consistency under this interpretation. The most important case law is Consiglio di Stato March 1, 2006, no. 928.

However, by means of the interviews we carried out, we understood that posted workers are usually remunerated by their employer through a wage lower than the mandatory minimum wage set forth by the NCBAs in force, in the considered sector. They also do not benefit from the minimum labour protection level applicable to the local workers.

We understood that this may happen for temporary workers, above all in the aircraft industry. As to the health care workers, salary differences can be set up between posted workers (lower salary, usually connected to the place of origin) and local workers (higher salary, connected to the applicable NCBA). Road Transport workers are paid according to the place where the employer is set up (please see 2014 CNA FITA Report). In the construction sector, paritarian institutions (Casse Edili), by means of a special protocol with similar institutions at European level, are able to monitor and cooperate to reduce abuse and social security fraud (please see "Accordo quadro per il riconoscimento reciproco dei versamenti - in http://www.cassaedilebrescia.it/images/fileallegati/DISTACCO%20-%20CONVENZIONI%20CNCE%20AUSTRIA%20FRANCIA%20GERMANIA.pdf)

Q3: **In practice, what are the wage differences between posted workers and local workers? Provide an answer per sector.**

We understood that the wage differences between posted workers and local workers are mainly due to the lower labour costs borne by the posting employer. The lower level of labour costs of the posting employers mainly depends on the lack of a harmonization of those domestic rules setting the notion of minimum labour standards.

The social partners are aware of this but no evidence may be used. The inspectorate and the social security institutions are not competent on this issue. They can examine only the fulfilment of social security contributions, if due (please see below for further clarifications on this issue)

Is there evidence that posted workers earn (per sector) generally less/more than local workers?

The evidence that posted workers earn less than local workers is given by the fact that the provider is able to offer its services at a price lower than a local provider, due to a lower labour cost.

Considering the road transport sector, for instance, according to 2013 Eurostat data, the hourly cost of labour in Italy is equal to 28.1 Euros against 3.7 for Bulgaria or 4.6 Euros for other Eastern European countries. As to the temporary work agencies sector, the Italian Ministry of Labour has recently intervened with operative instruction to the local users in order to contrast some advertising initiatives coming from temporary work agencies established in other member State (please see Circolare Ministero del Lavoro n. 15/2015 in http://www.lavoro.gov.it/Strumenti/normativa/Documents/2015/Circolare_n14_09-04-2015.pdf).

In particular, such foreign agencies, despite PWD legislation, offer the supply of foreign workers by underlying the economic advantages for the Italy-based companies in getting

temporary workers with Romanian (or Eastern Europe related) individual employment contracts, i.e., their flexibility and the absence of some salary obligations such as 13th and 14th salary months and the severance indemnity, the so-called TFR that are items of the mandatory minimum wage according to Italian legislation (see Ruling n. 14 of April 9, 2015)

Q4: **In the temporary work agencies sector, could you describe who the "final users" of posted workers are?**

We understood that currently the final users are prevailingly related to the aircraft industry and the health care sector.

In that regard, very recently the aircraft company Ryanair has been sued by INPS in order to pay social security contribution for workers hired in Dublin and posted at the Orio al Serio's airport (Bergamo).

Q5: **Is 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 (hereafter "PWD") implemented in your country so as to comply with minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers?**

Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?

The PWD has been implemented by Decree n. 72 of 2000 (hereinafter "DL 72/2000") that complied the minimum protection measures described in Article 3(1)(c) of PWD as it provides that:

a. the posting employer has to apply to its posted employees the "same" labour conditions set forth by the laws, regulations and/or NCBAs applicable to local workers who carry out similar activities. According to the "Vademecum" issued by the Ministry of Labour on November 2010 containing the instructions to the Ministry of Labour's inspectors on the legitimate use of the posting worker in the framework of the provision of services (hereinafter the "Vademecum" – see http://www.assolavoro.eu/uploads/2012/mlps_-_vademecum_distacco_comunitario.pdf) the labour conditions that the posting employer must apply to its posting employees in Italy include working time, holidays, regulations (contained in the Decree n. 66 of 2003 that implemented the working time EU Directive), the minimum wage (which also include the additional compensation for overtime) fixed by the national NCBAs of the concerned sectors, health and safety at work, pregnancy and child labour protection, overnight working regulations (contained in Decree n. 81 of 2008), equal treatment among men and women and the prohibition of gender discrimination (included in the Decree n. 198 of 2006),
b. the Italy-based contractor/company who commits to a foreign entrepreneur/supplier the supply of services to be carried out by temporary posted workers from inside its company, is jointly liable with the foreign entrepreneur/supplier for paying the posted workers the mandatory

minimum wage and providing the mandatory labour protection applicable to the local workers.

c. During the supply of services and up to one year after the termination of the supply contract, the posted worker can sue before the Italian labour Court (or and other Court of a foreign State that is part of an international convention on jurisdiction in the field of labour relationships) both its employer and the local contractor/company in order to claim the application of the labour protections provided by the local rules/regulations/NCBAs;
d. Article 4 of DL 72/2000 provides that temporary work agencies established in another Member State have to observe the local regulation applicable to the Italy-based temporary work agencies (i.e. the regulation contained in Decree n. 276 of 2003) under which (i) the posted worker is entitled to labour conditions no less than those applicable to the worker of the local user/employer performing equal duties (ii) the posting employer and the local final user/employer are jointly liable for the fulfilment of wage and social security duties.

No optional derogation set forth in article 3, paragraph 3 and paragraph 5 of PWD has been introduced by the Italian legislation.

PWD principles as implemented by DL 72/2000 do not apply only to the merchant navy companies, but to their shipping personnel and to the construction sector in the cases listed under article 3, paragraph 2 of the PWD.

Q6: To what extent is the subject of the minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.

We understood, also by means of the interviews we carried out, that the posting employers' failure to comply with the minimum wage and the minimum labour protections set forth by the PWD is an issue of major concern for social parties and the Italy-based employers. They consider that posting determines social dumping phenomenon.

In the road transport sector, the social dumping practiced by carriers established in other member States, as to the posting driver manpower, in addition to other factors such as the illegal coastal navigation and the increase of gasoline and toll costs, caused in 2013 the closure of 7,640 Italy-based road transport companies. Furthermore in the first trimester of 2014, 2,119 road transport companies closed (please refer to the report issued by Union Road Transport Companies' Organization). The temporary work agencies sector has registered a considerable increase of the Italy-based companies/contractors demand for foreign manpower (with Romanian work contracts) supplied by temporary work agencies established in other EU member States, due to the absence of some wage obligations (such as 13th, 14th and severance indemnity) that under Italian law are mandatory and part of the minimum wage set by the NCBAs (please refer to our report to Q. 3).

We understood that similar issues and problems also concern sectors dealing with construction, medical/care services and temporary work agencies. No evidence about such problems arising from the interviews and the meetings we had.

II. WAGE-SETTING MECHANISMS

II.1. A better understanding of minimum wage-setting mechanisms

Q7: Which types of legal instruments/practices are used to set minimum wages? Describe in detail the mechanism(s) used.

- **Statutory provisions**
- **Law, regulations or administrative provisions**
- **other administrative practices (e.g. "social clauses" in public procurement rules)**
- **Collective agreements**
- **collective agreement with "statutory" value (e.g. procedure of extension)**
- **cross-industry**
- **multi-sectoral, sectoral**
- **local (regional, community...)**
- **company or infra-company (e.g. establishment level)**
- **management unilateral rules**
- **arbitration awards**
- **other mechanisms/practices**

There is a double scheme. The first one is related to the Italian legislation that does not contain any rule defining the minimum wage or listing the instruments for determining the minimum wage. Indeed, article 36 of the Italian Constitution only affirms the principle of a sufficient wage as it establishes that the worker is entitled to a wage proportionate to the quantity and the quality of the performed work and in any case sufficient to ensure him/her and his/her family a decent life. The minimum wage, instead, is fixed by the NCBAs for sectors. On the other hand, the law determines the minimum amount of social security contribution due based upon the minimum wage fixed by the NCBAs in the concerned sector. Indeed Law n. 88 of 1989 attributes to employers starting their business a social security classification under the industry or handcraft or agriculture or bank and insurance or services category, depending on the business activity carried out. Such social security classification obliges the local employer to calculate and pay the social security contributions on the minimum wage fixed by the NCBAs in force in the concerned sector, even if the employers decided to apply to its workers a collective bargaining agreement other than that entered into in the sector of the employers' classification.

In the aforesaid contest administrative regulation offers certain instruments such as the "DURC" (The so-called "Documento Unico di Regolarità Contributiva") i.e. a certificate that allows the administrative authorities to assess whether or not the employers have fulfilled their social security obligations according to its social security classification and therefore the payment of the minimum wage (due the fact the social security amount

depends on the remuneration, if social security obligations have been correctly fulfilled, minimum wage payment can be considered properly applied).

Which collective agreements are (or may be) universally applicable within the meaning of Article 3(8) PWD?

Under the Italian legislation a collective bargaining agreement that could be considered universally applicable under the meaning of Article 3(8) PWD does not exist. Indeed, in our industrial relation system, the NCBAs (that are the fruit of complex interaction between statutory provisions, case law decisions, administrative procedures and agreements between the social partners) does not have a "binding" nature in relation to all workers, neither the members or non-members of the union's negotiating them (the principle known as erga omnes). With reference to this particular practice, the Constitution makes provision for trade-union registration, that for political, trade union and technical reasons has not yet been implemented, in order to provide for the negotiation of "collective labour agreements that are mandatory for all who belong to the respective industry of these agreements" (Article 39, Constitution). In the absence of ordinary legislation to implement this principle, specific regulations for collective labour agreements are lacking and as a result, since the provisions of the Civil Code relating to corporative collective agreements are not applicable, such agreements have been included in the area of private law, as atypical contracts. As such, like all contracts (Article 1372 (1), Civil Code) they are binding exclusively on the contracting parties (or rather, on the members of the associations signing the contracts). As the result of negotiations, pursuant to Article 1322 (2), Civil Code, such agreements are regulated by the general provisions of the Civil Code governing contracts and obligations. However, on the basis of numerous case law rulings, common law collective contracts have a general effect de facto, and are not limited to the members of the associations. In this sense the provision of the collective bargaining agreement is binding also for employers who are not a member of the association who signed the contract, if they selected that it will be a collective agreement to regulate the relationship with its workers.

Q8: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)**

In determining the minimum wage, the social partners take into account a combination of different factors such as the worker's conventional classification, the working time, the level of difficulties of the workers' duties, the workers' skills, the workers' seniority within the company, the work's supply and demand in the concerned sector, the general labour market situation, considering, among other things the major needs of the concerned sectors in a certain historical period and the business trend. The social partners that have signed the NCBAs of the concerned sector periodically meet (usually at the expiration of the economic part of the NCBAs that last two years) to discuss the major changes that have occurred in the business and are influencing the remuneration provisions, and to establish whether or not the minimum wage needs to be updated or not.

Q9: **To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wages? What groups/what share of workers do not receive the minimum wages, and what reasons can be identified?**

In addition to our comments to Q7, included in the report above, we outline that the wage-setting mechanism adopted by the NCBAs usually ensures that the workers receive a salary proportionate to the quality and quantity of the work performed, as prescribed by Article 36 of the Italian Constitution (the principle of the sufficiency of the salary). Indeed, when an employer does not apply a collective bargaining agreement to their workers, litigations may occur. The labour judge refers to the minimum wage set by the NCBAs in a similar sector in order to determine whether or not the worker received a sufficient salary under Article 36 of the Italian Constitution. Therefore, the minimum wage set by the NCBAs is in practice the most important parameter used by the Italian labour court to assess whether the workers' salary is proportionate to the quality and quantity of the work performed.

This is a de facto NCBA extension to workers. Such extension arises from a litigation, as in Italy there is no minimum wage legislation: Article 36 of the Italian Constitution entitles a worker to receive a wage 'proportionate to the quality and quantity of his work and in any case sufficient to guarantee a free and decent life to him/her and to his/her family' and a long established jurisprudential opinion has interpreted this norm as immediately effective, so as to grant indirectly any employee the right to a minimum wage determined by the labour courts, normally equal to prevailing collective tariffs.

Although such de facto extension system is strongly applied, it can be possible that workers do not receive the minimum wage. It can happen in the case of undeclared work.

Q10: **To what extent do the wage-setting mechanisms differentiate rules on minimum wage according to:**

- **Employee's conventional classification,**
- **Employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.),**
- **Employment policies: type of working contract (e.g. low number of hours /week), person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc.**
- **Other criteria**

Italy does not have minimum wage legislation although the problem has been recurrently under discussion. However, Article 36 of the Italian Constitution entitles an employee to receive a wage 'proportionate to the quality and quantity of his work and in any case sufficient to guarantee a free and decent life for him/her and to his/her family' and a long established jurisprudential opinion has interpreted this norm as immediately effective, so as to grant indirectly any employee the right to a minimum wage determined by the courts, normally equal to prevailing collective tariffs.

The criterion of the employee's conventional classification is the criterion adopted in the wage-setting mechanism to determine the different minimum wage. Indeed, each level of workers' classification has its own minimum wage.

In general the parties refer to this collective classification in order to identify the performance due from the employee and the corresponding remuneration due from the employer. The basic principle stated by Article 2103 – as amended by Article 13 of the Workers' Statute (Act No. 300 of 1970; and recently by the 2015 Jobs Act) – is that a

worker must be assigned to and employed on the jobs, and classification, for which he has been hired. The same article, however, acknowledges a very limited power of an employer to change these jobs, under fixed conditions.

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

Over the last 20 years, the Italian industrial relation system has been affected by important changes. The fixing of the minimum wage level had always been a matter falling within the collective bargaining at national level. On 23 July 1993 the Italian government and the social partners entered into a Framework agreement (the so-called "1993 Protocol"). In such Protocol the parties adopted a model with two levels of bargaining: the first level was NCBAs, supplemented, where the social partners considered it appropriate, by second-level collective bargaining on a territorial scale, or more often, at company level. The NCBAs were valid for four years in relation to the regulation of the terms and conditions of employment (the normative part) and for two years in relation to remuneration (the economic part). The second-level collective labour agreement was valid for four years and might only deal with points other than those dealing with remuneration covered by the NCBAs (1993 Protocol, Clause 2).

According to the 1993 Protocol, therefore, the second-level collective labour agreement could not deal with the minimum wage but only with the remuneration issues concerning the salary linked to the company's productivity. However, the model created by the 1993 Agreement failed to be satisfactory, as it did not allow for adequate decentralization in all categories to enable more flexible salaries and terms of employment. In particular, it failed to focus on the needs of specific companies or local situations in order to encourage economic development and employment, to the point that local negotiations continued to be seen as an alternative to firm level bargaining, and were usually only found in sectors with a long tradition of them. This led to the need, supported by several parties, to review the negotiation system and give more space - in addition to the pre-existing national and firm levels – to local contracts. Therefore, on 22 January 2009, in order to incentivise the development of decentralized bargaining, the social partners entered into a framework agreement (AQ) that includes the so-called open clauses under which for the purposes of "directly managing crisis situations on a local or firm level, or to encourage economic development and employment, specific agreements may outline special procedures, methods and conditions to modify all or part, even in a temporary or experimental manner, individual economic or regulatory aspects of the NCBAs". The 2009 AQ therefore attributes local (or firm level) bargaining to intervene, subject to certain conditions (managing crisis situations, promoting economic development and employment), and also to derogate the minimum wage set by the NCBAs.

Q12: **How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce minimum wage?) Is there an automatic indexation rule? Which criteria are taken into account when deciding on changes of the minimum wage level?**
Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

In condition of a normal evolution of the business involved in the relevant sector, the NCBAs intervene, after the expiration of the economic part of the NCBAs (that usually last two years) in order to compare the amount of the minimum wage to the living costs indexation rules. However, the monitoring and adjustment of the minimum wage could also be matter for decentralized collective bargaining. Indeed according to the 2009 AQ the decentralized bargaining for the purposes of "directly managing crisis situations on a local or firm level, or to encourage economic development and employment, specific agreements could intervene to derogate the minimum wage set by the NCBAs'. In practice however, up to date, decentralized collective bargaining has never intervened for resetting the minimum wage fixed by the NCBAs and, therefore, we are not able to mention concrete examples in this respect. In condition of a normal evolution of the business involved in the relevant sector, the NCBAs intervenes, after the expiration of the economic part of the NCBAs (that usually last two/three years) in order to compare the amount of the minimum wage to the living costs indexation rules.

II.2. Minimum wage-setting mechanisms in the context of posting of workers

Q13: What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?

- **To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?**
- **To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?**
- **To what extent would the extension be easy to implement (and to control) from an administrative point of view?**
- **To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?**
- **To what extent would it reduce the displacement effect on local undertakings and labour force?**

As referred to in our report on Q. 7 above, under the Italian legislation a collective bargaining agreement that could be considered universally applicable under the meaning of Article 3(8) PW does not exist. This is because of Article 39 of the Italian Constitution (under which "the collective labour agreements are mandatory for all who belong to the respective industry of these agreements" has not been implemented and, therefore, the collective bargaining agreement does not have a "binding" nature in relation to all workers, neither the members or non-members of the union's negotiating them (the principle known as erga omnes). However, based on our experience, the core of the problem under the Italian legislation is not the lack of instruments allowed to set rules in terms of minimum rates of pay applicable to posted workers, but the lack of surveillance over the social dumping phenomenon.

Indeed, as referred to in our report on Q5 above, DL 72/2000 not only complied with the minimum protection measures described in Article 3(1)(c) of PWD but also provided a series of remedies/tools that would ensure the enforcement of the PWD provision by the

posting employers and the local employers/contractors (i.e., the joint liability of the domestic contractor, the entitlement of the posted worker to sue the posting employer for obtaining).

Within the EMPOWER project (Exchange of Experience and Implementation of Actions of Posted WorkER) the Ministry of Labour issued a "Vademecum" containing a set of instructions to the labour inspectors in order to ensure the observance of the provision of PWD as locally implemented. Under such instructions the Ministry gives instruction to its inspectors on the steps that they have to implement to assess the implementation of the PWD provisions, and also in case of a failure to act, for challenging the failure of the posting employer and notifying the penalty to its registered office abroad.

III. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

III.1. Constituent elements of the minimum rates of pay: the host country perspective

Q14: **Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).**

There is no minimum wage legislation in Italy. However, Article 36 of the Italian Constitution entitles the employee to receive a wage 'proportionate to the quality and quantity of his/her work and in any case sufficient to guarantee a free and decent life to him/her and to his/her family' and a long established jurisprudential opinion has interpreted this norm as immediately effective, so as to grant indirectly any employee the right to a minimum wage determined by the courts, normally equal to prevailing collective tariffs.

In case of litigation, based on Article 36 mentioned above, the posted workers could be entitled to the following salary elements (i.e. the determination of the minimum wage applicable):

- Basic salary
- Bonus granted on a regular basis (Christmas bonus, holiday bonus);
- Extra payment for overtime
- Additional remuneration based on working conditions
- Holiday allowances.

Social security contributions are not included in the minimum wage. This is because Article 12 of EU Regulation n. 883 of 2004 on the coordination of the social security systems applies, and under this provision the posted workers remain subject to the social security legislation of the posting Member State to the extent that (i) the predicted duration of the posting does not exceed 24 months and (ii) he/she has not been posted in replacement of another worker.

Income taxes are excluded from the setting of the minimum wage. This is because Convention on the income double taxation entered into by Italy and the relevant Member State applies by providing the income tax subjection of the posted workers in the posting Member State provided that certain conditions (such the temporary frame of his/her posting) are met. Social advantages (e.g. food stamps, movie tickets), other advantages in kind (e.g. free access to a care system, free housing, free means of transportation home-work), Social protection related advantages (e.g. payment of premiums for supplementary health coverage, maternity pay, contribution to early retirement fund, etc.) are elements of social protection nature that cannot be take into account in the minimum wage setting.

Q15: **Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker?**

Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)

Social Security, Income taxes, social advantages, other advantages in kind, social protection related advantages, costs reimbursement, and dismissal compensation are excluded from the calculation of the minimum wage applicable to a posted worker.

NCBAs of the concerned sectors - (1) construction, (2) road transport, (3) medical and care services and (4) temporary work agencies - do not include any provision regarding the posted workers and the setting of their wage.

Italy does not have minimum wage legislation; Article 36 of the Italian Constitution entitles to receive a wage 'proportionate to the quality and quantity of his/her work and in any case sufficient to guarantee a free and decent life to him/her and to his/her family' and a long established jurisprudential opinion has interpreted this norm as immediately effective, so as to grant indirectly any employee the right to a minimum wage determined by the courts, normally equal to prevailing collective tariffs.

Q16: **Which components (NB: use the indicative list above) are in the "grey area"? (not clearly belonging or excluded for the calculation of the minimum pay rates)**
Explain your response and give examples. Describe concrete difficulties encountered per sector.

Christmas and holiday bonuses (i.e. 13th and 14th salary) are in the grey area. This is because NCBAs set the minimum wage by indicating the minimum hourly wage or the minimum weekly or monthly wage without considering the incidence of these additional items of salary.

Q17: **In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?**

No, there are not. The wage-setting mechanism does not include any specific rules applicable to posted workers for the determination of the minimum wage.

Q18: How do the differences in the definition of minimum rates of pay impact income levels of posted workers (also taking into account compensation of expenses)?

Q19: In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with requirements of the host country on minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)

Based on our experience, if the posted worker is a highly skilled worker, his/her salary usually far exceeds the minimum wage, since it includes specific posting allowance and or other advantages in kind. On the contrary if the posted worker is a low skilled worker, his/her salary could not be in line with the minimum wage of the host country since it does not incorporate any components other than the base salary determined by the posting member state legislation. In practice the posting employer does not observe the minimum labour protection requirement imposed by the PWD in order to provide a more competitive service to the Italian contractor. For its part, the Italy based contractors take advantage from the inobservance of the PWD requirement by the foreign supplier, since it pays a lower price for the requested services.

III.2. Constituent elements of the minimum rates of pay: the sending country perspective

Q20: **In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country on minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

NCBAs may provide specific indemnities to be paid to the workers in case of their temporary posting abroad in addition to the regular salary. Based on our experience, in the lack of any similar provision in the NCBAs, the posting employers could apply their own policy on the international posting of their workers, if any, or agree with the posted workers for a specific posting allowance. The contractual power of the posted workers in determining the amount of the posting allowance decreases if he/she is a low skilled resource.

NETHERLANDS

I. BACKGROUND INFORMATION

Q1: To what extent is the minimum wage amount connected to:

- **(local) living costs?**
- **average salaries (general / sectoral)?**
- **social policies?**
- **fight against social dumping and protective measures? (e.g. fair competition at national or international level between companies?**
- **other national/international matters?**

To start with[254], there are two wage-setting mechanisms in the Netherlands that are relevant in the context of the posting of workers: the statutory minimum wage (as laid down in the Minimum Wage Act, *Wet Minimumloon*) and generally binding (sectoral) collective agreements (as referred to in the *Wet op de collectieve arbeidsovereenkomsten*). The latter apply to posted workers whose contract is governed by other than Dutch law and who temporarily are posted to the Netherlands (Art. 2(6) Act on the Extension of the Terms of Collective Agreements, *Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*). In line with Art. 3(10) PWD, the Dutch Government decided in the course of the EU enlargements 2004/07 to apply generally binding provisions of a collective agreement not only to the construction sector, but to all sectors.[255] Extending the applicability of generally binding provisions of collective agreements to all sectors was justified by the need to combat possible labour displacement as well as illegal constructions in the labour market.[256]

The statutory minimum wage, introduced in 1969, applies to all employees in an employment relationship and serves as a floor. Derogation from the statutory minimum wage is only allowed if is more beneficial to the employee.[257] It is to be understood as the pecuniary income ensuing from the employment relationship. That means that the income has to be paid in cash, excluding any payment in kind (Art. 6 Minimum Wage Act). The aim of having a statutory minimum wage is to secure a minimum level of employment conditions for the most vulnerable group of employees,[258] so as to enable

254 Most parts of this answer are taken from: Miriam Kullmann, *Enforcement of Labour Law in Cross-Border Situations*, vol 14 (Sebastian Kortmann and Dennis Faber eds, Series Law of Business and Finance, Kluwer 2015), chapters 3 and 4.

255 Wet van 1 december 2005 tot wijziging van de Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten in verband met de uitbreiding van de werkingssfeer van de wet arbeidsvoorwaarden grensoverschrijdende arbeid, *Stb*. 2005, 626.

256 *Kamerstukken II* 2004/05, 29 983, nr. 3, p. 2-3.

257 HR 2 March 2001, ECLI:NL:HR:2001:AB1254, *JAR* 2001/58 (Hotel New York B.V./Horecabond FNV), Opinion of Procurator-General Mok, para 3.4.3.5.

258 *Kamerstukken II* 1967/68, 9574, nr. 3, p. 5-6.

them to make a daily living.[259] By taking into account the welfare situation in the Netherlands, employees should be guaranteed a socially acceptable reward for work done.[260] As of July 2015, the statutory minimum wage is 1507.80 EUR (gross) per month. The level of the statutory minimum wage is linked to the average contractual wage development (Art. 14 Minimum Wage Act).[261] The starting point is the average percentage of the development of wages in the market, wages in the premium and subsidised sectors and wages in the public sector, as calculated by the government body for economic planning (*Centraal Planbureau*). The adjustment percentage is based on half of the estimate as established for the contractual wage raise in 2015 by the government body for economic planning, as published in the Macro Economic Enquiry of 2014. That is 0.5 x 1.41 = 0,705. This is subtracted from the estimate for the contractual wage development in 2015 as published in the Central Economic Plan 2015, which is 1.11. The difference is 0.4077 and is the non-rounded adjustment percentage. The latter is multiplied with the (non-rounded) statutory minimum wage as calculated for adjustment per 1 January 2015.[262]

Generally binding (sectoral) collective agreements contain wages that are generally higher than the statutory monthly minimum wage. The explicit aim of declaring (provisions of) collective agreements generally binding is to prevent competition on employment conditions, whereby non-bound employers and employees undercut for instance the wages agreed in such agreements.[263] It is for the social partners to bargain on raising the wage levels in collective agreements; there is no legislative interference requiring collectively agreed wages to be linked to market developments or any other policies, except for not undercutting the statutory minimum wage.

Q2: **How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?**

It is not possible to give a clear-cut answer to this question. For actually answering this question, access to the employment contracts and payslips is needed to be able to assess what posted workers earn in practice and what the difference is between the posted workers' wages and the wages national workers earn. In fact, this requires proper monitoring and enforcement, not only by the social partners, but, because of the competence to search workplaces and related documents, also by the *Inspectie Sociale Zaken en Werkgelegenheid* (Inspection Social Affairs and Employment, in short: *Inspectie SZW*).[264] In practice, however, such monitoring is not structurally conducted.

[259] *Kamerstukken II* 1967/68, 9574, nr. 3, p. 14.

[260] *Kamerstukken II* 1967/68, 9574, nr. 3, p. 12-5.

[261] Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 8 april 2015, 2015-0000078229, tot aanpassing wettelijk minimumloon per 1 juli 2015, *Stcrt*. 2015, 10678.

[262] Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 8 april 2015, 2015-0000078229, tot aanpassing wettelijk minimumloon per 1 juli 2015, *Stcrt*. 2015, 10678.

[263] Para 1 Toetsingskader Algemeen Verbindend Verklaring CAO-bepalingen (AVV), *Stcrt*. 1998, 204, last amended by Beleidsregel van de Minister van Sociale Zaken en Werkgelegenheid van 28 november 2013, 2013-0000158609, tot wijziging van de Beleidsregel Toetsingskader Algemeen Verbindend Verklaring CAO-bepalingen (AVV), Stcrt. 2013, 34009

[264] See on enforcement more extensively: Miriam Kullmann, *Enforcement of Labour Law in Cross-Border Situations*, vol 14 (Sebastian Kortmann and Dennis Faber eds, Kluwer 2015).

Therefore, the question cannot be fully answered. Nevertheless, there are some examples from the construction and the transport sectors.

Every worker posted to the Netherlands earns, based on legislation, at least the statutory minimum wage, unless a generally binding (sectoral) collective agreement applies, in which case the wage will generally be higher. Nevertheless, for the construction sector it is mentioned that posted workers may earn between 3.50 and 13 EUR per hour; what is left after tax deductions or other deductions cannot be said. In fact, a combination of factors makes that posted workers earn less than comparable Dutch workers, such as low(er) job classification, working between 55-60 hours a week and being paid for a normal working week of 40 hours, and irregular deductions of so-called costs made by the employer for the posted worker. Moreover, the number of hours worked overtime is not mentioned on the payslip, making it hard to prove. As far as construction workers are concerned, FNV Bouw (Trade Union for the Construction Sector) emphasises that so far there are many examples which show that posted workers are not correctly paid. As posted workers are per definition cheaper, they are frequently used otherwise Dutch employers would employ and/or hire Dutch construction workers more often (unemployment rates of Dutch construction workers is quite high). That is different in the case of highly educated technical staff (engineers for instance), as they are posted to the Netherlands because of their knowledge and specialisation (this can also be vice versa in the context of water work whereby Dutch workers are posted abroad). In the construction sector, mostly workers doing the actual work are posted; it is less frequently seen among highly educated.

Employees' and employers' representatives in the temporary agency work sector mention that it is actually unknown what posted workers earn "in practice". Here, it seems that because usually the wage as paid by the user undertaking to his own employees must be paid to temporary agency workers as well, it is hard to identify the actual wage of the posted worker. The actual wage can only be identified if there is sufficient monitoring and control of compliance with applicable collective agreements. But even then fake papers may disguise what posted workers really earn. A recent example from the transport sector shows that employees from Hungary in that specific case earned approximately 350 EUR per month; in addition, posted workers were paid a net reimbursement of expenses of 40 EUR per day. There are, according to the trade union FNV Transport en Logistiek in the transport sector many such examples.[265] FNV Bouw mentions that it often occurs that the gross wage is improperly reduced with the result that the net wage is less than the statutory minimum wage. There have been also situations in which the gross wage is composed of a low gross amount that is complemented with a net, i.e. tax-free, compensation, according to the tax rules applicable in the employer's home state. There is also evidence in the construction sector, FNV Bouw says, that foreign employees are improperly qualified as being posted; misuse of the notion 'posting' is seen frequently. It is improper because employees are only recruited for the foreign/Dutch market, thus usually not employed for the undertaking concerned in their home country. Also many letterbox companies make use of that practice. Also self-employed individuals (*zelfstandigen zonder personeel*) work in the construction sector 'posted' by 'temporary-work agencies'.

[265] Rb. Oost-Brabant 8 January 2015, ECLI:NL:RBOBR:2015:19, *JIN* 2015/29 m.nt. E.K.W. van Kampen (FNV Bondgenoten/Van den Bosch Tranporten B.V. e.a.).

The statutory minimum wage in the Netherlands is 1,507.80 EUR per month; there have been discussions on introducing an hourly statutory minimum, but this has failed so far.[266]

As to the sectors concerned, the following wages apply:

Sectors	***Wages per month or hour, according to collective agreement applicable, excluding any additional payments***
Construction	as of 1 July 2015, posted workers earn between 12.71 to 16.04 EUR per hour. An average construction worker in the Netherlands earns, according to FNV Bouw between 2,257 and 2,565 EUR gross per month, excluding any additional compensation paid.
Temporary Agency Work	depends on the wage paid at the user undertaking; if paid according to the ABU CAO between 8.70 EUR and 27.27 EUR per hour, depending on their job qualification and duration of employment contract with the temporary-work agency
Transport	between 9.70 EUR per hour (1,686.28 EUR per month) and 19.33 EUR per hour (3,361.96 EUR per month)
Health and Care	between 1.507.80 (the statutory minimum wage level) at the lowest wage scale and 5,787 EUR (after 18 years of service 8,627 EUR) at the highest

The wages furthermore may differ depending on the additional allowances paid either during the posting or because of the posting.

In the Netherlands, care (that is not health) covers five branches: nursing (*verpleging*), care (*verzorging*) and homecare (*thuiszorg*) (in short: VVT); hospitals (*ziekenhuizen*); disabled people (*gehandicapten*); mental welfare (*geestelijke gezondheidszorg,* GGZ); and other care (e.g. physiotherapy, general practitioners, dentistry).[267] The following refers to care in the sense of nursing, care and homecare (VVT), unless otherwise specified. For the care sector it is necessary to emphasise that posting workers does not occur. Figures from 2012 prove that in the health and care sector approximately 3000 workers officially living for at least four months in the Netherlands (meaning that they are registered), from the 2004 and 2007 acceded Member States worked, compared to 1,318,000 Dutch workers.[268] As health/care is structurally needed, posting is of no interest to this sector. However, in terms of flexible work relations, it is a fact that increasingly use is made of so-called self-employed individuals (*zelfstandigen zonder personeel*). Moreover, it can be doubted whether the collective agreement would apply to service providers established abroad and temporarily posting their workers to the Netherlands. It seems that the personal scope of the CAO VVT[269] is addressed to institutions and organisations that fulfil certain duties in the care sector as defined by Dutch (social security) law. The latter normally only applies to those undertakings

[266] Miriam Kullmann, *Enforcement of Labour Law in Cross-Border Situations*, vol 14 (Sebastian Kortmann and Dennis Faber eds, Kluwer 2015), p. 83.

[267] UWV, *Sectorbeschrijving Zorg* 2015).

[268] See Ernest Berkhout, Paul Bisschop and Maikel Volkerink, *Grensoverschrijdend aanbod van personeel: Verschuivingen in nationaliteit en contractvormen op de Nederlandse arbeidsmarkt 2001-2011* (SEO Economisch Onderzoek, 2014), p. 83. These figures may include posted workers as long as they are registered, which is not always the case. It is unknown how may posted workers actually work in the Netherlands (SER, *Arbeidsmigratie* (uitgebracht aan de Minister van Sociale Zaken en Werkgelegenheid, Advies nr. 14/09, 2014), p. 33-34).

[269] Collective Agreement Nursing homes and Homecare, Maternity Care and Youth Health Care (*CAO Verpleeg-, Verzorgingshuizen en Thuiszorg, Kraamzorg en Jeugdgezondheidszorg*, CAO VVT).

established in the Netherlands rather than foreign service providers with their establishment elsewhere in the EU.

There are several problems in relation to the application of (minimum) wages to posted workers. FNV Bouw, as also confirmed by FNV Flex, notes that there are problems in case the generally binding collective agreement expires, that means that there is a period in which the collective agreement may still be applicable to the parties who have agreed and signed the collective agreement, but the declaration of extending the scope of the agreement making it generally binding does not apply anymore. As a result, posted workers are only entitled to the statutory minimum wage. That means that, on top of the already lower hourly labour costs, the costs are lowered even more because a different wage level applies to posted workers. Monitoring and enforcement of collective agreements, as FNV Bouw further emphasises, is left to the social partners. That means that the Inspectie SZW – in accordance with its legal mandate – enforces compliance with wages only up to the statutory minimum wage level; wages that go beyond that level are not enforced unless the trade union or the posted worker him-/herself starts a judicial procedure to ensure compliance with his/her employer. Nevertheless, FNV Bouw notes that more frequent on-site controls could have the effect of ensuring greater compliance by posting employers. An additional problem is that the Inspectie SZW only assesses whether the gross wage provisions are complied with, that means that it does not look at deductions made that may be too high. By using this approach, during controls by the Inspectie SZW no irregularities can be established. As a result, the social partners in the construction sector will as of 1 January 2016 introduce a Construction ID card (Bouw ID pass), obliging all individuals working at the construction site, including posted workers, to possess such an ID card for identification. The ID card contains the following information: form of contract based on which work is provided, experience/education, safety certificates, number of hours worked, details of the employer and the working individual. It may also be possible to identify subcontracting chains.[270]

Q3: **In practice, what are the wage differences between posted workers and local workers? Provide an answer per sector. Is there evidence that posted workers earn (per sector) generally less/more than local workers?**

Often, if the law or the collective agreements are applied correctly, there is no wage difference between posted workers and local workers (i.e. those employed with an employer established in the Netherlands) if looking at the gross wages and the additional compensation paid. However, as the PWD only obliges service providers to respect the hard core conditions as referred to in that directive, net wages may differ as income tax and social security as well as pension contributions are paid according to the law of the home state, i.e. the country in which the posted worker normally works.[271] So, the hourly labour costs differ between Dutch workers and posted workers, the latter being cheaper, as was the intention of the PWD.[272] It is, however, not possible to explicate to what extent exactly wage differences exist.

[270] Initially, the Minister SZW considered introducing a so-called ID12, as inspired by Sweden's ID06, an identity verification instrument, see Miriam Kullmann, *Enforcement of Labour Law in Cross-Border Situations*, vol 14 (Sebastian Kortmann and Dennis Faber eds, Kluwer 2015), p. 209-210. So far, however, besides a pilot project in the mushroom sector, the state has not introduced a statutory ID verification.

[271] The home state may, for the duration of 183 days, regulate income taxation for posted workers; after the period has lapsed, the host state may imposed its own income tax regulations.

[272] Cf. Ernest Berkhout, Paul Bisschop and Maikel Volkerink, *Grensoverschrijdend aanbod van personeel: Verschuivingen in nationaliteit en contractvormen op de Nederlandse arbeidsmarkt 2001-2011* (SEO

It is, for reasons set out in the answer to question 2, not possible to say that posted workers "generally" earn more or less than local workers. On the basis of the answers given by the interviewees, however, it can be said that, derived in some sectors, and in particular the transport and the construction sectors, posted workers seem to earn less than the local workers. There are, for instance, examples in the construction sector where there are practices to lower the net wage by combining gross and net elements in the wage (see above).

FNV Flex mentions that temporary agency workers are classified at the lowest job levels and will remain classified at that level, even though there should be a reassessment after one year. While this may occur to local workers as well, it occurs more often to foreign agency workers. Particular difficulties arise with practices around bonuses and/or compensations paid as well as deductions made from the workers' wages as a result of accommodation, transport, sickness insurances and improperly imposed fines because of non-compliance with house rules. Using the rules on extraterritorial costs, compensations can be set-off against the gross wage. The wage for tax purposes, that is the gross wage, can thus be lowered. Some users undertaking collective agreements, as are applicable in the construction and metal sectors, prohibit the setting-off. Moreover, it should be mentioned that the costs employers charge their workers for are often much higher than the actual costs if the worker would him-/herself organise accommodation and transport for instance. In Dutch, this is referred to as *gedwongen winkelnering*.

Q4: **In the temporary work agencies sector, could you describe who the "final users" of posted workers are?**

According to the employers' association ABU in the temporary-work agency sector, it is unknown who, in chain constructions where work is subcontracted, the final users are. If use is made of subcontracting chains, the main contractor (i.e. the user undertaking) is responsible of making sure that subcontractors comply with the applicable employment conditions such as the user undertaking's remuneration that applies from the first day of placement, unless the remuneration as laid down in the ABU CAO applies (Art. 19(1) ABU CAO). The latter applies if it concerns, inter alia, a temporary agency worker who has been long-term unemployed, job-seekers who are, e.g., dependent on wage cost subsidies, school leavers, workers without a starting qualification, and holiday workers (Art. 27 ABU CAO). Collective agreements often contain provisions obliging employers/main contractors to make sure that subcontractors comply with the obligations laid down in the collective agreement applicable to the main contractor. In the construction sector, employers are obliged to explicitly agree with subcontractors on applying the construction sector collective agreement (Art. 5 CAO Bouw). Similarly, if a transport undertaking established in the Netherlands concludes subcontracts with undertakings established outside the Netherlands, the former must stipulate that the latter complies with the basic employment conditions (*basisarbeidsvoorwaarden*) laid down in the CAO Beroepsgoederenvervoer (Art. 73(1)).

Economisch Onderzoek, 2014), p. 24, 28, 58, 65-67. The report refers, inter alia, to the existing clash between equal pay for equal work and the hard core provisions of the PWD. See also Kamerbrief, Kabinetsreactie SER-advies arbeidsmigratie TK, 16 June 2015 <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2015/06/16/kamerbrief-met-kabinetsreactie-ser-advies-arbeidsmigratie-ek.html> (accessed 20 July 2015).

Final users of posted workers according to the social partners in the construction sector are mainly Dutch and foreign subcontractors, active on construction sites in the Netherlands. Subcontractors can also be Dutch or foreign temporary-work agencies. FNV Flex noted that final users in the agency sector are often undertakings in the agricultural sector, industry, construction, transport etc.[273]

Moreover, in case use is made of temporary agency workers, the transport and the construction sector collective agreements determine that contracts may only be concluded with certified temporary-work agencies, so-called NEN 4400/1 (agencies established in the Netherlands) or NEN 4400/2 (agencies established outside the Netherlands) certified agencies.[274] These certificates express the sector's self-regulatory setup. But neither certificate, as emphasised by FNV Bouw, guarantees the correct payment of wages. As to the use of temporary agency workers, the CAO VVT explicitly determines that the use of agency workers should be limited, as much as possible (Art. 4.5(3)). Based on this it can be said that the CAO VVT provision referred to has a market protective effect as to the use of temporary agency workers. Nonetheless, employers have various possibilities to employ workers through other contractual constructions than agency work.

Q5: Is 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 (hereafter "PWD") implemented in your country so as to comply with minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers?

Article 3(1)(c) PWD refers to 'minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes'; this is broadly framed. Furthermore, the Directive emphasises that the concept of minimum rates of pay is defined by national law and/or practice of the Member State to whose territory the worker is posted, that is the host state. Thus, based on the case law of the ECJ (e.g., C-396/13), which grants at least some discretion as to establish minimum *rates* of pay, it can be said that Dutch law as well as the collective agreements dealt with in this study are in accordance with the minimum standard set by the Directive. It is unclear what is meant with 'broader protection' as referred to in the question. If this is meant to refer to elements that do not cover (minimum) wages as such but include also social security contributions and pensions, it can be said that the statutory minimum wage and the collective agreements concerned do not go beyond the limits set by the ECJ's case law as to the applicability of minimum wages. Nevertheless, it does not automatically mean that the wage provisions as such cannot be broad.

The collective agreements in the construction and temporary agency work sector contain a list of elements constituting the minimum wage applicable to posted workers (see Annex 3 Bouw CAO and Annex IV ABU CAO). No such specifications can be found in the collective agreements of the transport (referring to wage and other compensation (*loon en overige vergoedingen*), see Art. 3(17) CAO Beroepsgoederenvervoer) and health and care sector (referring to salary (*salaris*)[275]). Van Hoek and Houwerzijl in their study from

[273] See for more information: <http://www.abu.nl/cms/showpage.aspx?id=13015> accessed 13 July 2015.

[274] See Art. 9 CAO Beroepsgoederenverboer (transport) and Art. 6(8) Bouw CAO.

[275] This is the gross amount from which the employer deducts social security contributions and income taxes. The amount excludes extra allowances, contributions, benefits and compensations based on the collective agreement (Art. 1.1(13) CAO Beroepsgoederenvervoer).

2011 refer to the fact that 'about half the provisions of the CLA [read: collective agreement] for the construction sector apply to posted workers, leading to a cost difference between posted and domestic workers of about 25%'.[276]

Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?

In fact, this question seeks to establish two different kinds of situations. The first part refers to the *application* of the PWD, while the second part of the question is about the *implementation* of the Directive. As to the *application* of the Directive there is a clear divide between the construction, temporary agency work, and the transport sector, on the one hand, and the health and care sector, on the other hand. It seems that, based on the answers provided by the Dutch trade union ABVAKABO the PWD is not relevant, i.e. is not used in practice in the health and care sector, in the Netherlands. With regard to the *implementation* of the Directive, apart from the health and care sector, it seems that all the other three sectors have, to a varying degree, implemented the Directive. Implementation may differ as to the different wage elements that are taken into account for calculating/establishing the sectoral minimum wage, which means that there are differences in the content and quantity of the elements that are considered being a minimum wage. Art. 2(6) Act on the Extension of the Terms of Collective Agreements almost literally reiterates the hard core of employment conditions laid down in Art. 3(1)(a) to (g) PWD.

One of the questions in the interview questions template referred to enforcement. That question, at least not in the way posed, does not come back in the country report template. Nevertheless, some information on enforcement is in order, as application and implementation are closely related to each other. According to the Inspectie SZW, enforcement is characterised by a combination of private (wages exceeding the statutory minimum and collectively agreed wages) and public (statutory minimum wage) enforcement of the minimum wage as referred to in the PWD. The Inspectie SZW is entrusted with the public enforcement of the statutory minimum wage as laid down in the Minimum Wage Act. Controls take place on the basis of risk analysis, as elaborated in the long-range plan (*meerjarenplan*) of the Inspectie SZW. Underpayment is characterised as one of the high risks in the long-range plan. Monitoring and enforcement of collectively agreed wages is entirely left to the social partners. In case there is a good reason to believe that provisions of a generally binding collective agreement are not complied with, the social partners can ask the Minister SZW, based on Art. 10 Act on the Extension of the Terms of Collective Agreements, to start investigations on the compliance of collective agreements. If the Minister agrees to conform to a request, the Inspectie SZW will draw a report with its findings and send this to the social partners that have lodged the request. With this information, social partners are able to start a judicial procedure.

Q6: **To what extent is the subject of the minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.**

[276] Aukje van Hoek and Mijke Houwerzijl, *Comparative Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union* (Study to the European Commission Contract Number VT/2009/0541, 2011), p. 65, with reference to information received by a spokesperson of FNV Bouw.

The posting of workers is in that sense of particular concern to social partners, policy makers and companies as particular attention is paid to this form of work. Nevertheless, the posting of workers becomes less relevant when employers have other options to employ or hire cheap(er) employees, such as self-employed individuals, and forms of employment that deviate from the standard full-time permanent employment relationship.

Nevertheless, the posting of workers is of particular interest to the construction, temporary agency work and transport sectors, as these are sectors where frequently posted workers are temporarily employed. However, this, at least for the construction sector, does not necessarily mean that one can speak of 'temporary' posting. In particular in the construction sector, practice shows that many workers are posted to the Netherlands via temporary-work agencies and letterbox companies. These workers are hired to provide services across the borders and do not normally work in the home state for the undertaking concerned. Posted workers often are posted from project to project. Main contractors often cooperate with the same subcontractors. Wherever there is a large construction undertaking contracting work, the same posted workers appear, because usually the same temporary-work agencies are used for subcontracting work. On average, posted workers are "posted" for one or two years per project, depending on the type of work to be performed. As a result of this kind of strategy, posted workers work for many years in the Netherlands, often based on flexible contracts. This means that these workers are not likely to complain about underpayment, as otherwise they will be dismissed. Why should they complain anyway if they earn more than in the state in which they habitually reside? Even if a trade union is eager to enforce the collective agreement, it has to pay the posted workers for that. One of the biggest problems thus is the misuse of 'temporary posting' and ensuring compliance with collective agreements.

As said earlier, social partners are particularly concerned about the gross/net wage arrangements that are being made between the employer making the posting and the workers he posts. Furthermore, because social security and tax is subject to the law of the country in which the posted worker normally works, there is a comparative advantage for undertakings posting workers, which makes the provision of services less expansive for undertakings established in host states.

The issue of posting of workers is a research topic in particular in law[277], but also in political economy[278].

[277] Frans J.L. Pennings, 'Arbeidsrechtelijke aspecten van detachering van werknemers in/uit België en Nederland' in Frans J.L. Pennings (ed), *Tewerkstelling over de grenzen, Reeks Vereniging voor Arbeidsrecht nr. 25* (Kluwer 1996); Frans Pennings and Mijke Houwerzijl, 'Double Charges in Case of Posting of Employees: the Guiot Judgment and Its Effects in the Construction Sector' (1999) 1 EJSS 91 AAH van Hoek, *Internationale mobiliteit van werknemers: Een onderzoek naar de interactie tussen arbeidsrecht, EG-recht en IPR aan de hand van de Detacheringsrichtlijn* (Sdu 2000); Aukje AH van Hoek, 'Collectieve handhaving van het arbeidsrecht en internationale detacheringen: taakverdeling tussen publieke en private instanties en handhavingslacunes' in Anthonie W. Jongbloed (ed), *Samen sterk, over optreden in rechte door groeperingen* (BJu 2002); Mijke S Houwerzijl, 'De deur een kier of wijd open voor verkeer van (gedetacheerde) werknemers uit de toetredende lidstaten?' (2004) 59 SMA 176; Mijke Houwerzijl, 'Minimumloonregeling voor gedetacheerde werknemers rechtvaardigt belemmeringen van het vrije dienstverkeer' (2005) 9 NTER 185; Mijke S Houwerzijl, 'Bevordering van het EU-dienstenverkeer met behulp van gedetacheerde werknemers: tijd voor bezinning?' (2005) 9 SMA 406; Mijke S Houwerzijl, *De Detacheringsrichtlijn: Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (diss. UvT, 2005); Mijke S Houwerzijl, 'Administratieve verplichtingen bij grensoverschrijdende detachering van werknemers: noodzaak of 'red tape'?' (2007) 10 SMA 360; Aukje AH van Hoek and Mijke S Houwerzijl, 'Loonconcurrentie als motor van de interne markt? Een tweeluik – Deel 2: De arresten *Laval, Rüffert* en *Commissie/Luxemburg*, interpretatie van de Detacheringsrichtlijn' (2008) 14 NTER 337; Veerle van den Eeckhout, 'Alle wegen leiden naar Rome (I), alle wegen vertrekken vanuit Rome (I)!? Mogelijkheden tot opheldering van ipr-onduidelijkheden bij internationale detachering' (2009) 8 ArA 3; Mijke S Houwerzijl and Miriam Kullmann, 'Werknemersmobiliteit binnen de EU' (2010) 17 ArbeidsRecht 27; Mijke Houwerzijl, 'The Dutch Understanding of Posting of Workers in the Context of Free Services Provision and Enlargement: A

II. WAGE-SETTING MECHANISMS

II.1. A better understanding of minimum wage-setting mechanisms

Q7: **Which types of legal instruments/practices are used to set minimum wages? Describe in details the mechanism(s) used.**

- **Statutory provisions**
- **Law, regulations or administrative provisions**
- **other administrative practices (e.g. "social clauses" in public procurement rules)**
- **Collective agreements**
- **collective agreement with "statutory" value (e.g. procedure of extension)**
- **cross-industry**
- **multi-sectoral, sectoral**
- **local (regional, community…)**
- **company or infra-company (e.g. establishment level)**
- **management unilateral rules**
- **arbitration awards**
- **other mechanisms/practices**

Which collective agreement are (or may be) universally applicable within the meaning of Article 3(8) PWD?

According to Dutch labour law, employees are at least entitled to be paid according to the statutory minimum wage level (adjusted twice a year -in January and July) or, where a generally binding collective agreement applies, the wage laid down in that agreement. All collective agreements applicable in the four sectors of concern in this study are generally binding, thus have a statutory value. The applicable collective agreements are: ABU CAO (Federation of Private Employment Agencies Collective Agreement (*Algemene Bond Uitzendondernemingen Cao*, ABU) for the temporary-work agency sector[279] applicable from 2012 to 2017; the Bouw CAO (Construction Sector Collective Agreement)[280]; CAO

Neutral Approach?' (Formula, 2010); Miriam Kullmann, 'The Principle of Effet Utile and its Impact on National Methods to Enforce the Rights of Posted Workers' (2013) 29 IJCLLIR 283; Fieke van Overbeeke, 'Het toepasselijk recht op gedetacheerde werknemers na de Handhavingsrichtlijn inzake de Detacheringsrichtlijn' (2014/44) ArbeidsRecht 18; Miriam Kullmann, *Enforcement of Labour Law in Cross-Border Situations*, vol 14 (Sebastian Kortmann and Dennis Faber eds, Kluwer 2015).

[278] See, e.g., Nathan Lillie, Ines Wagner and Lisa Berntsen, 'Posted Migration, Spaces of Exception, and the Politics of Labour Relations in the European Construction Industry' in Marco Hauptmeier and Matt Vidal (eds), *Comparative Political Economy of Work* (Critical Perspectives on Work and Employment, Palgrave Macmillan 2014); Nathan Lillie and Lisa Berntsen, 'Hyper-Mobile Migrant Workers and Dutch Trade Union Representation Strategies at the Eemshaven Construction Sites' (2014) Economic and Industrial Democracy 1.

[279] See for the text of the collective agreement in Dutch (http://www.abu.nl/yourpassage/CAO_Uitzendkrachten_2012-2017/index.html accessed 13 July 2015) and in English (http://www.abu.nl/yourpassage/collective_labour_agreement_temporary_agency_workers/index.html accessed 13 July 2015). The collective agreement has been declared generally binding by Besluit van de Minister van Sociale Zaken en Werkgelegenheid van 12 maart 2015 tot wijziging van het besluit tot algemeen verbindendverklaring van bepalingen van de collectieve arbeidsovereenkomst voor Uitzendkrachten, 13 September 2013, *Stcrt*. 2013, 24290, and amended by Besluit van de Minister van Sociale Zaken en Werkgelegenheid van 12 maart 2015 tot wijziging van het besluit tot algemeen verbindendverklaring van bepalingen van de collectieve arbeidsovereenkomst voor Uitzendkrachten, *Stcrt*. 2015, 926.

[280] After a lengthy debate, on 13 June 2015 a new collective agreement in the construction sector has been agreed upon (see: http://www.fnvbouw.nl/actueel/nieuws/paginas/Onderhandelingsresultaat_Cao_Bouwnijverheid_1481.aspx accessed: 13 July 2015). As the new version is not available yet, please refer to the old version applicable until 31 December 2014:

Beroepsgoederenvervoer (Road Transport and Haulage Collective Agreement) applicable from 1 January 2014 to 31 December 2016[281]; and CAO Verpleeghuizen, Verzorgingshuizen, Thuiszorg (VVT) applicable from 2014 to 2016[282].

Q8: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)**

In case there is a generally binding collective agreement, the latter prevails over the statutory minimum wage.

Q9: **To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wages? What groups/what share of workers do not receive the minimum wages, and what reasons can be identified?**

It can be suggested that there is some – although implicit – influence from the statutory minimum wage that is adjusted twice a year. As the statutory minimum wage, serving as a floor, is raised regularly, this has an impact on the higher wage categories as well. In order to distinguish wage categories in collective agreements from the lowest levels, the higher levels must be raised as well.

Whether someone performing a service or work receives the statutory minimum wage or the collectively agreed (and generally binding) sectoral wage depends on the question whether s/he is covered by the personal scope of the act or agreement. Generally, all those who have an employment relationship or contract under civil law are covered. Collective agreements may explicitly include or exclude individuals from the personal scope (Art. 1(6) to (11) Bouw CAO, Art. 1 and 2 ABU CAO, Art. 1.1 and 1.2 CAO VVT, Art. 2 CAO Beroepsgoederenvervoer).

For the statutory minimum wage it must be emphasised that there are some doubts as to the efficiency with regard to the protection of workers regarding the youth minimum wage levels. The statutory minimum wage applies to workers aged 23 to 65 years, although there is a legislative proposal to apply the Minimum Wage Act to those beyond 65 years as well.[283] Making age the characteristic for being eligible to receive the statutory minimum wage, means that those individuals who have not reached the age of 23 receive a wage that is below the statutory minimum. For them, a so-called youth minimum wage applies. The following monthly youth minimum wage levels apply as of 1

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http://www.fnvbouw.nl/SiteCollectionDocuments/Cao%27s/Bouwnijverheid/Cao%20bouw%20november%202014.pdf accessed 13 July 2015.

[281] See https://www.fnv.nl/site/alle-sectoren/caos/caos/9034/TLN_cao_2014-2016.pdf accessed 13 July 2015. Declared generally binding by Besluit van de Minister van Sociale Zaken en Werkgelegenheid van 6 februari 2015 tot algemeen verbindendverklaring van bepalingen van de collectieve arbeidsovereenkomst voor het Beroepsgoederenvervoer over de weg en de verhuur van mobiele kranen, *Stcrt*. 2015, 961.

[282] See https://www.fnv.nl/site/alle-sectoren/caos/caos/915832/919301/919308/vvt-2014-2016 accessed 13 July 2015. Declared generally binding by Besluit van de Minister van Sociale Zaken en Werkgelegenheid van 26 februari 2015 tot algemeen verbindendverklaring van bepalingen van de collectieve arbeidsovereenkomst voor de Verpleeg-, Verzorgingshuizen en Thuiszorg, Kraam- en Jeugdgezondheidszorg, *Stcrt*. 2015, 4815.

[283] *Wet werken na de AOW-gerechtigde leeftijd* (Act on working beyond pensionable age), which likely to be adopted in September 2015.

July 2015: 15 years – 452.35 EUR; 16 years – 520.20 EUR; 17 years – 595.60 EUR; 18 years – 686.05 EUR; 19 years – 791.60 EUR; 20 years – 927.30 EUR; 21 years – 1,093.15 EUR; 22 years – 1,281.65 EUR.[284]

Q10: **To what extent do the wage-setting mechanisms differentiate rules on minimum wage according to:**

- **Employee's conventional classification,**
- **Employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.),**
- **Employment policies: type of working contract (e.g. low number of hours /week), person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc.**
- **Other criteria**

The statutory minimum wage does not distinguish based on the worker's experience or type of employment contract etc. It does, however, distinguish between those being entitled to receive a youth minimum wage and those between 23 and 65 years being entitled to the normal statutory minimum wage.

Collective agreements, however, take more criteria into account. The following table will provide a comparative overview of the four sectors.

Sectors	***Differentiating according to...***	***Relevant provisions***
Temporary agency work	as of 1 January 2015, from the first day, a temporary agency worker is entitled to receive the user undertaking's remuneration. For this, the worker will be graded in the job list applying to the user undertaking before commencement of the assignment. Grading takes place based on the basis of information as provided by the user undertaking. So, the user undertaking's remuneration is based on: the user undertaking's job grade, amount of salary, applicable working hours' reduction, level of period-linked salary amount, amount and time of initial wage increase, expenses allowances and bonuses.	Art. 20 ABU CAO (job classification, *functieindeling*)
Construction	construction workers are classified according to job groups ranging from A to E, which is based on job requirements with regard to education/training, experience, safety and health, aggravating physical working conditions, lead and the extent to which decisions must be taken independently. Besides, age is a distinguishing characteristic that is taken into account: workers between 16 and 21	Annex 9a-1 Bouw CAO

[284] See <http://www.rijksoverheid.nl/onderwerpen/minimumloon/vraag-en-antwoord/hoe-hoog-is-het-minimumloon.htm> accessed 13 July 2015.

	receive a lower wage than those who have reached the age of 22 years.	
Transport	experience is relevant for job classification and thus wage; if the worker is aged between 15 and 21, a lower wage can be paid ranging from 45 to 95% of the normal wage	Art. 18, 19 CAO Beroepsgoederenvervoer (job classification)
Health and care	job classification takes place based on the level of education/training (qualification level) as well as experience and job groups requiring different kinds of qualifications and tasks	Art. 3.1 CAO VVT

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

It is clear that the adoption and implementation of the PWD has led to identifying the hard core employment conditions more specifically in the construction and the temporary agency work sectors. Here, particular annexes exist identifying the applicable employment and working conditions and the corresponding provisions in the collective agreement. In that sense, social partners have been 'forced' to specify exactly the applicable wage elements to create more transparency for foreign service providers who temporarily post their workers to the Netherlands. The collective agreement in the health and care sector, the CAO VVT, does not conform to the requirement of making mandatory employment conditions belonging to the hard core provisions visible. A reason for that, as provided by the trade union representative, is the irrelevance of the posting of workers in the health and care sector.

Q12: **How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce minimum wage?) Is there an automatic indexation rule? Which criteria are taken into account when deciding on changes of the minimum wage level?**
Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

For the statutory minimum wage, an answer to this question has been provided earlier. As to the four sectors concerned, this question should have been part of the questionnaire sent to the interviewees, in particular the social partners. As setting the wage is for the social partners to bargain on, there is some discretionary power on their behalf to raise or lower wages as long as this is in accordance with the statutory minimum wage, which means it may not go below the minimum wage level.

II.2. Minimum wage-setting mechanisms in the context of posting of workers

Q13: **What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?**

- **To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?**
- **To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?**
- **To what extent would the extension be easy to implement (and to control) from an administrative point of view?**
- **To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?**
- **To what extent would it reduce the displacement effect on local undertakings and labour force?**

As there is a system to declare collective agreements generally binding, this question is not relevant and thus cannot be answered.

III. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

III.1. Constituent elements of the minimum rates of pay: the host country perspective

Q14: **Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).**

To start with, in the context of the posting of workers, no social security contributions or income taxes may be deducted based on host state law, as it remains, at least for a certain duration as follows from EU law, in the competence of the state in which the posted worker normally works.

The Dutch Social Economic Council (*Sociaal Economische Raad)* published advice in November 2014 on labour migration, including the posting of workers. In reaction to that advice, the Government, on request of the Labour Foundation (*Stichting van de Arbeid*) identified the wage elements belonging to the hard core employment conditions, such as the minimum wage, and what is included is the gross wage for regular working time on the basis of a full-time worker including initial wage increases and increments. Accordingly, in case a wage element applies to all workers, it belongs to the minimum wage. Also part of the minimum wage is the so-called thirteenth month or Christmas bonus.[285]

[285] Kamerbrief, Kabinetsreactie SER-advies arbeidsmigratie TK, 16 June 2015 http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2015/06/16/kamerbrief-met-kabinetsreactie-ser-advies-arbeidsmigratie-ek.html (accessed 20 July 2015).

As the collective agreements concerned are declared generally binding, they fulfil the conditions imposed by Art. 3(1) PWD. The following overview specifies the applicable wage elements per collective agreement: (1) construction sector; (2) temporary agency works sector; (3) transport sector; and (4) health and care sector.

(1) Construction sector

According to Annex 3, Part I Bouw CAO addressing the hard core provisions that must be applied to posted workers, the following wage elements are included in the definition minimum wages, which means compensation for overtime, but excluding supplementary company pension regulations (*aanvullende bedrijfspensioenregelingen*).

Provisions	*Content*	*PWD classification*
Art. 30, 31	overtime allowance (*overwerkvergoeding*)	extra-payment for overtime
Art. 32a	bonuses for unsocial hours for infrastructural work (toeslag verschoven uren Infra)	additional remuneration based on working conditions
Art. 32b	bonuses for unsocial hours for tidal work (*toeslag verschoven uren Tijwerk*)	additional remuneration based on working conditions
Art. 33	bonuses for shift work (*toeslag ploegendienst*)	additional remuneration based on working conditions
Art. 34	compensation for on-call work (*vergoeding bereikbaarheidsdienst*)	additional remuneration based on working conditions
Art. 41a, 41b	job classification (*functie-indeling*)	n/a
Art. 42a-42c, 43	guaranteed wage and wage scales (*garantielonen en salarisschalen*)	gross basic salary
Art. 44	wage rise (*loons- en salarisverhogingen*)	gross basic salary
Art. 45	performance pay (*prestatiebeloning*)	
Art. 46a, 46b	holiday allowance (*vakantietoeslag*), not holiday pay(!)	holiday allowance (also: bonus granted on regular basis)
Art. 49	method of paying wages (*wijze van loonbetaling*)	n/a
Art. 50, 54	travel reimbursement (*reiskostenvergoeding*)	costs reimbursement
Art. 51	travel time reimbursement (*reisurenvergoeding*)	additional remuneration based on working conditions
Art. 52	driver's bonus (*chauffeurstoeslag*)	additional remuneration based on working conditions
Art. 53	accident-free driving bonus (*premie schadevrij rijden*)	additional remuneration based on working conditions
Art. 55	compensation for remote construction sites (*vergoeding verafgelegen werken*), inter alia compensation for meals, accommodation	additional remuneration based on working conditions
Art. 56	compensation for working clothes and equipment (*vergoeding werkkleding en gereedschap*)	costs reimbursement
Art. 56 and 57	allowance for masonry work (*toeslag steenzetterswerkzaamheden*)	additional remuneration based on working conditions

(2) Temporary agency work sector

Please note that here only the minimum wage elements of the ABU CAO can be provided; for the user undertaking's remuneration one has to consult the applicable collective agreement of the sector in which the user is active (see also above). However, the ABU CAO refers to the remuneration, including allowances and compensation, as is paid in the user undertaking, indicating that the agency will conform to these rules to ensure that temporary agency workers and workers employed with the user undertaking an equal or similar job benefit from equal or similar employment and working conditions.

Provisions	***Content***	***PWD classification***
Art. 20, 29, 30, 31, 32	job classification and remuneration (*functie-indeling en beloning*)	n/a
Art. 20(1) and (2), 27(1), (2), (3) and (4), 29(1), 30(1), 31(1,) 32(1), 46(2), (3)(a) and (c)	remuneration (*beloning*)	gross basic wage
Art. 51	temporary agency workers working in the construction industry (*uitzendkrachten werkzaam in de bouw*)	n/a
Art. 20(3) and (5), 26, 27(1), 28(2), 29(4), 33, 34, 50	mandatory correction in connection with statutory minimum wage if wage under ABU is below statutory minimum (*ABU-gebouw*); salaries of young people; conversion of employment conditions into tax-free reimbursements/benefits in kind	n/a
Art. 23, 35	initial wage increase (*initiële loonsverhoging*)	n/a
Art. 25, 28(3)(a)	period-linked salary increase (*periodieke verhoging*)	n/a
Artikelen 20 lid 2 onder e, 22, 36 en 37	bonus for irregular working hours (*toeslagen onregelmatige werktijden*), overtime bonus (*overwerktoeslag*)	additional remuneration based on working conditions
Artikel 49	compensation hours (paid instead of bonus for irregular working hours; to be agreed between agency and agency worker) (*compensatieuren*)	additional remuneration based on working conditions
Artikelen 20 lid 2 onder e, 24 en 39	work-related expenses and allowances (*kostenvergoeding*)	costs reimbursements
Bijlage I (Annex I)	job classification (*functie-indeling*)	n/a
Bijlage II (Annex II)	additional provisions remuneration (*aanvullende bepalingen beloning*)	gross basic wage

(3) Transport sector

Art. 3(17) CAO Beroepsgoederenvervoer refers to wages and other forms of compensation (*loon en overige vergoedingen*). As the transport sector did not specify which provisions of the collective agreement in relation to wages apply to posted workers, the following is based on own assessment and interpretation of the notion 'wage and other compensation'. For a service provider established abroad posting his workers, this makes it less transparent. It can be noted that it is quite recent that the social partners came to include a provision making an explicit reference to the PWD. It can be derived from the 2011 of Van Hoek and Houwerzijl that the previous collective agreement, and in particular Art. 2 thereof, determined that the collective agreement 'is applicable to all employers and employees of road transport companies established in the

Netherlands'.[286] Thus, undertakings, like service providers, that were established abroad were explicitly excluded from the personal scope of the collective agreement.

Provisions	Content	PWD classification
Art. 27, 29, 30	overtime compensation in leisure time (*overuren tijd-voor-tijd*)	compensation in kind
Art. 32, 33	compensation for work on Saturdays, Sundays, holidays (*arbeid op zaterdag, zon- en feestdagen*)	additional remuneration based on working conditions
Art. 36	bonuses for shift work (*ploegendiensttoeslag*)	additional remuneration based on working conditions
Art. 37	bonuses for one-day night drive (*toeslag ééndaagse nachtritten*)	additional remuneration based on working conditions
Art. 38 A)	bonuses for dirty work (*vuilwerktoeslag*)	additional remuneration based on working conditions
Art. 38 B)	bonuses for working in cold (e.g. cold storage warehouse) (*koudetoeslag*)	additional remuneration based on working conditions
Art. 39	travel reimbursement (*vergoeding van reiskosten*)	costs reimbursement
Art. 40	reimbursement of accommodation (*vergoeding van verblijfkosten*)	costs reimbursement
Art. 41	reimbursement in case of there is temporarily no work while performing service (*vergoeding overstaan*)	costs reimbursement
Art. 42	bonuses for consignment (*consignatievergoeding*)	additional remuneration based on working conditions
Art. 47	travel reimbursement workers employed at mobile cranes (*reistijd werknemers tewerkgesteld op mobiele kranen)*	costs reimbursement
Art. 49	reimbursement of accommodation workers employed at mobile cranes (*vergoeding van verblijfkosten werknemers tewerkgesteld op mobiele kranen*)	costs reimbursement
Art. 55	bonus for irregular working hours (*onregelmatigheidstoeslagen*)	additional remuneration based on working conditions

(4) Health and care sector

In case the CAO VVT would be applicable to the posting of workers, the following elements could constitute the minimum wage.

Provisions	Content	PWD classification
Art. 1.1(13), 3.2	gross salary (*bruto salaris*)	gross basic salary
Art. 5.9	bonuses for on-call duties/consignation nursery homes (*vergoeding bereikbaarheids-, aanwezigheids- en consignatiedienst specifiek voor Verpleeg- en Verzorgingshuizen*)	additional remuneration based on working conditions
Art. 5.10	bonus sleep service for nursery homes	additional

[286] Aukje van Hoek and Mijke Houwerzijl, *Comparative Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union* (Study to the European Commission Contract Number VT/2009/0541, 2011), p. 38.

	(*slaapdienst*)	remuneration based on working conditions
Art. 5.12	bonus guard duties maternity carers (*wachtdiensten kraamverzorgenden*)	additional remuneration based on working conditions
Art. 5.15	bonuses for unsocial hours nursery homes (*verschoven dienst specifiek voor verpleeg- en verzorgingshuizen*)	additional remuneration based on working conditions
Art. 5.16	overtime compensation nursery homes (*overwork*)	additional remuneration based on working conditions
Art. 5.19	bonuses for irregular working hours (*onregelmatige dienst*)	additional remuneration based on working conditions
Art. 5.20	inconvenient working hours for maternity carers (*inconveniënte uren voor werknemers in de kraamzorg*)	additional remuneration based on working conditions
Art. 3.9	year-end bonus (*eindejaarsuitkering*)	additional remuneration based on working conditions

Q15: **Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)**

As for the Minimum Wage Act, there are certain elements that are explicitly not included in the notion statutory "minimum wage". Accordingly, not included in the concept of a statutory minimum wage, either because they do not have recurrent character or because they are granted on the basis of personal qualities, whereby there is no relation with the performance of work, are: extra income earned for working overtime; holiday allowances; distribution of profits; special payments, such as an incidental payment for turnover achieved, payments that will be awarded under certain conditions with the lapse of time (e.g. part-payment of contributions for pensions or savings by the employer); reimbursement of costs a worker has to incur for work purposes; Christmas and year-end bonuses; and the employer's contributions to medical expenses.[287] In terms of "minimum rates of pay" which is broader than the flat minimum wage, it is not excluded to consider also, e.g., overtime compensation as part of the minimum rates of pay.

As explained above, Dutch collective agreements, and in particular in the construction and the temporary agency work sectors, include the constituent elements of the sectoral minimum wage[288] rather than excluding explicitly certain elements. Clearly not included in the abovementioned lists are social security contributions and income taxation rules.

Q16: **Which components (NB: use the indicative list above) are in the "grey area"? (not clearly belonging or excluded for the calculation of the minimum pay rates)**

[287] Miriam Kullmann, *Enforcement of Labour Law in Cross-Border Situations*, vol 14 (Sebastian Kortmann and Dennis Faber eds, Kluwer 2015), p. 81-82.

[288] The reference to minimum wage(s) is based on the collective agreements' use of that notion. In relation to the PWD, however, it may be translated into "minimum rates of pay".

Explain your response and give examples. Describe concrete difficulties encountered per sector.

By identifying which components are included for the calculation of the minimum pay rates, it is not necessary to answer this question.

Q17: **In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?**

There are, except for the temporary agency work sector, no specific rules applicable to posted workers in order to determine the constituent elements of the minimum rates of pay. Based on what has been said earlier, it can be said that, either explicitly or implicitly, the ECJ's case law seems to be taken into account when identifying the applicable wage provisions of the generally binding collective agreements. This certainly is true for the collective agreements applicable in the construction and the temporary agency work sectors. With regard to the agency work sector, in chapter 10 of the ABU CAO (Art. 64-68), it is determined that part of the gross wage may be paid in kind, which is sensitive to fraud. Besides, costs made in relation to accommodation and sickness insurances may be set-off against the wage. The latter is possible with regard to the statutory minimum wage, but only if certain conditions are fulfilled.[289]

Q18: How do the differences in the definition of minimum rates of pay impact the income levels of posted workers (also taking into account compensation of expenses)?

Q19: In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with the requirements of the host country on minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach the minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)

As said earlier, without proper enforcement it cannot be assessed what posted workers actually earn when being posted to the Netherlands, that means neither what their employers actually pay them, or what elements of the lists based on the collective agreements as provided above are included in the pay posted workers receive can be assessed.

According to the trade union FNV Bouw in the construction sector, practices have been identified whereby the gross wage consists of a fixed amount per hour and a tax-free compensation according to the regulations applicable in the home state (for instance, a posting bonus of 25%). FNV Bouw is of the opinion that, in addition to the gross wage, tax-free compensation must be paid, and not by combining both, that is to say by making the bonus part of the gross wage, to reduce the actual hourly wage costs for the employer. Over the lower gross wage taxes and social security contributions are paid,

[289] See *Wet aanpak schijnconstructies*, which entered into force on 1 July 2015. See also Miriam Kullmann, 'Verrekening en inhouding Wet Minimumloon en de bredere arbeidsrechtelijke handhavingsproblematiek' (2015) 4 TAO 28.

which could be seen as fraud. In any case, this leads to the fact that the wage costs are illegitimately low and fewer contributions and taxes are paid to the state, either in the home or host state.

It should be added that the higher the wage of posted workers is, the higher the contributions for social security and pensions, as well as income taxes. Home states would thus – financially at least – benefit from a more active monitoring and enforcement role.

As to the question of comparing wages under the sending and host countries' laws and collective agreements, the following can be said. According to Art. 3(7) PWD, which has not been implemented in the Terms of Employment (Cross-Border Work) Act, the Netherlands has interpreted right from the beginning the said provision in line with the ECJ's case law, as confirmed by Viking and Laval.

The Dutch legal system, according to the Minister of Social Affairs and Labour, prescribes a comparison of the home and host state employment conditions as imposed by the PWD, including wages, on the level of each provision. However, no specification applies in relation to wages alone. But, based on the previous, it can be said that each element of the wage, as applied according to home state law or according to the law that applies to the employment relationship between the employer posting his employees, will be compared with the elements that are included in the Dutch statutory or collectively agreed minimum wage. Elements that are paid in the home but not in the host state will be taken into account, except for those elements excluded as determined by the PWD. However, if the Dutch collective agreements require wage elements that must be paid that are not known in the home state, the employer making the posting is obliged to pay these elements to his posted workers for the duration of the posting. The collective agreements in the construction and temporary agency work sector make clear which wage elements must be paid, which makes comparison easier.

III.2. Constituent elements of the minimum rates of pay: the sending country perspective

Q20: **In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

From a sending state perspective, which hardly occurs for the Netherlands at least, it may be easier to control employers on compliance with collectively agreed wage provisions or the statutory minimum wage. Nevertheless, according to Art. 2 of the Dutch implementation act, the *Wet arbeidsvoorwaarden grensoverschrijdende arbeid*, employees who work outside the Netherlands or have worked temporarily in an EU Member State are entitled to receive, the employment conditions established by the Netherlands, regardless the law applicable to the employment contract.[290]

[290] In Dutch: 'Een werknemer die tijdelijk buiten Nederland arbeid verricht of heeft verricht in een lidstaat van de Europese Unie of in een andere staat die partij is bij de Overeenkomst betreffende de Europese Economische Ruimte kan, ongeacht het recht dat de arbeidsovereenkomst beheerst, met betrekking tot die arbeid aanspraken ontlenen aan het recht dat eerderbedoelde staat heeft vastgesteld ter uitvoering van de Richtlijn 96/71/EG van het Europees parlement en van de Raad van de Europese Unie van 16 december 1996

The social partners that have participated in this study all mentioned that there is no information on compliance in relation to the PWD.

ANNEX I – USEFUL INFORMATION (as provided by the social partners)

Construction sector

- http://nlconstruction.info/
- http://www.posting-workers.eu/
- http://www.fnvbouw.nl/actueel/nieuws/paginas/Bouw_IDpas_1487.aspx

Temporary agency work sector

- ABU CA text: http://www.abu.nl/cms/showpage.aspx?id=8865; excluded from personal scope: NBBU: https://www.nbbu.nl/pagina/nbbu-cao-voor-uitzendkrachten
- ET-regeling Flex-migranten (see answer to Q1): http://www.abu.nl/cms/showpage.aspx?id=10551
- Flexcijfers: http://www.flexbarometer.nl/1Aantalflexwerkers.aspx
- Zelfcertificering Uitzendbranche: http://www.normeringarbeid.nl/keurmerk/default.aspx
- CAO compliance and enforcement: http://www.sncu.nl/
- Inspectie SZW: http://www.inspectieszw.nl/onderwerpen/arbeidsverhoudingen/malafide_uitzendbureaus/index.aspx

betreffende de terbeschikkingstelling van werknemers met het oog op het verrichten van diensten (PbEG 1997, L18)'.

POLAND

I. BACKGROUND INFORMATION

Q1: **To what extent is the minimum wage amount connected to:**

- **(local) living costs?**
- **average salaries (general / sectoral)?**
- **social policies?**
- **fight against social dumping and protective measures? (e.g. fair competition at national or international level between companies?**
- **other national/international matters?**

The minimum wage in Poland is regulated by Act of 10 October 2002 on the Minimum Wage (Remuneration) for Work[291]. The mechanism for determining the minimum wage amount is based on indexation mostly in line with changes in the prices of goods and services, information about average household spending and information on the standard of living of various social groups. The minimum wage amount is adjusted according to inflation on a quarterly basis.

Below I present a methodology and macro-economic data which have an impact on the minimum wage amount.

Pursuant to Article 2 (2) of the Minimum Wage Act, the procedure starts with the Council of Ministers presenting to the Tripartite Commission, by 15 June of each year, the following documents:

1) the proposal of the minimum wage for the coming year, along with the effective date of the change in the amount of the remuneration,
2) information on the price index in the previous year,
3) information on the forecast of the price index and the ratio of the average remuneration for the next year,
4) the amount of remuneration in the first quarter of the year in which negotiations take place,
5) information on household expenditure in the previous year,
6) information on the amount of average monthly remuneration in the previous year, by type of activity,
7) information on the standard of living of different social groups,
8) information on the economic conditions of the country regarding the state budget, the requirements of economic development, levels of productivity and the need to maintain a high level of employment, and
9) the projected effective growth rate of the gross domestic product.

[291] Ustawa z dnia 10 października 2002 r. o minimalnym wynagrodzeniu za pracę Act of 10 October 2002 on the Minimum Wage (Remuneration) for Work (Dz.U. 2002 nr 200 poz. 1679 Z PÓŹ ZM. Journal of Laws 2002, No 200, item 1679, with subsequent amendments).

The proposition of the minimum wage amount comes from the Council of Ministers taking into account all the above mentioned factors. However the amount proposed by the Council of Ministers has a floor, as the average minimum wage in a given year should grow at least in line with the price index forecast for the given year (Article 5 (1) of the Minimum Wage Act).

Upon receipt of the above information, the Tripartite Commission decides upon the minimum wage amount for the next year no later than 15 July of each year (Article 2 (3) of the Minimum Wage Act).

The amount is then published, as the Prime Minister's announcement, in the Official Journal of the Republic of Poland – *Monitor Polski* – not later than on 15 September of each year (Article 2 (4) of the Minimum Wage Act). The new rate becomes effective from the 1 January of the next year.

The minimum wage is in principle updated once a year in this procedure. However, if the price index, which constitutes one of the determinants of the minimum wage, exceeds a certain level (105% or higher), the minimum wage is updated (adjusted) twice a year.

Since 1 January 2015 the minimum wage for work has been PLN 1,750 (legal basis: rozporządzenie Rady Ministrów z dnia 15 września 2014 r. w sprawie wysokości minimalnego wynagrodzenia za pracę w 2015 r., (Dz.U. z 2014 r., poz. 1220). [Regulation of the Council of Ministers of 15 September 2014 on the minimum remuneration for work in 2015] (Journal of Laws 2014, item 1220)[292]. After reduction of contributions for social insurance, personal income tax and health insurance, the remaining net amount is approx. PLN 1,286.16.

Q2: **How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?**

National Labour Inspectorates

The National Labour Inspectorate was designated simultaneously as the liaison office and national body for the purposes of implementing Directive 96/71/EC in the Polish legal system[293]. It is also the institution obliged to inform foreign employers about universally binding rules of law, applicable to work performed in the territory of the Republic of Poland (Chapter IIa of the Labour Code)[294].

The National Labour Inspectorate is entitled to impose on employers orders having the legal value of an administrative decision. These include, among others:

- orders to eliminate the identified irregularities within a specified time-limit;
- orders to cease the operation of machines and equipment when their operation causes an immediate hazard to the life or health of humans (orders in these matters are to be enforced immediately);

[292] http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140001220 .

[293] Act of 13 April 2007 on the National Labour Inspectorate, Journal of Laws 2007, No 89, item 589, with subsequent amendments.

[294] Article 13, paragraph 1, point 13 of the National Labour Inspectorate Act.

- prohibitions to perform work or activity in places, where the state of working conditions causes immediate hazard to the life or health of humans (orders in these matters are to be enforced immediately);
- orders for the employer to pay the employee due remuneration for work as well as other due benefits (orders in these matters are to be enforced immediately).

Thanks to its broad competencies, the National Labour Inspectorate, both at regional (District) and central levels, constitutes one of the most reliable sources of data relating to the wages of posted workers in practice. The National Labour Inspectorates, according to Act of 13 April 2007 on the National Labour Inspectorate, is the authority competent to supervise and inspect the observance of labour law, in particular safety at work and health regulations and rules, as well as regulations on legality of employment and other paid work. It is the only entity within the entire administrative system that has the competence to review private contract provisions, such as the provisions of an employment contract. Therefore, for instance, the Marshal of the Pomeranian Voivodship (on whose behalf acts the Voivodship (Regional) Labour Office) registers and controls temporary agencies but it has no power to monitor contractual provisions between a temporary work agency (employer) and a temporary worker. The Voivodship (Regional) Labour Office only controls public duties of employers, for instance, social insurance contributions, personal income tax and health insurance.

Representative of public authorities

Unfortunately, the deputy of the District Labour Inspector to legal and organisational matters in the Pomeranian Region, answered that there are no special data in this regard. He was not in a position to give any information about the remuneration of posted workers in each of the considered sectors[295]. The main reason for this situation lies in the small number of inspections of companies posting workers to the territory of Poland during the last years. Another reason is the very short time for the answer, which has not allowed gathering specific data.

Health Care Services

The concept of subcontracting is applied to extend an offer by health care facilities to the territory branches of *Narodowy Fundusz Zdrowia* [National Health Fund]. Legal bases of this institution are included in: *ustawa z dnia 24 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych* [Act of 24 August 2004 on Health Care Services Financed from Public Funds (Article 133 and Article 136)][296], *rozporządzenie Ministra Zdrowia w sprawie ogólnych warunków umów o udzielanie świadczeń opieki zdrowotnej* [Ordinance of the Minister of Health on General Conditions of Contracts on Provision of Health Care Services] (Article 1 (18))[297], *ustawa o zakładach opieki zdrowotnej* [Healthcare Facilities Act]*(*Article 35 (1) (12))[298].

[295] Conclusions based on written response to questions (Annex B) which was sent on 17 July by the District Labour Inspector in Pomeranian Region.

[296] Tekst jednolity: Dz.U. z 2008 r., Nr 164 poz.1027, z późniejszymi zmianami [Consolidated text: Journal of Laws 2008 No. 164 item 1027 with subsequent amendments].

[297] Dz.U. z 2008 r. Nr 81, poz. 484 [Journal of Laws 2008 No. 81 item 484].

[298] Teks jednolity: Dz.U. z 2007 r., Nr 14 poz.89, z późniejszymi zmianami [Consolidated text: Journal of Laws 2007 No. 14 item 89 with subsequent amendments].

Thereby, medical facilities can provide comprehensive medical services offered not only by their employed staff. **Subcontracting is widely applicable, mainly in public hospitals in a form of outsourcing**. It enables hospitals to limit their operations to *strict* closed treatment and therefore to reduce costs of these facilities' operation. It should be noted that if the public facility enters into the contract with the National Health Fund, it will not be entitled to provide commercial services.

Subcontracting in healthcare can be realised by both national enterprises and foreign ones. There is no legal obstacle for foreign companies to post workers to supply medical services or to send workers to medical services outside Poland. Nevertheless posting does not occur because of economic reasons. Polish public hospitals cannot afford to send their workers to perform services abroad because they do not have sufficient funds to pay the posted workers' wages which are usually higher than the ones paid in Poland. There are also no economic benefits associated with posting workers to the Polish territory in this sector, due to the low amount of remuneration of Polish health care workers, notably doctors and nurses. Such forms of posting as outsourcing or outplacement in the medical and health sector are applied first of all to reduce the costs of work and to fill the personnel deficits resulting from the emigration of workers for economic reasons. For that reason, public closed hospitalisation institutions most often employ doctors under individual medical practice (the general specialist or group ones) considered by law as single-person business entities, and nurses usually perform their work under civil law contracts.
It should be underlined that large amounts of Polish doctors and nurses emigrate for economic reasons (which is particularly evident in the Pomeranian voivodship). They usually perform their work directly for foreign employers. In these circumstances they are considered under European law as migrant workers and not as posted workers. It results from the report of Okręgowa Izba Pielęgniarek [the Regional Nursery Chamber] that since Poland's accession to the EU approximately 30% of nurses and midwives have left the Pomeranian province and have gone to the Scandinavian countries, Germany and the United Kingdom but also to Italy[299].

Below same answers of respondents:

***Representative of public authorities*[300]**
If we talk about hospitals we have to bear in mind that Polish hospitals have problems even with paying wages in Poland. It is absolutely impossible for Polish hospitals to be able to afford to post a worker to Western Europe. However, a lot of Polish health care workers work abroad. As far as I know they have their own employment contract or are self-employed.

This information was also confirmed by **a representative of the employers' organisation dealing with matters pertaining to health and care services.**

Representative of public authorities
Our Office (Marshal Pomeranian Voivodship Office) usually does not post workers to other countries. There was only one case, in 2004; we were supposed to delegate one worker to Brussels. Surely he received the minimum remuneration that is applicable in Belgium.

[299] Newspaper article under the title: *Pielęgniarek jak na lekarstwo. W każdym z pomorskich szpitali brakuje co najmniej 30 proc. białego personelu [Deficit of nurses. In which of the Polish hospitals at least 30 per cent of the medical staff is missing]* of 10 July 2009.

[300] Interview conducted on 22 July.

However, it was such a huge amount of money in comparison to workers in Poland that we had to change this idea. Finally he got an employment contract in Brussels; officially he did not work for us.

Representative of public authorities

Our Office does not have any access to the ***content of the employment contract****. Therefore we do not know if the remuneration fulfils the requirements of the Directive. May I also add that minimum remuneration in Poland is so low that usually there are no problems to pay this circa 430 EUR. Our Office mainly supervises taxes and social security, so public duties, not the private ones. We used to have access to personal data of employees but now we do not have this data anymore – it is the obligation of the Inspector General for the Protection of Personal Data. If there are problems with wages employees contact the Polish Inspection of Labour.*

Robert Szewczyk - Director of the International Department; Andrzej Matla- International Department and Barbara Surdykowska- expert on International Department organisation: National Committee of NSZZ "Solidarność"[301]

It is hard to say. As a trade union we do not have any access to payroll data. However a lot of workers complain that large sums of money are deducted from the remuneration for work. It concerns not only deduction of social security contributions and income tax contributions, but also payment for accommodation, transport, insurance.

Construction and Transport Sector

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster

*Posted workers always earn more than workers performing their work in the host country (*Poland*). For this reason, they are ready to bear higher costs of maintenance abroad. Do they earn more than the workers of the country? It depends on their qualifications. The higher the qualifications the more likely they earn higher remuneration.*

Ryszard Trykosko President of Gdańsk Municipal Investments[302]

There are some cases of posting workers by foreign companies which perform investments ordered by the Gdansk municipal investments (for example, a tunnel under the Dead Vistula). These workers come from Germany or Spain and they have very high qualifications, which are lacking in the local labour market. In this case posted workers earn much more than the national average remuneration. No claims were submitted by posted workers relating to abuse of their rights. However in practice, there is no possibility of inspecting entities acting in the capacity of subcontractors, by an awarding entity, and any review of their obligations towards [its] workers is impossible. I was given, in annex, a table with the names of foreign subcontractors and the number relating to the posting of workers[303].

Michał Maksymiuk - Project Team Leader in **Pomeranian Employers Association[304]**

[301] Interview was conducted at June 22nd

[302] Interview was conducted at June 18th and 22nd June.

[303] OHL_posted workers tunnel under the Dead Vistula.

[304] Interview was conducted at August 18th.

When considering the transport sector we have to bear in mind that employers consider sending their workers not as posting workers but as sending them on business trip. It is caused by the fact that the sending takes only 1-7 days. Because of the short time of sending, employers do not treat it as posting. In practice, employers send employees for short-term trips. I would like to point out that drivers earn more in international transport than in local, however I realise that it is not an answer for this question. What is more, treating this as a business trip is not unprofitable, they receive a similar amount of money.

Most stakeholders both from the trade unions and the employers' organisations side agreed with the view that the working conditions of employees with very high qualifications are much more favourable in the case of the posting abroad than they would be in the host country (in territory of Poland). For this reason, for example, the public hospitals belonging to the Marshal of Pomeranian Voivodship cannot afford to send workers (doctors and nurses) to work abroad. A representative of the employers' organisation (health and care services) noted that a large amount of doctors and nurses emigrate for economic reasons performing their work directly for foreign employers.
All social partners have underlined the relationship between qualifications and the level of remuneration.
The trade union pointed out difficulties related to the observance of the minimum wage for blue-collar posted workers but without stating specific examples.

Q3: **In practice, what are the wages differences between posted workers and local workers? Provide an answer per sector. Is there evidence that posted workers earn (per sector) generally less/more than local workers?**

It is very difficult to give an answer to this question. This question relates to the individual working conditions of the employment contract which are offered by the individual employer. It should be emphasised that there are no statistics in this regard provided by Polish authorities.

Below same answers of respondents:

Representative of public authorities
Based on written responses to the question, evidence has been given by the District Labour Inspector in Pomerania Region, confirming the amount of remuneration (and other work-related benefits) of posted workers, for example: payroll of workers, accounting statements ZUS RCA or personal report relating to payable premiums and paid benefits for workers, showing the basis for a calculation of social security contributions.

As it has been pointed out above, the District Labour Inspector in Pomerania Region has no specific data relating to differences between posted workers and local workers[305]. The main reason for this situation lies in the small number of inspections of companies posting workers to the territory of Poland during the previous years. Another reason is the very short time for the answer which has not allowed for the gathering of specific data.

Representative of public authorities

[305] Conclusions based on written response to questions (Annex B) which was sent on 17 July by the District Labour Inspector in Pomerania Region.

I do not have access to this information.

Representative of public authorities
As I mentioned before our Office does not have any access to the content of the employment contract.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowskan - expert on International Department organisation: National Committee of NSZZ "Solidarność"[306]
It depends on the sector. The biggest differences are in blue-collar workers, as their knowledge about the law is the lowest. When we consider white-collar workers there is no big difference, on the contrary they usually earn much more than minimum wage in the host country.

Adam Roszczyk President of Gdansk Construction Cluster organisation: Construction Cluster
There is no unambiguous answer to this question.

Michał Maksymiuk - Project Team Leader in **Pomeranian Employers Association**
Employers are entitled to reimbursement of travel expenses. It is a so-called diet – about 30-50 euro/day and the costs of night – 50-150 euro/night, these elements can be crucial for the final remuneration.

It was a difficult task to present in practice the differences between posted workers and local workers due to the lack of official statistics in this regard. The practice could be revealed by employers, but the employers are very reluctant to answer this question. There were other obstacles such as the small number of controls of the working conditions of posted workers made by the National Labour Inspectorate in the Pomerania district. In the opinion of trade unions the so-called white-collar workers usually earn much more than minimum wage, so trade unions are unaware of infringements of the Posting Directive in that respect. The situation of blue-collar workers presents itself differently, but the social partners have not provided any examples of infringements of the Directive.

Q4: **In the temporary work agencies sector, could you describe who the "final users" of posted workers are?**

The triangular employment relationship has been introduced into the Polish legal system by *ustawa o zatrudnianiu pracowników tymczasowych* [Act on employing temporary workers].[307] At the the Act came into force many doctrines included therein were completely unknown and even different from the Polish labour law tradition. Therefore, it still raises problems when applying and interpreting its provisions. However Polish labour law fully applies to temporary work agencies acting as employers[308].

[306] Interview conducted on 25 and 29 June.

[307] *Ustawa z dnia 9 lipca 2003 r. o zatrudnianiu pracowników tymczasowych (Dz.U. Nr 166, poz. 1608 z późniejszymi zmianami),* Act of 9 July 2003 on employing temporary workers **(**Journal of Laws No 166, item 1608, with subsequent amendments).

[308] M. Tomaszewska, *Study on the protection of workers' rights in subcontracting processes in the European Union*. Sumple Report, Gdańsk 2011.

A temporary work agency employs temporary workers on the basis of a fixed-term employment contract or an employment contract for the time of performing a particular job[309].

A temporary employee cannot be entrusted with performing work for an employer/user:
1. which is classified as especially hazardous in the provisions issued on the basis of Article 237 of the Labour Code;
2. at the post of an employee of the employer/user in a period when the employee is on strike;
3. at a post where, during the last three months preceding the scheduled starting date of the temporary work by a temporary employee, an employee of the employer/user was employed, if their employment relationship was terminated for reasons not attributable to the employee.[310]

For the purpose of concluding an employment contract between a temporary work agency and a temporary employee, **the employer/user agrees with the agency**, in writing, about the:
1. type of work to be entrusted to a temporary employee,
2. qualifications essential to perform the work which is to be entrusted to a temporary employee,
3. foreseeable period for which the temporary work is to be performed,
4. working hours of the temporary employee,
5. place where the temporary work is to be performed.[311]

The employer/user must notify the temporary work agency in writing about:
1. the remuneration for the work which will be entrusted to a temporary employee, as specified in the provisions concerning remuneration in force with the employer/user;
2. the terms for performing temporary work concerning occupational safety and hygiene.

A temporary work agency **is registered and controlled by the Marshal of the Pomeranian Voivodship** on whose behalf acts the **Voivodship (Regional) Labour Office**.

Below are some answers of respondents:

Representative of public authorities
I do not have access to this information.

Representative of public authorities
I do not have access to this information.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
Unfortunately we do not have any access to information about agencies. Temporary work agencies are unwilling to provide such information and it is easy to understand why.

[309] Article 7 Act on employing temporary workers.

[310] Article 8, Act on employing temporary workers.

[311] Article 9, paragraph 1 Act on employing temporary workers.

Actually, as they are not obliged by law, they do not have any interest in informing about 'final users'. As we know unofficially there are "long chains" of temporary work agencies which explains why it is so hard to point out the 'final user'.

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster
There is no unambiguous answer to this question.

Michał Maksymiuk - Project Team Leader in **Pomeranian Employers Association**
In transport there is no term 'final user'. Employees work for the actual employer directly, without any agents. The driver is subordinated directly to the employer in Poland, in comparison to the building sector. Temporary work agencies practically do not exist in transport.

Most of the stakeholders emphasised that there is no legal obligation to give information about 'final users' of temporary workers. Due to this reason such data is not collected by the Voivodship Labour Office, even though the Office can proceed to registration and an inspection of temporary work agencies.

Q5: **Is 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 (hereafter "PWD") implemented in your country so as to comply with the minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers?**

Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?

The Polish legislature differentiates duties of the employer towards employees working abroad depending on whether they have been expatriated to perform work in a non-EU country or posted to work in one of the EU Member States. Consequently, the Labour Code makes a distinction between the category of "**expatriate**" workers, which refers to the group of those working outside the territory of the EU, and the group of those "**posted**" to work in the territory of the EU. Moreover, the personal scope *(ratione personae)* of those "expatriated" covers both individuals who had been employed before in their [home] country by an employer as well as those admitted to work abroad, whereas there is a requirement of establishing the employment relationship with the posted workers prior to posting. The terminology differences have been taken from the Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship[312] and the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.[313]

[312] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship **(**OJ L 288 of 18.10.1991, p. 32–35)

[313] 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. 1–6),

The legal situation of both groups of workers has been regulated by the amendment to the Labour Code provisions in the form of the Act of 24 August 2001[314], which has been adopted mainly for the purposes of approximation of Polish legislation to the EU regulations including Directive 91/533/EEC and Directive 96/71/EC. The provisions of that part of the Labour Code have been amended many times thereafter, among others in 2003[315] and 2006[316] as a result of the incorrect interpretation of obligations imposed by Directive 96/71/EC with regard to overriding mandatory provisions to an employment contract with a posted employee. Under the influence of critical opinions by legal academics and writers (legal theory)[317], the [legal] scheme of the country of performing work has finally been indicated in the Labour Code as the appropriate one to indicate these types of legal rules and not that of the posting country, in accordance with the amendment to the Labour Code of 24 August 2001[318].

Polish legislation does not define the term "**posted worker**" explicitly. However it is generally recognised in the Polish legal system that a posted worker is a worker performing work in a Member State other than the state in which he normally works.

The status of the **posted workers** is governed by Chapter IIa of the Labour Code[319] whose provisions have been formed by two legal acts, namely of 14 November 2003 and of 26 June 2006 r.[320] Title of Chapter IIa has the following wording: *"Employment conditions for employees posted from a European Union Member State to work in the Republic of Poland".* The differentiation of the employers from the Member States and those from non-EU countries is not of any significance as far as the scope of application of legal provisions identified by the Labour Code as *ius cogens* is concerned. This follows from Article 67^3 [(1)] of the Labour Code. It states that the provisions apply accordingly to an employee delegated to work in the Republic of Poland by an employer with its registered office in a country not being a European Union Member State. The provisions in questions are to ensure that the posted employee *"[…] has employment conditions that are not less favourable than those applicable under the Labour Code and other provisions regulating rights and duties of employees".* (Article 67^1 (2) in fine of the Labour Code).

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[314] Ustawa z dnia 24 sierpnia 2001 r. o zmianie ustawy - Kodeks pracy i niektórych innych ustaw, Dz. U. z 2001 r., Nr 128, poz. 1405 [Act of 24 August 2001 Amending Labour Code and Certain Other Acts, Journal of Laws 2001, No 128 item 1405]

[315] Ustawa z dnia 14 listopada 2003 r. o zmianie ustawy - Kodeks pracy i niektórych innych ustaw, Dz. U. z 2003 r., Nr 213, poz. 2081 [Act of 14 November 2003 Amending Labour Code and Certain Other Acts, Journal of Laws 2003, No. 213 item 2081].

[316] Ustawa z 26 czerwca 2006 r. o zmianie niektórych ustaw w związku z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej [Act of 26 June 2006 on amending certain acts as a result of the membership of the Republic of Poland in the European Union], Journal of Laws 2006, No. 133 item 395.

[317] J. Skoczyński, *opinia prawna dla Senatu RP z dnia 27 sierpnia 2001 r. dotycząca ustawy z dnia 24 sierpnia 2001 o zmianie ustawy Kodeks pracy oraz zmianie niektórych innych ustaw*.

[318] Dz.U. z 2001 r., nr 128, poz. 1405 [Journal of Laws 2001, No 128 item 1405].

[319] Tomaszewska M., Komentarz do rozdziału IIa Kodeksu pracy pt.: Warunki skierowania pracowników skierowanych do pracy na terytorium rzeczpospolitej Polskiej z państwa będącego członkiem Unii Europejskiej, red. Baran K.W., Warszawa 2014 (*Large commentary to the chapter IIa of Polish Labour Code entitled*: *Employment Conditions for Employees Delegated from a European Union Member State to Work in The Republic of Poland*, ed. Baran KW. Warsaw 2014.

[320] Ustawa z 26 czerwca 2006 r. o zmianie niektórych ustaw w związku z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej [Act of 26 June 2006 on amending certain acts as a result of the membership of the Republic of Poland in the European Union], Journal of Laws 2006, No. 133 item 395.

Pursuant to Article 67[1] (1) and (2) of the Labour Code the provisions on posting are applicable to an employee delegated by the employer for a fixed time to work in the territory of Poland:
1) in relation to the performance of a contract concluded by this employer with a foreign entity,
2) in a foreign branch of this employer,
3) as an agency for temporary work.

Article 67[1] (1) and (2) attests to the fact that **Poland has almost literally transposed Article 1(3) by defining the different posting situations that fall within the scope of the Directive.**

The employment conditions concerning the posted employee, pursuant to Article 67[2] (1) [of the Labour Code] refer to:

a. standards and length of working time[321] as well as periods of daily[322] and weekly[323] rest,
b. length of annual leave [324],
c. **minimum remuneration for work[325]**,
d. the bonus amount for overtime work[326],

[321] Part 6 of the Act of 26 June 1974 - Labour Code, Journal of Laws 1998, No 21, item 94, with subsequent amendments. Basic working time may be no longer than 8 hours in a 24-hour period and an average of 40 hours in an average five-day working week over the adopted calculation period of no longer than four months (Article 129, paragraph 1 of the Labour Code). Weekly working hours plus overtime must be no longer than, on average, 48 hours over the adopted calculation period (Article 131, paragraph 1 of the Labour Code).

[322] Every 24-hour period, an employee is entitled to at least 11 hours of uninterrupted rest (Article 132, paragraph 1 of the Labour Code)

[323] Every week an employee is entitled to at least 35 hours of uninterrupted rest, including at least 11 hours of uninterrupted rest within a 24-hour period (Article 133, paragraph 1 of the Labour Code)

[324] Part 7 of the Labour Code. Annual leave totals: 1. 20 days – for employees who have been employed for less than 10 years; 2. 26 days – for employees who have been employed for at least 10 years (Article 154, paragraphs 1 and 2 of the Labour Code)

[325] Ustawa z dnia 10 października 2002 r. o minimalnym wynagrodzeniu za pracę (Dz.U. z 2002 Nr 200, poz.1679 z późniejszymi zmianami) [Act of 10 October 2002 on the Minimum Remuneration for Work, Journal of Laws 2002, No. 200 item 1679, with subsequent amendments] and rozporządzenie Rady Ministrów z dnia 5 października 2010 r. w sprawie wysokości minimalnego wynagrodzenia za pracę w 2011 r., (Dz.U. z 2010 r., nr 194, poz. 1288). [Regulation of the Council of Ministers of 5 October 2010 on the amount of minimum remuneration for work in 2011] (Journal of Laws 2010, No 194, item 1288). Since 1 January 2011 the minimum remuneration for work has been PLN 1386.

[326] Article 151 of the Labour Code. In addition to the regular remuneration, a bonus for overtime work must be paid off: 100% of remuneration for overtime work:

1. during the night,

2. on Sundays and public holidays which are not working days on the employee's work schedule,

3. on a day off granted to an employee in exchange for working on a Sunday or on a holiday on the employee's work schedule,

50% of remuneration for overtime work on any day other than those specified above.

e. health and safety at work[327],
f. the rights of employees in relation to parenthood[328],
g. employment of juveniles, as well as work and other paid jobs performed by children[329],
h. the prohibition against discrimination in employment[330],
i. performing work in accordance with the provisions on employing temporary employees[331].

The PWD is applied in all sectors to the same extent insofar as the amount of minimum wage is concerned. However, some additional obligations in the scope of working conditions (but not minimum wage) are imposed upon employers who sent their workers to the territory of a non-Member State (Article 29^1 of the Labour Code)[332]. The second exception of working conditions relates to employers who perform their activity in the construction sector outside the EU.

Article 3(2) of the Directive, apart from the construction activities listed in the Annex, excludes the application of the provisions on minimum rates of pay and the duration of paid annual leave for initial assembly and/or first installation of goods, provided the period of posting does not exceed eight days. The Polish legislator transposed this exemption into Article 67^2 (2) *in fine* of the Labour Code. Article 67^2 (2) relates to employees posted to perform initial assembly or installation works (outside the construction sector), as provided for in the contract concluded by the employer with a foreign entity. The duration of the above- mentioned works cannot exceed eight days a year. Derogations allowed by the provisions in question mean that the group of provisions referred to in items 2-4 does not apply. This means that **some provisions, namely minimum rates of pay, do not apply to the employees delegated to perform work in the Republic of Poland if, due to their qualifications, they work for up to eight days a year on a given job position**, from the date of commencing work on a given job position, performing initial assembly or installation works (outside the construction sector), as provided for in the contract concluded by the employer with a foreign entity, where the performance is necessary to use the delivered good.

It is worth mentioning that the Polish legislature did not introduce any other derogation from minimum rates of pay, i.e. neither derogations for short periods of work as referred to in Article 3(3) of the Directive, nor derogations in

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The bonus of 100% of remuneration must also be paid for each hour of overtime work in excess of the average normal weekly working time over the adopted calculation period, unless the excess was a result of overtime work for which an employee is entitled to the bonus for overtime work in excess of the normal daily working time (Article 151, paragraphs 1 and 2 of the Labour Code)

[327] Part 10 of the Act Labour Code and provisions implementing the Labour Code specially for the Regulation of the Minister of Labour and Social Policy of 26 September 1997 on general provisions for safety and hygiene at work (Journal of Laws 2003, No. 169, item 1650)

[328] Part 8 of the Labour Code.

[329] Part 9 of the Labour Code.

[330] Article 11, paragraphs 2 and 3 of the Labour Code, Chapter IIa of Part 1 of the Labour Code

[331] Act of 9 July 2003 on employing temporary workers (Journal of Laws No 166, item 1608, with subsequent amendments.

[332] Tomaszewska M., Komentarz do art. 29^1 Kodeksu pracy, red. Baran K.W., Warszawa 2014 (*Commentary to art 29^1 of Polish Labour Code*, ed. Baran K.W., Warsaw 2014).

case the amount of work to be done is not significant, as referred to in Article 3(5) of the Directive.

According to Article 1(2), the Directive does "not apply to merchant navy undertakings as regards seagoing personnel". This exemption was included for merchant navy undertakings. Article 67^4 the Labour Code states that the provisions of posted workers do not apply to enterprises of the merchant navy in relation to the staff on merchant ships if an employer has its registered office in a Member State of the European Union or in the Member State of the European Free Trade Association (EFTA) - a party to the agreement on the European Economic Area.

In **Poland** the law implements Article 4 of Directive 91/533 concerning the obligation of the employer to inform the employee about the conditions that apply to the contract or employment relationship. Polish law obliges the employer to provide extensive information only in the case of posting (expatriate) of an employee to a third country. Employment conditions of the expatriate workers required to work in a non-EU country for a **period exceeding one month** are specified by Article 29^1 and Article 67^3 of the Labour Code.

These provisions, as referred to above, extend the duties of an employer by:
1. extending the contents of an employment contract (Article 29^1 (1))
2. extending the obligation to provide information for all employees (Article 29^1 (2)).

The provisions in question state that an employer, in an employment contract, except for standard terms and conditions determines additionally:
1) the duration of performing work abroad,
2**) the currency to be used for the payment of remuneration**
3) the benefits to which an employee will be entitled in respect of being expatriated, including the reimbursement of travelling costs and the provision of accommodation,
4) the conditions of the employee's return to the country.

As far as information duties towards expatriate workers are concerned, they cover: **informing** (the worker) **in writing about the benefits to which an employee will be entitled in respect of expatriation, including the reimbursement of travelling costs and the provision of accommodation opportunities**, as well as the conditions of the employee's return to the country. The information duties are satisfied in the form of a reference, by the employer, to the applicable legal regulations governing the issues in question. The information cannot shape the contents of an employment contract. Should any incorrect data on the rights governed by the legal regulations be included therein, the applicable legal provisions shall apply.

That being said, the minimum wage is out of the scope of the additional obligations deriving from Article 29^1 of the Labour Code, because it is set at national level and its mechanisms apply in the same way both to workers performing their work on the territory of an EU Member State and to those working in a non-EU Member State.

Umowa między Rządem Rzeczypospolitej Polskiej a Rządem Republiki Federalnej Niemiec o oddelegowaniu pracowników polskich przedsiębiorstw do realizacji umów o dzieło, sporządzona w Bonn w dniu 31 stycznia 1990 r.- The agreement between the Government of the Republic of Poland and the Government of the Federal Republic of Germany on the posting of workers from Polish undertakings to carry out works

contracts, signed in Bonn on 31 January 1990[333], was a special international agreement regulating bilateral relationships and obligations in the cases of posting of workers from Poland to the territory of Germany. As the name of this act suggests, it was applicable only in transnational situations resulting from the export of services outside the borders of Poland. It was a binding agreement until the end of transitional period between Poland and Germany. The Supreme Court stated in its ruling, 29.11.2005 r**, II PK 100/**05: *Employment conditions of Polish workers posted to work in Germany during the transitional period are the same as working conditions during the pre-accession period regarding the minimum wage in the construction sector. The international agreement requires from the Polish employer special permission of the competent German body*. In another ruling (2.02.2012, **III PK 49/11**), the Supreme Court held: *Polish posted workers are entitled to receive at least the minimum wage that is regulated by German collective bargaining binding in the construction sector. This conclusion is not undermined by the fact that Polish law applies to work performed in Germany in accordance with the provisions of the employment contract[334].*

Below are the answers of respondents:

Representative of public authorities
I have heard that there are some problems with enforcing the Directive. Unfortunately I do not know any details.

Representative of public authorities
I have heard that there are some problems with enforcing the Directive. Unfortunately I do not know any details, because it is within the scope of duties of the Polish Inspection of Labour.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
There are a lot of problems with enforcing the Directive. Classic delegation is not practiced that often in Poland. We have to bear in mind that our minimum rate of pay is very low in comparison to other European countries, it is around 450 euro. If we have posted workers from other countries, there is no problem to provide this amount. The situation is different when 'exporting' (sending) workers from Poland. For example, the minimum rate of pay in the Netherlands, Germany is much higher and employers usually try to avoid paying a proper amount of money.

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster
The Directive in my opinion is not a binding legal act. And what about workers employed on civil contracts? Why doesn't the Directive protect them?

Michał Maksymiuk - Project Team Leader in Pomeranian Employers Association
The PWD is not enforced at all. There are a lot of practices that could be considered as contrary to the PWD. As I mentioned before, the first and basic practice is treating it as a business trip.

[333] (Dz.U. z 1994 Nr 98, poz.474 z późniejszymi zmianami) [Journal of Laws 1994, No. 98 item 474, with subsequent amendments]

[334] The Supreme Court referred to CJEU case C-346/06 Dirk Rűffert.

Article 67(2) (1) of the Labour Code attests to the fact that Poland has almost literally transposed Article 3(1)(c) of the PWD by defining the employment conditions concerning the posted employee. Therefore, it can be said that the Polish legislator implemented exactly the minimum protection set by Article 3(1)(c).

One of the interviewees pointed out that there are some doubts as to the distinction between a business trip and the posting of a worker. Polish legislation does not define the term "posted worker" explicitly so it opens up the possibility of treating a posting as a business trip. It is worth noting that in the case of a business trip the worker is entitled to a reimbursement of travel expenses called a per diem (daily) subsistence allowance. He or she is not entitled to the binding wage level in the receiving country.

Q6: To what extent is the subject of the minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.

The new German legal act regulating minimum rates of pay at federal level is currently a topic of heated discussion in Poland.

The federal minimum wage in Germany and its interpretation by German administrative bodies is the subject of a number of reasonable critiques published by professional legal magazines (for instance Gazeta Prawna- the Legal Newspaper from 19.03.2015 title *8,5 euro nie tylko dla oddelegowanych i kierowców* [335] - "8.5 euro not only for posted workers and drivers", or daily Gazeta Wyborcza from 15.05.2015 title *Niemiecka płaca minimalna niebezpieczna dla małych firm*[336] - "German minimum wage is dangerous for small companies").

II. WAGE-SETTING MECHANISMS

II.1. A better understanding of minimum wage-setting mechanisms

Q7: **Which types of legal instruments/practices are used to set minimum wages? Describe in details the mechanism(s) used.**

- **Statutory provisions**
- **Law, regulations or administrative provisions**
- **other administrative practices (e.g. "social clauses" in public procurement rules)**
- **Collective agreements**
- **collective agreement with "statutory" value (e.g. procedure of extension)**
- **cross-industry**
- **multi-sectoral, sectoral**

[335] http://praca.gazetaprawna.pl/artykuly/859951,8-5-euro-nie-tylko-dla-oddelegowanych-i-kierowcow.html; http://logistyka.wnp.pl/minimum-8-5-euro-h-dla-delegowanych-do-pracy-w-niemczech,240803_1_0_0.html

[336] http://wyborcza.biz/biznes/1,100896,17920491,Niemiecka_placa_minimalna_niebezpieczna_dla_malych.html

- **local (regional, community…)**
- **company or infra-company (e.g. establishment level)**
- **management unilateral rules**
- **arbitration awards**
- **other mechanisms/practices**

The minimum wage in Poland is regulated by the Act of 10 October 2002 on the Minimum Wage[337]. It came into force on 1 January 2003. The term "minimum wage" has an equivalent meaning as "minimum remuneration". The definition of the term "minimum wage" should be understood as the lower limit of remuneration (salary) guaranteed to the employee for a full month of working time in full-time job (work). The Minimum Wage Act mentions "full monthly working time", without specifying any further details and number of hours. According to provisions of the Labour Code, the working time should not on average exceed eight hours per day and 40 hours per a five-day-long working week (Article 129 (1) of the Labour Code); In case of overtime hours, the weekly working time (including the overtime hours) should not on average exceed 48 hours (Article 131 (1) of the Labour Code).

This mechanism describes the remuneration (wage) for a full-time employee (worker). If an employee is employed part-time, the minimum wage shall be calculated proportionally.

The Minimum Wage Act also regulates the mode in which the amount of the minimum wage shall be fixed. This mode consists of two stages. In a first stage, the universal minimum wage is negotiated at national level within the framework of a Tripartite Commission (government, worker and employer representatives) on the basis of a proposal by the government[338].

If a tripartite agreement is reached, the minimum wage that has been agreed upon assumes statutory character. If the tripartite negotiations fail, the minimum wage is set unilaterally by the government.

This year, as it was the case in previous years, the Tripartite Commission for Social and Economic Affairs did not reach an agreement by 15 July, therefore the minimum wage in 2016 year has not been agreed upon through negotiations. In such a case, the minimum wage for the next year will be established by the Council of Ministers' regulation, no later than by 15 September. However, this amount may not be lower than the original government's proposal (see procedure which was described in Q1).

Which collective agreements are (or may be) universally applicable within the meaning of Article 3(8) PWD?

Provisions in Chapter Eleven of the Labour Code regulate the legal institution called "generalisation of collective agreements". Generalisation covers only multi-enterprise collective labour agreements (Article 241^{18} of the Labour Code) and allows for extending their personal scope. In accordance with Article 241^{18} of the Labour Code, upon a joint

[337] Ustawa z dnia 10 października 2002 r. o minimalnym wynagrodzeniu za pracę (Dz.U. z 2002 Nr 200, poz.1679 z późniejszymi zmianami) [Act of 10 October 2002 on the Minimum Remuneration for Work, Journal of Laws 2002, No. 200 item 1679, with subsequent amendments]

[338] See the answer on Q1.

motion of employers' organisations and upper-level trade union organisations which concluded a collective labour agreement for several establishments, the Minister for Labour may – where major public policy reasons exist – extend, in a regulation, the application of such collective agreement in whole or in part, so that it benefits employees employed by an employer not bound by any collective agreement made for several work establishments, who pursues the same or similar line of business.

The minister must request in advance the opinion of the employer concerned or an employers' organisation, as well as the opinion of a trade union active in an establishment. The application of the multi-enterprise agreement can only be extended until an employer is covered by another multi-enterprise agreement but no longer than one year (Article 241[18] (4) of the Labour Code)

So far, however, there are no collective agreements or arbitration awards which have been declared universally applicable in Poland within the meaning of Article 3(8) of the Directive. There is also no example of application of the generalisation of collective agreements by the Minister for Labour.

In practice collective agreements do not have far-reaching importance for posted workers.

Q8: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)**

There is only one minimum wage-setting mechanism in Poland determined at the national level. It covers all the employees. For that reason there are no differences in the minimum wages per region and/or sector of national economy.

Q9: **To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wages? What groups/what share of workers do not receive the minimum wages, and what reasons can be identified?**

The person who has a legal status of worker, according to Article 2 of the Labour Code, is covered by the Act of Minimum Wage. It follows that there is a single common minimum wage-setting mechanism in Poland. This also means that the minimum wage applies only to a person employed under a contract of employment, vocation, election, appointment or cooperative contract of employment. Consequently, each worker (employee) has a right to the minimum wage on the same conditions and based on the same provisions.

It was mentioned above that remuneration for a full-time employee shall not be lower than the minimum wage established pursuant to the mechanism described in Q1[339]. If an employee is employed in a part-time job, the minimum wage shall be calculated proportionally.

There is, in Polish labour law, a mechanism to prevent unfair conditions of remuneration. If the contract of employment specifies a remuneration that is lower than it should be

[339] Article 6 (1) of the Minimum Wage Act.

under the Minimum Wage Act, according to Art. 18 (2) of the Labour Code, such a provision is null and void, and provisions on the minimum wage apply instead[340].

Outside of the scope of the protection of the minimum wage-setting mechanism there are people who perform their work on civil contracts such as, first and foremost, the contract of mandate or the contract for a specific task. Provisions on the minimum wage do not cover people working as a self-employed.

In the situation described above, the people concerned do not have the status of worker and they have no protection even though the conditions for performing their work are similar to the conditions of workers[341]. In the Polish legal system, the individual's work shall be considered as work performed under an employment relationship when it fulfils the criteria specified in Article 22 (1) 1 of the Labour Code. If the work is performed under supervision and at the time and place designated by the employer, as well as in exchange for remuneration, it is treated as a contract of employment, regardless of the title given to the contract by the parties. Replacing the contract of employment by a civil contract while the conditions mentioned above are fulfilled, is strictly prohibited (Article 22 (1) of the Labour Code).

In this regard, the protection of people who perform their work on a ground other than an employment contract is ineffective due to the fact they are not guaranteed the minimum wage.

Q10: **To what extent do the wage-setting mechanisms differentiate rules on the minimum wage according to:**

- **Employee's conventional classification,**
- **Employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.),**
- **Employment policies: type of working contract (e.g. low number of hours /week), person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc.**
- **Other criteria**

In the Polish legal system there is an exception according to which the employee can be paid less than the minimum wage. It refers to the employee during his/her first year of employment, when the remuneration he/or she receives cannot be lower than 80% of the minimum wage announced in the "Monitor Polski" (Art. 6 (2) the Minimum Wage Act). The reason for the introduction of a specific sub-minimum is to facilitate the entry into the labour market for young people. The Minimum Wage Act does not, however, specify the age as one of the premises.

[340] Mincewicz K., 'The minimum wage in Poland – from the post-communist heritage to the global economic crisis 2009' [2014] Social Justice Conference

[341] There is a mechanism which allows employees to file a lawsuit to establish the existence of an employment relationship. Action to establish the existence of an employment relationship may by filled, with the interested persons' consent, also by the labour inspector. Cases where such lawsuits are brought before a court during the work performance are rare.

The annual period of employment mentioned above includes all the periods for which social security contributions were paid, except for periods of employment under a contract of employment for vocational training (Art. 6 (3) of the Minimum Wage Act).

Below are some answers of respondents:

Representative of public authorities
The criteria that determine an amount of remuneration include: the type of work or the practical skills of the employee. These criteria can be derived directly from the enterprise's internal sources of labour law, such as a collective bargaining agreement or remuneration regulations.

Representative of public authorities
I have no idea.

Representative of public authorities
Unfortunately this is out of my duties.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
To be honest, I do not know any example relating to the question. In Poland there is no collective agreement that could be considered as universally applicable within the meaning of Art. 3. Although the Polish Labour Code stipulates requirements relating to the extension of the application of a collective agreement, there was no such extension.

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster
In my experience there is no relationship between the minimum wage and remuneration in my companies. The same considerations apply to posted workers. Wages are determined on the basis of qualifications and labour market conditions in the given occupation.

Ryszard Trykosko President of Gdańsk Municipal Investments
I do not know.

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

I would like to draw your attention to the Act on the Minimum Wage. It was proclaimed in October 2002 and came into force on 1 January 2003. It has been governing the same centralised minimum wage-setting mechanisms for thirteen years. These mechanisms are based on indexation and valorisation.

It should be emphasised that indexation of the minimum wage, in line with changes in the prices of goods and services, was introduced in Poland since 1987. According to former art. 77(4) of the Labour Code, the authority to determine the minimum wage was in the hands of the Minister of Labour. The Minister defined the minimum wage first by way of an ordinance (*zarządzenie*). Nowadays the minimum wage amount is published, as a Prime Minister's announcement, in the Official Journal of the Republic of Poland –

Monitor Polski after consultation procedure described in Article 2 (4) of the Minimum Wage Act (see answer on Q1).

The majority of respondents did not know the answer to the question.

Below are some answers of respondents:

Representative of public authorities
The time is too short to answer reliably to this question.

Representative of public authorities
I do not know.

Representative of public authorities
I would like to know.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
Never have we had in Poland branch minimum rates of pay. There has been one, universally applicable rate for all branches.

Michał Maksymiuk - Project Team Leader in **Pomeranian Employers Association**
We cannot consider any structural evolution.

Q12: **How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce minimum wage?) Is there an automatic indexation rule? Which criteria are taken into account when deciding on changes of the minimum wage level?**
Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

See the answer to Q1.

II.2. Minimum wage-setting mechanisms in the context of the posting of workers

Q13: What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?

- **To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?**
- **To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?**

- **To what extent would the extension be easy to implement (and to control) from an administrative point of view?**
- **To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?**
- **To what extent would it reduce the displacement effect on local undertakings and labour force?**

In Poland the conditions covered by Article 3(1) lit. a) – g) of the Directive are determined by statutory law. However, there is no legal obstacle to introduce more favourable conditions by a collective agreement in favour of posted workers or to grant them additional benefits. According to Article 18(1) of the Labour Code, the provisions of employment contracts and other acts – *inter alia* collective agreements - on the basis of which an employment relationship is established, may not disadvantage an employee more than the provisions of labour law.

In practice collective agreements do not have far-reaching importance for posted workers

Below are some answers of respondents:

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
In Poland there would not be any difference. We do not have collective agreements for particular branches.

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster
In my opinion this article cannot be combined with any provisions of collective agreements, but only and exclusively with specific legal (statutory) provisions in each of the countries.

Ryszard Trykosko President of Gdańsk Municipal Investments
In Poland there would not be any difference.

III. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

III.1. Constituent elements of the minimum rates of pay: the host country perspective

Q14: **Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"?**
Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).

The legal act on the Minimum Wage states that "**the wage of the employee is calculated including the elements of basic remuneration and other benefits/supplements related to employment**". This provision first of all describes the structure of the minimum wage. There is, of course, a direct link between the structure of the minimum wage and the rate of the minimum wage, because the minimum personal wage (basic remuneration and other benefits/supplements) cannot be lower that the abovementioned rate of the minimum wage.

The basic remuneration and other benefits/supplements form the so-called "personal wage". Other elements of remuneration (i.e. other than the basic remuneration) such as benefits/supplements related to employment can be justified for instance given the specific characteristics or conditions of the work performed, professional qualifications of employees etc. This means that the minimum wage includes basic remuneration fixed in the contract of employment but also additional benefits/supplements related to employment (the so-called personal wage). The act on the Minimum Wage does not specify these components precisely. For that reason I treat other benefits/supplements related to employment as "grey area".
The Act on the Minimum Wage specifies only which benefits/supplements related to employment **could not be included in the minimum wage**.

Below are some answers of respondents:

Representative of public authorities
There is only one component – the minimum wage.

Representative of public authorities
Unfortunately I cannot help you.

Representative of public authorities
Unfortunately I cannot help you.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
As far as I know, there are no components. There is only one component of remuneration.

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster
There is only one component – the minimum wage.

Q15: **Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)**

The Act on the Minimum Wage clearly excludes such elements as: remuneration for overtime, jubilee reward, gratuity and retirement pay - Article 5 (5) of the Minimum Wage Act.
Below are some answers of respondents:

Representative of public authorities

The answer to this question is not clear.

Representative of public authorities
Unfortunately I cannot help you.

Representative of public authorities
Unfortunately I cannot help you.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
As I mentioned before, there is only one component of remuneration.

Michał Maksymiuk - Project Team Leader in **Pomeranian Employers Association**
Social security contributions and income taxes are included. Having known the mentality of Polish drivers, each one of them dreams about this legendary 8.5 euro/hour – minimum rates of pay in Germany.

Q16: **Which components (NB: use the indicative list above) are in the "grey area"? (not clearly belonging or excluded for the calculation of the minimum pay rates)**
Explain your response and give examples. Describe concrete difficulties encountered per sector.

For most of the full-time employees the minimum wage is calculated monthly on the basis of the "basic remuneration" that encompasses the wage/salary as well as other supplements and benefits related to employment and included by the Central Statistical Office in the so-called "personal wage". Those who are remunerated monthly but who, because of their working schedules or the timing of the payment of some of the elements of their remuneration, earn in that specific month a wage/salary below the minimum wage, get the wage supplement for every hour they have worked.

The following elements could be considered as belonging to the "grey area": seniority supplements, wage supplements related to the possession of special skills, wage supplements related to specific working conditions, (annual) rewards, end-of-the year benefits, material benefits, insurance benefits, etc.

Representative of public authorities
The answer to this question is not clear.

Representative of public authorities
Unfortunately I cannot help you.

Representative of public authorities
Unfortunately I cannot help you.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
We can put in the "grey area" the bonus for working at night.

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster
I do not know.

Michał Maksymiuk - Project Team Leader in **Pomeranian Employers Association**
As it is treated as a business trip, I cannot answer the question.

Q17: **In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?**

This question should be answered in the negative.

Below are some answers of respondents:

Representative of public authorities
No, there are not.

Representative of public authorities
I do not know.

Representative of public authorities
I do not know.

Robert Szewczyk - Director of the International Department; Andrzej Matla - International Department and Barbara Surdykowska - expert on International Department organisation: National Committee of NSZZ "Solidarność"
No, there are not.

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster and **Ryszard Trykosko President of Gdańsk Municipal Investments**
Such mechanisms do not exist. It is a matter between an employee and an employer and of course an agreement between them.

Michał Maksymiuk - Project Team Leader in **Pomeranian Employers Association**
As it is treated as a business trip, I cannot answer the question.

Q18: How do the differences in the definition of minimum rates of pay impact income levels of posted workers (also taking into account compensation of expenses)?

There are no differences.

According to Article 67^2 (1) of the Labour Code the employment conditions concerning the posted employee refer to:

a. standards and length of working time as well as periods of daily and weekly rest,
b. length of annual leave,
c. **minimum remuneration for work**,
d. bonus amounts for overtime work,
e. health and safety at work,

f. the rights of employees in relation to parenthood,
g. employment of juveniles, as well as work and other paid jobs performed by children,
h. the prohibition against discrimination in employment,
i. performing work in accordance with the provisions on employing temporary employees.

This means that the PWD is applied in all sectors to the same extent taking into account the minimum wage amount.

Q19: In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)

The minimum wage in Poland is regulated by the Act of 10 October 2002 on the Minimum Wage (Remuneration). Access to sources of statutory law is very easy in Poland.

Below some answers of respondents:

Representative of public authorities
In 2015 there was no case of underpayment of minimum wages to employees posted in the territory of Poland.

Representative of public authorities
Unfortunately I cannot help you.

Representative of public authorities
Unfortunately I cannot help you.

Robert Szewczyk - Director of the International Department; Andrzej Matla- International Department and Barbara Surdykowska- expert on International Department organisation: National Committee of NSZZ "Solidarność"
Trade unions do not have any knowledge about this issue. However, usually employers are complaining when they are obliged to comply with the requirements of the host country.

Adam Roszczyk - President of Gdansk Construction Cluster organisation: Construction Cluster
Unfortunately, I am not aware about rules for the posting of workers from another country on Polish territory.

Michał Maksymiuk - Project Team Leader in **Pomeranian Employers Association**
There are some drivers from Lithuania and Latvia. Polish inspection usually checks only public duties, not the private ones. They do not have any access to the content of the employment contract, so it is nearly impossible to answer this question.

III.2. Constituent elements of the minimum rates of pay: the sending country perspective

Q20: **In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

Below are some answers of respondents:

Representative of public authorities
The National Labour Inspectorate was designated simultaneously as the liaison office and national body for the purposes of implementing Directive 96/71 in the Polish legal system[342]*. It is also the institution obliged to inform foreign employers about universally binding rules of law, applicable to work performed in the territory of the Republic of Poland (Chapter IIa of the Labour Code*)[343].

Representative of public authorities
Our Office does not have any knowledge about this issue.

Representative of public authorities
Our Office does not have any knowledge about this issue.

Robert Szewczyk - Director of the International Department; Andrzej Matla- International Department and Barbara Surdykowska- expert on International Department organisation: National Committee of NSZZ "Solidarność"
Trade unions do not have any knowledge about this issue.

Michał Maksymiuk - Project Team Leader in Pomeranian Employers Association
There are a lot of problems related to compliance with requirements. They try their best to avoid these requirements, especially when we consider transit through Germany. However, the situation changes when they are going from one German city to another. In this case they try to comply with requirements as the German inspection does what it can to catch some Polish drivers.

One of the interviewees pointed out that there are some doubts as to the distinction between a business trip and the posting of a worker. Polish legislation does not define the term "posted worker" explicitly so it opens up the possibility of treating a posting as a business trip. It is worth noting that in the case of a business trip the worker is entitled to a reimbursement of travel expenses called a daily subsistence allowance. He or she is not entitled to binding wage levels in the receiving county. In the case of a posting, a worker is entitled to the employment conditions set out in Article 67(2) (1) of the Labour Code and is entitled to a reimbursement of travel expenses called a daily subsistence allowance. According to Polish labour law, the minimum wage does not cover daily subsistence allowances. In other words, the remuneration (wage) shall be considered in the light of the criteria set out in Art. 78 § 1 of the Labour Code as a monetary compensation for an individual who performed a work.

[342] Act of 13 April 2007 on the National Labour Inspectorate, Journal of Laws 2007, No 89, item 589, with subsequent amendments.

[343] Article 13, paragraph 1, point 13 of the National Labour Inspectorate.

ROMANIA

I. BACKGROUND INFORMATION

Q1: To what extent is the minimum wage connected to:

- **(local) living costs?**
- **average salaries (general / sectoral)?**
- **social policies?**
- **fight against social dumping and protective measures? (e.g. fair competition at national or international level between companies?**
- **other national/international matters?**

In Romania, the minimum wage is annually determined at national level by means of a Government Decision, after consulting the social partners. The minimum wage is updated twice a year, usually in January and July, respectively. **The minimum wage is gross and has only one fixed component.**

According to article 164 of the Labour Code, the national minimum wage is set in correspondence with the normal working schedule. Article 112 of the Labour Code provides that the normal working time for full-time employees is 8 hours per day and 40 hours per week. If the actual working schedule is lower than eight hours per day, the minimum gross basic pay shall be calculated by dividing the national minimum gross pay to the average number of monthly hours under the approved legal working schedule. These provisions shall also apply when the employee is at the working place, within the work schedule, but s/he cannot perform his/her activity for reasons not related to him/her, except in the case of strikes. In all the interviews there were no ambiguities regarding the minimum wage. There is a common understanding about what the minimum wage is and how it is determined.

The information on minimum wages in Romania is well known by social partners and government representatives. Interviewees made reference to the prevailing national legislation and to the mechanism for setting the minimum salary. Since the introduction of the minimum wage into the Romanian system there have been few changes to the regulations, and this has resulted in a correct understanding of this concept.

Some of the people interviewed are directly involved in the annual process of negotiating the minimum wage and are hence first-in-line sources of information. But also for those not directly involved in the negotiations, the mechanisms on minimum wage setting are well known. During the interviews held in the frame of the present project it appeared that there are no ambiguities regarding the minimum wage, the wage setting mechanisms and the parties involved in this process.

Until 2003, the minimum wage was calculated taking into account a minimal consumption basket. It was approved for the first time by Government Emergency Ordinance (GEO) no. 217/2000, published in Official Journal of Romania no. 606/2000.

The consumer basket[344] was calculated for a household composed of 2,804 members. The level of the minimal consumption basket was updated quarterly by the National Institute of Statistics until Q2/2003, when this responsibility was passed to the Ministry of Social Solidarity and Family which ceased publishing it. Currently, the minimum wage is no longer calculated on the basis of a minimal consumption basket.

Two factors play an important role in the establishment of the minimum wage: **the collective bargaining and the use by government of the minimum wage as a tool for its economic policies**.

The collective bargaining in which the government is taking up a lead role, is determining wage rates for the whole economy. The elements taken into consideration in determining the level of minimum wages include: the needs of workers and their families, the cost of living, social security benefits and other economic factors.

Certain comments (by representatives of social partners) were made during some interviews about the negotiations, which were described as a ”simulation” in the sense that there was no real analysis of the items that are considered in determining the amount. **Sectoral and/or company level wage agreements can determine the actual wages paid in companies.** These wages are usually higher than the minimum wage set by Government Decision (GD). Legislative changes related to the law on social partners have in practice led to a reduced importance of collective agreements at sector or branch level. Most relevant are the collective agreements at unit or company level. In what regards the actual levels of salaries, the most important mechanism is the bilateral negotiation between the employer and the individual worker.

The conclusion of an individual employment agreement encompassing a minimum wage which is lower than the one set in the Government Decision represents a contravention and will be subject to a fine, the amount of which varies from 1.000 RON to 2.000 RON.

In interviews with social partners it was stressed that the minimum wage is important to employers (construction sector) as they use the minimum wage as a benchmark in setting the wages for their employees.

[344] The consumer’s basket is a tool to measure the wealth of poverty of the people from urban and rural areas. The methodology of the minimum subsistence basket was elaborated by an expert group of the ministries, trade unions and researchers from research institutes having an exclusively normative and not a statistical nature. Governmental Emergency Ordinance no. 217/2000, approved by Law no. 554/2001, approved the structure, components and value of the minimum monthly subsistence basket computed for the prices of the month of October 2000. In accordance with Art. 2 of Government Emergency Ordinance (GEO) no. 217/2000, the value of the minimum subsistence basket was updated quarterly by the National Institute of Statistics and its value was approved by Government, the last legal act adopted being the Government Decision (GD) no 1079/2003 on the approval of the value of the minimum monthly subsistence basket for the second quarter of the year 2003. In the year 2006, at the initiative of the Ministry of Labour and Social Solidarity, a Technical Committee was established on the fixing the minimum wage as a tripartite technical body whose main purpose was to determine the minimum wage.

Number of persons receiving minimum gross wage

	Active population	Employees	Beneficiaries of minimum gross wage		
			Total	Public sector	Private sector
2010	8.712.829	5.648.607	-	-	-
2011	8.528.149	5.697.235	-	-	-
2012	8.605.052	5.734.492	790.677	125.762	664.915
2013	8.549.132	5.743.493	-	-	677.267
2014	8.613.739	5.850.256	804.225	238.143	566.112
2015			1.471.356	488.630	982.726

Data source is the Explanatory Memorandum for Government Decisions.

In general, the interviewees made no reference to any link between the minimum wage and social policies, fight against social dumping and protective measures and/or other national/international matters. Some employers' representatives (construction and TWA sectors) pointed out that although there are comments regarding the low level of the minimum wage, these comments should take into account the real economic power of the employers, which is directly linked to the general economic situation.

Living cost

According to a study[345] published by the Romanian Research Institute for the Quality of Life, referring to the period 1990-2012, one family (two adults plus two dependent minors) with a family income consisting of 2 average wages and the state allowances for children, could cover the cost of the consumption basket only starting as of the year 2005. Over the period analysed from 1990 to 2012, the families (consisting of two adults plus two dependent minors), which received only one minimum wage and the state allowances for children, were considered to be in a difficult economic situation.

Some interviewees (construction trade union, health trade union) noted that these salaries are small, especially when compared with revenues at European level, without making further observations.

Average wage

The relationship between the minimum wage and the average wage is not a question of labour market equilibrium. This is not about the effects on the demand and supply in this market. The average wage could be interpreted as a mirror for the real economy evolution, while the minimum wage remains only a question of social protection.

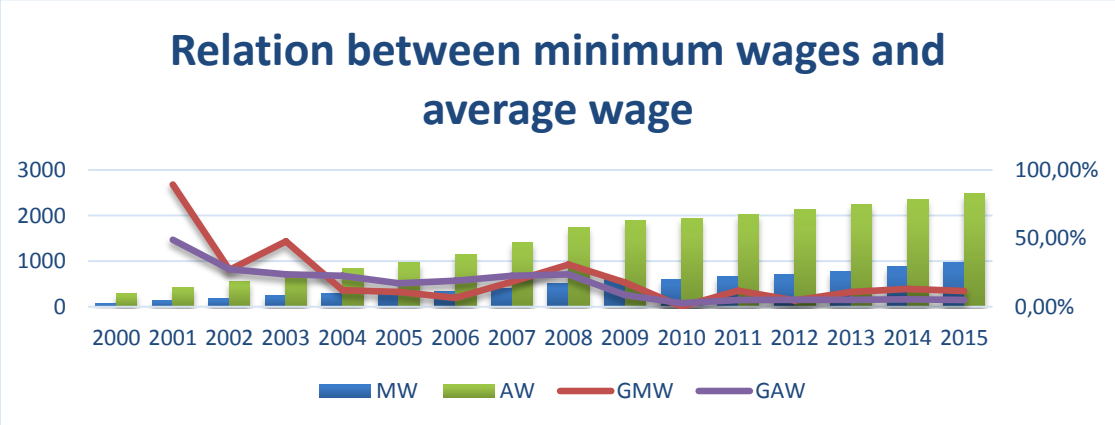
The ratio between the minimum and average wage in Romania is lower than in many EU countries. Since the year 2000 the ratio is varying around 30%. The evolution of this ratio has fluctuated, sometimes rising lower and sometimes faster.

[345] http://www.iccv.ro/sites/default/files/Cosul%20de%20consum.pdf

	Minimum wage as % of average gross wage	Increasing rate in average gross wage	Increasing rate in minimum gross wage
2000	**24.48%**		
2001	31.13%	**48.88%**	**89.35%**
2002	31.03%	27.31%	26.88%
2003	**37.09%**	23.64%	47.78%
2004	33.89%	22.55%	12.00%
2005	32.06%	17.03%	10.71%
2006	28.70%	18.95%	6.45%
2007	27.67%	22.58%	18.18%
2008	29.27%	23.59%	30.77%
2009	31.76%	8.45%	17.65%
2010	30.98%	**2.51%**	**0.00%**
2011	32.97%	4.92%	11.67%
2012	32.80%	5.02%	4.48%
2013	34.59%	5.01%	10.71%
2014	37.08%	5.32%	12.90%

Note: Annual averages are computed as simply an arithmetic average of monthly figures.
Source: own calculation based on NSI data

Empirical data reveals a link between the growth of the minimum wage and the political changes in Romania. The highest growth was recorded in 2001 at the beginning of the term of the government led by social democrats. The growth was 0% in 2010, which is the year in which the impact of economic crisis was felt most strongly in Romania. Comparing the dynamics of the minimum wage in relation to the average wage, one finds that the increase of the minimum wage was usually slower than the evolution of the average wage.



	Minimum wage as % of average gross wage			
	Total	Construction	Transport and storage	Health and social assistance
2015	**39%**	**54%**	**38%**	**45%**

The replies from the social partners in the health sector revealed that the minimum wage rate is about 50% of the average wage. The euro equivalent to the minimum wage is about 233 €/month. In the public and private sector, more than 40% of employees are remunerated with the minimum wage.

In the temporary work sector, wages received by temporary employees for a given assignment cannot be lower than the wage received by an employee of the user company who performs the same assignment or one similar as the temporary employee. In this way, the average income in the sector depends on the area in which the person concerned is active. The legislative provision on wage levels in the temporary work sector was considered by the representatives of employers (TWA sector) as unfair and/or prejudicial for the TWA.

In the case of the construction sector, salary levels depend very much on the skill level and competences of employees. The qualified and highly qualified workers are usually paid wages well over the average wage income. In case of welders for example, it is almost impossible to find a worker who will accept an employment contract with minimum wage.[346]

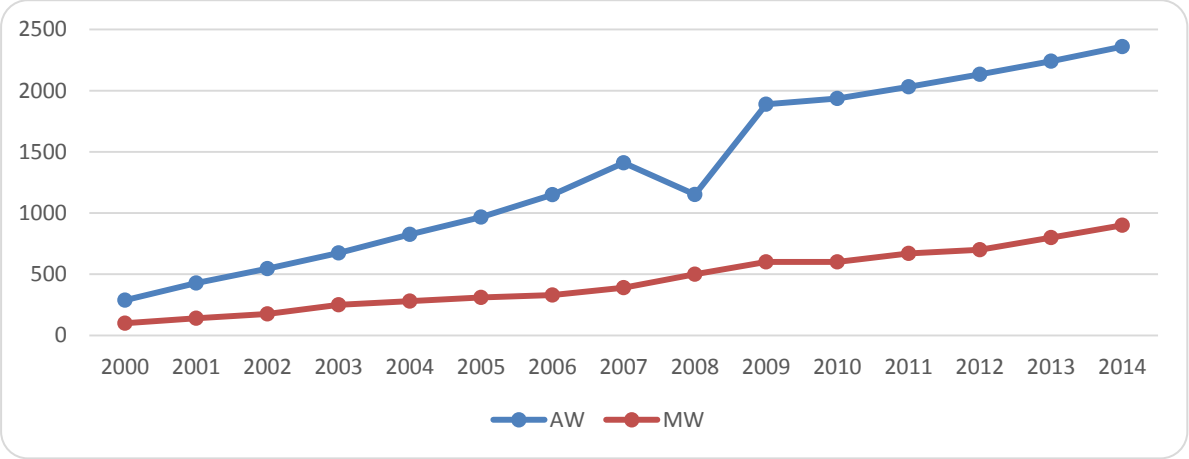
Sector		January	February	March	April	May
Total	*average gross earnings*	2.408	2.395	2.529	2.564	2.500
	average net earnings	1.740	1.731	1.829	1.857	1.806
Construction	*average gross earnings*	1.784	1.773	1.821	1.847	1.822
	average net earnings	1.291	1.282	1.317	1.337	1.314
Transport and storage	*average gross earnings*	2.580	2.459	2.608	2.603	2.636
	average net earnings	1.857	1.767	1.874	1.874	1.891
Health and social assistance	*average gross earnings*	2.180	2.150	2.188	2.181	2.196
	average net earnings	1.571	1.551	1.578	1.574	1.583

Social policies

The minimum wage is more the result of wage policy and social policies in general, and it is not necessarily related to the real economy. There are very different drivers of the minimum wage compared to other labour market variables.

Romania is an interesting case among EU member states (MS) both for the evolution of the minimum wage and for the effects of minimum wage related policies on the labour market, for many reasons. The minimum wage was about 30% of the average wage, with a maximum of 37.7% in 2003 and a minimum of 27.9% in 2007. Romania has practiced in the last 25 years a policy of low wages, and it is ranked among the last MS in terms of minimum wage/average wage ratio.

[346] This was underlined by employers in the construction and TWA sectors.

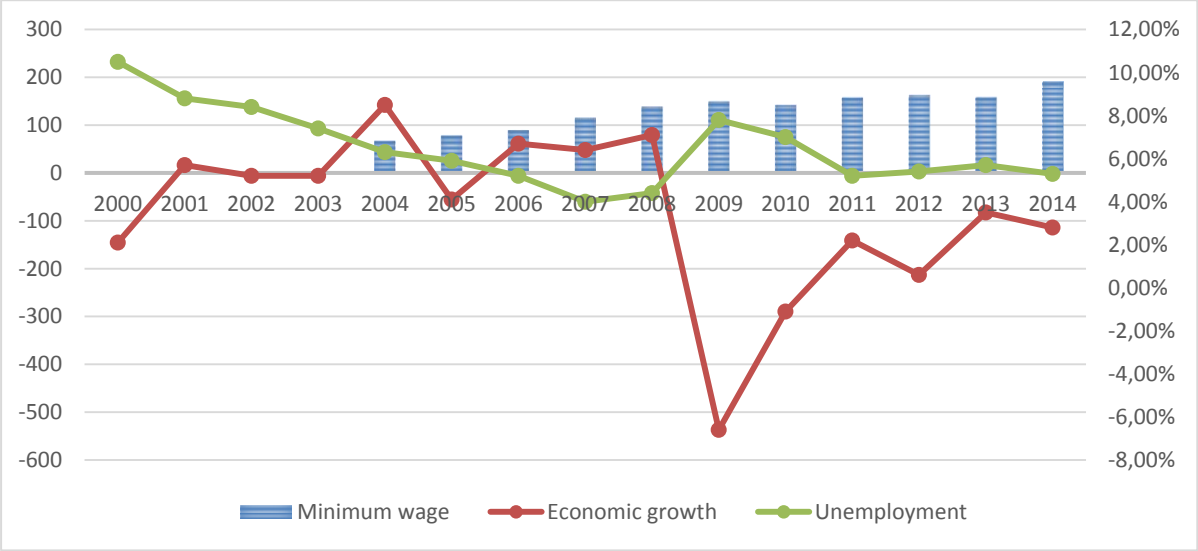


In the 2001-2008 period, when the GDP level increased substantially, minimum wage growth in nominal terms up-surged twice: first in 2003 (when the minimum wage rose by more than 40%) and secondly in 2008 (an almost 30% rise). In the same period, the average wage growth rate was generally higher. From 2009 onwards, the average wage growth rate has been lower, with one possible explanation being the lower inflation rate while the minimum wage has increased more than the average wage.

Asked about the link between the minimum wage and social policy, some of the people interviewed (construction trade union representative) said there is no connection between the two, because the annual negotiation is not considering the real needs of employees. The representative of the construction employers mentioned that this minimum wage (and all the related contributions) must represent a bearable burden for the employer according the market conditions.

Unemployment

The minimum wage determined as a percentage of the average wage is not related to the labour market evolution at all. Empirical data shows that in Romania one cannot establish a link between the increase in the minimum wage and rising unemployment. For example, since January 2011 the minimum wage was increased by GD, notwithstanding unemployment decreased in 2011 reaching 5.1% (from 6.8% in 2010). If one closely follows the minimum wage and the unemployment rate (see the chart below), one finds impossible to identify a pattern of relationship between these two indicators.



Data source: NIS

No person interviewed commented on the relationship between unemployment and minimum wage.

Q2: How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?

Data source:

- National Institute of Statistics www.insse.ro
- Statistical Bulletin on Labour and Social Protection provided by Ministry of Labour, Family, Social Protection and Elderly www.mmuncii.ro.

Sending state perspective

Romania's migration pattern is mainly characterised by emigration, especially following the accession to the European Union on 1 January 2007. The number of Romanians working abroad is estimated to be around 3 million people. However, data on the emigration of Romanian citizens or people born in Romania is limited. Officially registered emigration captures only a small fraction of the actual outflows. A better approximation of actual emigration is provided by the statistics of the main destination countries. For example, the Romanian population residing in Italy increased to a total of 1.131.839[347] at 1 January 2015, and in Spain to a total of 953.183[348]. Compared with the size of Romanian emigration in general, the volume of Romanian posted workers in the EU is very low, which explains the lack of information / analysis on this topic.

The most important destinations for posted workers are Germany (construction) this preference should be interpreted from the perspective of limits on access to the German labour market due to the transitional provisions relating to the free movement of workers; Germany is one of the few countries that have removed restrictions on the

[347] According the ISTAT Italy

[348] According to http://extranjeros.empleo.gob.es/

labour market on 1 January 2014) Italy (transport and social sector) and France (social sector).

Year	total	Construction	Transport	TWA	Social sector
2014	57.135	17.427	5.028	0	2.191
Main destination		DE-8.881	IT – 3.304	0	FR-603
2013	51.939	14.241	3.628		2.102
Main destination		DE-4.962	IT-1.974		FR - 621
2012	44.459	12.201	3.411		1.091
Main destination		DE – 5.082	IT-2.075		IT-278
2011	34.503	10.192	1.238		1.093
Main destination		DE - 4105	IT - 463		IT - 596

Data source: National House for Public Pensions

This data (which represents the number of A1 forms issued in Romania) should be read in conjunction with information derived from interviews (TWA representatives). So personally I appreciate that some of A1 forms issued in construction and transport sectors are in reality A1 forms for temporary work agencies[349]. The 2014 official data includes a special section for TWA while the number of A1 forms issued for TWA is equalling zero, which is in contradiction with other empirical results.

There is no information on how much posted workers are earning in practice, but we keep in mind that this specific form of mobility within the EU takes place in an economic context, which is characterized by high earning differentials. The wage discrepancy gives companies a great incentive to recruit migrant workers for lower wages. The rule of respecting the host country labour standards applicable to posted workers includes the minimum wage. Many companies from Romania interpret the provisions of Directive, by referring only to the minimum wage mandatory in the host state were Romanian workers are posted. Thus the wage is usually equal to the compulsorily minimum wage in the host state. According to some opinions expressed during the interviews conducted, no cases were identified in which workers received higher wages than the minimum compulsory wage. We underline that no data supports this statement.

None of the people interviewed specified the exact income posted workers are receiving. The government representatives indicated that they do not have such data. The representatives of employers mentioned that salaries vary depending on the skills and qualifications of each person. The trade union representatives (construction sector) mentioned only that posted workers incomes are higher than the income levels paid in Romania. In all the interviews it was specified that, according to the information that they hold, the hosting state law is respected. As for the question of whether they know any cases of companies sanctioned for violating destination country laws, those interviewed could not provide any specific examples. The information about such situations is the information that they have heard from the media or from discussions with acquaintances.

Host state perspective

Regardless the company selected for measurement purposes, the minimum wage in Romania remains the second lowest minimum wage in the EU. From the point view of the

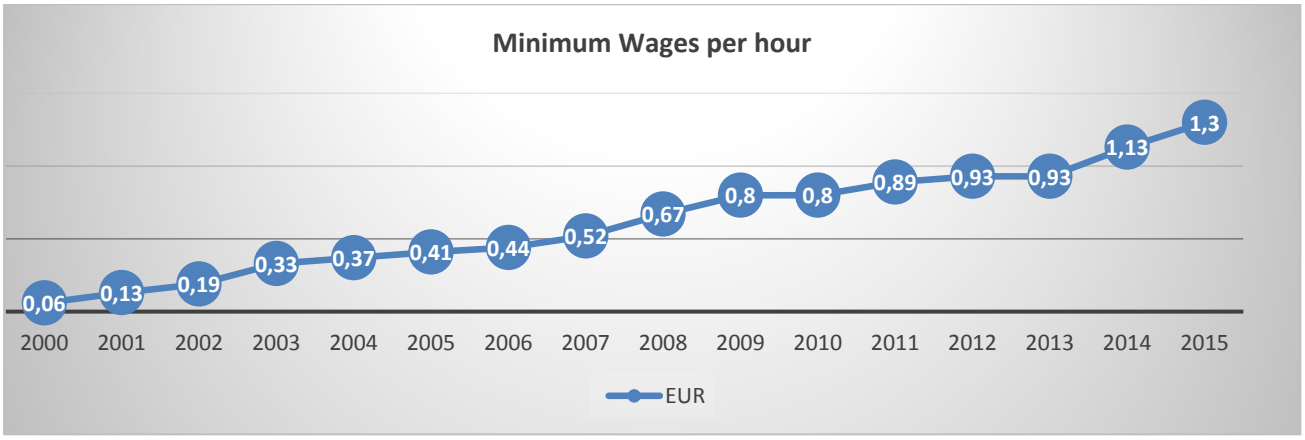
[349] This is supported by the way in which data is collected by the institution responsible for issuing A forms

statutory minimum wage per hour, Romania is included among the group of EU member states with minimum wages below 2 Euro.

Minimum Wages per hour on January 1st of each year (national currency/ EUR)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
LEI	0.27	0.59	0.83	1.48	1.66	1.84	1.96	2.31	2.96	3.56	3.56	3.97	4.15	4.15	5.04	5.78
EUR	0.06	0.13	0.19	0.33	0.37	0.41	0.44	0.52	0.67	0.8	0.8	0.89	0.93	0.93	1.13	1.3

Source: WSI Minimum Wage Database International



Data source: NIS

Minimum Wages in Romania

Year	Period	Gross minimum wage (LEI)	Legal instrument
2000	January	45	GD 296/1999
	February - November	70	GD 101/2000
	December	100	GD 1166/2000
2001	January - February	100	GD 1166/2000
	March - December	140	GD 231/2001
2002	January - February	140	GD 231/2001
	March - December	175	GD 1037/2001
2003	January- December	250	GD 1105/2001
2004	January- December	280	GD 1515/2003
2005	January- December	310	GD 2346/2004
2006	January- December	330	GD 1766/2005
2007	January- December	390	GD 1825/2006
2008	January- September	500	GD 1507/2007
	October- December	540	GD 1051/2008
2009	January- December	600	GD 1051/2008
2010	January- December	600	GD 1051/2008
2011	January- December	670	GD 1193/2010
2012	January- December	700	GD 1225/2011
2013	January- June	750	GD 23/2013

Year	Period	Gross minimum wage (LEI)	Legal instrument
	July - December	800	GD 23/2013
2014	January- June	850	GD 871/2013
	July - December	900	GD 871/2013
2015	January- June	975	GD 1091/2014
	July - December	1.050	GD 1091/2014

In 2015 1.471.356 employees will benefit from the minimum gross wage, out of which 488.630 employees are in the budgetary sector and 982.726 employees are in the private sector. In 2015 the minimum gross wages is determined as follows: 5,781 RON/hour for the amount of 975 LEI per month and 6,225 RON/hour for the amount of 1.050 RON per month.

In 2014 804.225 employees benefited from the minimum gross wage, out of which 238.143 employees are in the budgetary sector and 566.112 employees are in the private sector. For 2014 the minimum gross wage was fixed at: 5,059 ROM/hour for the amount of 850 LEI per month and 5,357 RON/hour for the amount of 900 LEI per month.

In 2013 677.267 employees in the private sector received the minimum gross wage of 800 RON/month. For 2013 the minimum gross wage was: 4.44 RON/hour for the amount of 750 RON per month and 4,74 RON/hour for the amount of 800 RON per month.

In 2012, 790.677 employees benefited from the gross minimum wage, out of which 125.762 employees are in the budgetary sector and 664.915 employees are in the private sector. **For 2012** the minimum gross wage was: 4.13 RON/hour for the amount of 700 RON per month. **For 2011** the minimum gross wage was: 3,529 RON/hour for the amount of 670 RON per month. **For 2010** the minimum gross wage was: 3,176 RON/hour for the amount of 600 RON per month.

From the perspective of the receiving state, it is obvious that the minimum wage in Romania is not an incentive to attract foreign posted workers from other EU Member States. Although there are no statistics in this regard, according to unofficial information, the wages for posted workers in Romania are considerably higher than those received by Romanian workers. These wages are not as high as those recorded before the economic crisis, yet they remain higher than the average in Romania.

None of the people interviewed could provide details on the actual income levels for posted workers. Government representatives have indicated that they do not have/collect such data. The trade union representatives (construction sector) mentioned only that posted workers' income levels are higher than the income levels obtained in Romania by a Romanian worker in similar positions. Usually these workers are posted in positions that suit highly qualified workers and their income is similar to the income received for a similar job in the sending State.

Q3: **In practice, what are the wage differences between posted workers and local workers? Provide an answer per sector. Is there evidence that posted workers earn (per sector) generally less/more than local workers?**

Posted workers in Romania definitely earn wages higher than the national minimum wage (according to construction trade union representatives). No data supports this statement,

but given the very low level of the minimum wage in Romania (the second lowest in Europe) one can easily estimate that the income obtained by a posted worker must be higher than the minimum wage of a local worker. However, in the case of posted workers in Romania, employers are obliged to observe equally the labour law provisions of the sending state. This obligation extends to the minimum wage that can be paid to a worker. Therefore in the case of these workers, even if the posted worker receives the minimum compulsory wage in the sending state, this wage is higher than minimum wage in Romania (the only exception being Bulgaria). According to some opinions expressed during the interviews conducted, the wages concerned are substantially higher than the average income per sector.

Government representatives have indicated that they do not have data on how much a posted worker earns in Romania. The trade union representatives (construction sector) mentioned only that posted workers incomes are higher than incomes obtained in Romania by a Romanian worker in a similar position. Usually these workers are posted on positions that request highly qualified workers and/or managerial skills and their income is similar to the income obtain for a similar job in their sending State.

The trade union representatives from the health sector stated that Romania is not a state of destination for posted workers and consequently such analysis is without object. Moreover, in the case of Romanian workers from Italy, Spain, the UK, these workers are usually long term workers rather than posted workers. And in this case such analysis is also without object.

Average gross earnings, by economic activity[350]

Average gross earnings, by economic activity	Average gross earnings December 2013 (RON/month; EUR/month)	Average gross earnings December 2014 (RON/month; EUR/month)	Average gross earnings April 2015 (RON/month; EUR/month)
Construction	1.960 RON/ 439,17 EUR	1.947 RON/ 436,64 EUR	1.847 RON/ 418,25 EUR
Transportation and storage	2.504 RON/ 561,06 EUR	2.667 RON/ 598,12 EUR	2.603 RON/ 589,45 EUR
Land transport and transport via pipelines	2.133 RON/ 477,93 EUR	2.257 RON/ 506,17 EUR	2.215 RON/ 501,59 EUR
Air transport	5.214 RON/ 1168,27 EUR	5.213 RON/ 1.169,10 EUR	5.275 RON/ 1.194,52 EUR
Warehousing and support activities for transportation	3.774 RON/ 845,62 EUR	3.926 RON/ 880,47 EUR	3.734 RON/ 845,56 EUR
Human health and social work activities	2.065 RON/ 462,69 EUR	2.135 RON/ 478,81 EUR	2.181 RON/ 493,89 EUR

Source: Own calculation based on NIS data

Q4: In the temporary work agencies sector, could you describe who the "final users" of posted workers are?

[350]Source National Statistic Institute www.insse.ro

Temporary agency work has been regulated and recognised in Romania since 2003. The Labour Code stipulates that a temporary work agency is a business venture licensed by the Ministry of Labour, Family, Social Protection and Elderly, which provides to **user companies**, on a temporary basis, skilled and/or unskilled labour which such an agency employs and pays for this purpose. **An agency worker** is a person employed by an employer that acts as a temporary work agency, and makes sure a person is available to a user company, temporarily, in order to perform precise tasks. **A user company** is the employer to which the temporary work agency provides a temporary worker for the performance of precise tasks on a temporary basis.

The grounds allowed for the use of temporary agency work stipulated in the Labour Code, Article 88, are as follows:

- The performance of a precise, but temporary task, referred to as a temporary work assignment, and only in the following cases:
    - to replace a permanent worker whose permanent employment agreement is suspended, during the suspension period;
    - to perform seasonal work;
    - to perform specialized or occasional work.

The length of assignment is regulated by article 89 of the Labour Code as follows:

- The length of a temporary work assignment may not exceed 12 months;
- The length of a temporary work assignment may be extended once, for a period which, added to the initial length of the assignment, may not exceed 18 months:
- The reasons for which the length of a temporary work assignment may be extended shall be as stipulated in the individual employment agreement, or as agreed upon in an addendum thereto.

Government Decision no. 938/2004 regulates two types of specific agreements:

- The **employment agreement** concluded by and between the temporary work agency and the employee, referred to as the temporary employment agreement, which encloses the following: the parties' particulars; temporary work assignment; type of business; user's identity and place of business; place of the temporary work assignment, or the option that the temporary employee may perform duties on the premises of several users; worker's professional qualification and skills; effective date of the agreement; length of the assignment; concrete working conditions, with a reference to the specific hazards of the job, if any; annual leave; probation period, if any; notice requirements; wage entitlements, means of payment, frequency of payment; normal length of working time; data related to the foreign-based location, when the worker is recruited for work abroad; provisions regarding termination of agreement by the agency, upon request by the user.
- The **agreement** concluded by and between the temporary work agency and the user, referred to as the sourcing agreement, which encloses the following: the reason and purpose for which the use of a temporary worker is necessary; time span required for the temporary work assignment, and any amendment thereof; job description, qualifications required, place of performance of the assignment, working schedule; working conditions; individual protection outfit and working implements the temporary worker is supposed to use; any other services or facilities to be made available to the temporary worker; value of the agreement, split into the share due to the agency and the wage due to the worker; user's obligation to brief/train the worker on the health and safety at work rules and regulations.

Agreements may be concluded for the length of the assignment, which may not exceed 12 months, and may be extended only once, without exceeding an overall period of 18 months.

According to the responses to the questionnaire, the user companies for posted workers from Romanian temporary work agencies are mainly companies active in the construction and transportation sectors.

Q5: **Is 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 (hereafter "PWD") implemented in your country so as to comply with the minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers?**

Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?

Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services has been transposed into the Romanian legislation through the **Law no. 344/2006** on the posting of workers in the framework of the provision of transnational services. The Law was adopted on 19 July 2006, published in the Official Journal of Romania on 24 July 2006 and entered into force on 1 January 2007. The adoption of Law no. 344/2006 aimed at ensuring the transposition of the Directive within the context of evolving the Romanian labour legislation in light of Romania's accession to the EU on 1 January 2007. In addition, GD 104/2007 (on the specific procedure for the posting of workers in the territory of Romania in the framework of the provision of transnational services) and Law no. 108/1999 (on the setting up and organising of the Labour Inspection, as republished on 10 October 2002) provide measures for the enforcement of the obligations deriving from Law no. 344/2006. In the framework of the transnational provision of services, whatever the law applicable to the employment relationship, the employees posted in the Romanian territory benefit from the labour conditions established by the Romanian law and/or by the collective agreement at national and branch level, concerning the minimum wage, including overtime payment or compensations.

Due to the fact that the current Title VII of Law no. 62/2011 on social dialogue has completely eliminated at a national level the collective bargaining which previously took place between representatives of the employers and trade union confederations, the recent amendment to Law no. 344/2006, approved by Emergency Ordinance No. 25/2015, brings some clarification[351] in this regard.

Thus, by the new regulations, in the framework of the transnational provision of services, whatever the law applicable to the employment relationship, the employees posted in the Romanian territory benefit from the labour conditions established by the Romanian law and/or **by collective agreement concluded at the sectoral level, with applicability extended to the whole sector of activity, according to the law**, concerning to the minimum wage, including overtime payment or compensations.

Currently, for the purposes of this law, the concept of the minimum wage applicable to employees posted in the Romanian territory is provided in the

[351] This is the Ministry of Labour's appreciation.

Romanian law and / or collective agreement concluded at the sectoral level, with applicability extended to the whole sector, according to the law.

The relevant law transposes Article 3(1) lit. a)-g) of the Directive almost literally. National law implementing the Directive does not provide for the application of terms and conditions of employment on matters other than those referred to in Article 3 (1) paragraph lit. a) - g) of the Directive.

The provisions related to the minimum wage shall not apply in the case of initial assembly and/or first installation of goods, where this is an integral part of an agreement for the supply of goods, necessary for taking the goods supplied into use and carried out by the skilled and/or specialised employees of the supplying undertaking, if the period of posting is less than 8 days.

This exception shall not apply to activities in the field of constructions, relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

- excavation
- earthmoving
- actual building work
- assembly and dismantling of prefabricated elements
- fitting out or installation
- alterations
- renovation
- repairs
- dismantling
- demolition
- maintenance
- upkeep, painting and cleaning work
- improvements.

The Law no. 344/2006 shall not limit the application of labour conditions which are more favourable to employees posted in the Romanian territory.

Romania did not use the opportunity offered in Article 3 Para (9) and therefore it did not extend the provisions for posted workers in Romania through temporary employment agencies to the terms and conditions applicable to temporary workers from Romania. **Consequently, in the case of temporary workers in Romania the general provisions set out in Article 3 (1) of the Directive are applicable.** "Art. 3 (1) (9) Member States may provide that the companies 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."

Regarding the Article 3(10) of the Directive, the exceptions regulated by this article are not provided for by the Romanian law, which only states that the provisions of this Law shall not preclude the application of terms and conditions of employment that are more favourable for the employees posted within the territory of Romania.

Article 3(10) stated that "this Directive shall not preclude the application by Member States, in compliance with the Treaty, to national companies and to the companies of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,

- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex."

Official Journal of Romania no 476 of 30 June 2015 published Government Emergency Ordinance no 28/2015 (the "Ordinance") which amends and supplements Law no 344/2006 on the posting of workers in the framework of the provision of transnational services ("Law no. 344/2006"). One of the major changes to Law no. 344/2006 refers **to the extension of its scope as its provisions shall also apply to companies established in the territory of Romania** that, in the framework of the provision of transnational services, post their employees to a Member State of the European Union (EU), of the European Economic Area (EEA) or to the Swiss Confederation ("Switzerland"), in the following situations:

- under a services agreement concluded by the posting Romanian employer with the beneficiary of services which is active in any of the abovementioned territories (EU, EEA or Switzerland);
- in case the Romanian employee is posted with another company established in any of the aforesaid territories (EU, EEA or Switzerland) and belonging to the group of companies of which the Romanian employer is a member;
- temporary work agents in Romania that post workers to a beneficiary undertaking which is established or is active in any of the territories mentioned hereinabove (EU, EEA or Switzerland).

The provisions regarding the working conditions applicable until now to foreign workers posted in Romania are now applicable also to Romanian workers posted abroad. Thus, these workers may benefit from the working conditions of the state where they are posted, in respect of:

- **the minimum rates of pay, including overtime rates**;
- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- the conditions of hiring-out of workers, in particular the supply of workers by temporary employment companies;
- health, safety and hygiene at work;
- protective measures with regard to the terms and conditions of employment of the following categories: pregnant women or who have recently given birth, children and young people;
- equality of treatment between men and women and other provisions on non-discrimination.

The workers posted in another state may benefit from the more favourable labour conditions between those of the state were they are posted in and those of the state in which they usually work.

Also, the new provisions establish the conditions of posting in the case of a Romanian employee and include a definition of "posted employee to Romania" and "posted employee from Romania", "costs related to posting" and "specific allowance for posting ".

According to the GEO no. 28/2"costs related to posting" designate any transport, accommodation and meals costs arising from posting. "Specific allowance for posting" designates any other allowance paid in order to compensate the posting related inconveniences.

Therefore the new provisions have been designed to bring some clarifications on the notion of posting, especially in terms of posted workers from Romania, in correlation with

other national laws, and by consequence there is no change in terms of the degree of protection offered to foreign employees posted to Romania when compared to the previous provisions.

We therefore can conclude that Romania has not extended the protection applicable to posted workers on its territory neither above the minimum level set by Directive 96/71/EEC nor in terms of the minimum wage, and any other matters set out in Article 3, Para. 1.

Regarding the Directive on posting, and national legislation transposing that directive, the representatives of employers in the transport area consider that there are not any posting situations in this sector and consequently they are exempted from these provisions.

Q6: To what extent is the subject of the minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.

In general, the issue of posted workers attracts limited attention in public debate and even for social partners the posting issue is not high on the agenda. The absence of debate is linked to the low relevance of "receiving" posting in Romania. The specialised magazines (i.e. on labour law) include articles on relevant European Union case-law on posting and usually the relevant CJ case-law is immediately presented after their occurrence. Also a number of specialized websites (in the legal or tax consultancy area) present and make comments on the case-law.[352] The "sending" of posted workers generated some debate between social partners and Romanian authorities, but it was not at the core of public debate.

The issue of posted workers has made the headlines more recently, following the inspection and closure of a temporary-agency by ANAF (National Tax Administration Agency). ANAF raised the problem of the special situation of the temporary-work agency that pays to posted workers allowances for relocation. These allowances are not covered by the special fiscal definition of daily allowances[353]. Therefore they were not considered as remuneration by the fiscal authorities[354], and these "allowances for relocation" are subject neither to social contribution payments nor to social benefits of any kind for the worker. This situation has been debated in the Media and several bilateral meetings were held with public institutions to analyse this situation. At the moment, it seems that the discussions between ANAF and the Romanian companies have been reduced on this

[352]http://www.juridice.ro/280347/intrebare-preliminara-cu-privire-la-preluarea-de-catre-un-sindicat-a-creantelor-intemeiate-pe-remuneratii-update-decizia-curtii-de-justitie.html

http://rojust.ro/cjue-referitor-la-detasarea-angajatiilor-intr-un-alt-stat/

http://jpa.ro/wp-content/uploads/2015/03/JPA_TAX_UPDATE_201502.pdf

http://www.avocatnet.ro/content/articles/id_39882/CJUE-Salariul-minim-al-lucratorilor-detasati-este-reglementat-de-legea-statului-gazda.html

[353]https://static.anaf.ro/static/3/Anaf/CP%20-%20908173.pdf

[354] According to Fiscal Code

issue. ANAF has passed a law on tax amnesty (i.e. Law 209/2015) which shall also apply to companies using posted workers abroad. However, the situation still remains unclear, whereas this law on tax amnesty will apply only to past situations and does not provide any clarification regarding means of its interpretation in the future for similar situations.

The minimum wage is a current topic for trade unions, but only from a national perspective. The low levels of the minimum wage and the lack of a direct link between the minimum wage and the minimum consumption basket, both determine the trade unions to request the increase of minimum wage at the level of 60% of the average income. Even during the recent meetings with the IMF,[355] trade unions have included on their agenda the minimum wage topic, since the IMF loan condition led to removal of the national collective bargaining[356].

As subject of our research, the minimum wage is used both from a sociological (i.e. minimum wage effects on living standards) and economic perspective. But one should emphasize that our analysis concerns only the situation of Romanian citizens and has no international/European dimension.

II. WAGE-SETTING MECHANISMS

II.1. A better understanding of minimum wage-setting mechanisms

Q7: Which types of legal instruments/practices are used to set minimum wages? Describe in details the mechanism(s) used.

- **Statutory provisions**
  - **Law, regulations or administrative provisions**
  - **other administrative practices (e.g. "social clauses" in public procurement rules)**
- **Collective agreements**
  - **collective agreement with "statutory" value (e.g. procedure of extension)**
  - **cross-industry**
  - **multi-sectoral, sectoral**
  - **local (regional, community…)**
  - **company or infra-company (e.g. establishment level)**
- **management unilateral rules**
- **arbitration awards**
- **other mechanisms/practices**

Which collective agreements are (or may be) universally applicable within the meaning of Article 3(8) PWD?

At this moment (September 2015) there is no collective agreement universally applicable within the meaning of Article 3(8) PWD in Romania.

[355] http://www.romaniajournal.ro/imf-representatives-dissatisfied-by-lack-of-reforms-in-public-administration-union-leader-says/

[356] See effects on Labour Code modifications

According to the legislation in force, Romania has a multi-layered system for fixing minimum wages.

At national level the minimum wage is determined by the government. Besides that, a minimum wage can be negotiated per industry sector, and per company. The national minimum wage set by government is the basis for the sector and company collective bargaining. The collective bargaining system was fundamentally changed by legislation in 2011 and collective bargaining at national level was abolished. Currently the collective agreements can be negotiated at industry sector level, at company level and for groups of companies.

The terms of collective agreements take effect as follows:

- for all employees in the company, where collective labour agreements are concluded at this level;
- for all employees employed in the companies that are part of the group of companies that concluded the collective agreement;
- for all employees employed in the companies of the industry sector which concluded the industry sector agreement and which are part of the employees' organisations signatory of the collective agreement.

In respect of agreements negotiated at the level of the industry sector, collective agreements will be recorded at that level only in case of the signatory employers' associations that employ more than half of the employees in the industry sector concerned. Otherwise, the collective agreement will be registered as an agreement for a group of companies and only covers those companies belonging to the signatory organisations.

Industry sector agreements are only binding to the whole industry sector if the signatory employers' associations employ more than half of the employees in the industry sector concerned and the extension has been requested by the signatories and approved by the National Tripartite Council for Social Dialogue.

If this is not the case, they will be registered as industry sector agreements that will cover only the companies of the industry sector which concluded the industry sector agreement and which are part of the employees' organisations signatory of the collective agreement

At company level, there is a legal obligation to negotiate – although not to reach an agreement. The employer should initiate the process. This obligation applies where the company has 21 or more employees. **Agreements at lower levels cannot contain clauses providing for worse conditions than those negotiated at a higher level.**

The new Social Dialogue Code changed the rules concerning who is entitled to negotiate at company level. At industry sector level, the situation remains unchanged and unions must represent at least 7% of the employees in the industry sector in order to be able to negotiate at this level. (Employers' associations must represent 10%). At company level they must represent at least half plus one (previously one third) of the employees of the company.

Statutory provisions

The Constitution of Romania, as supreme law, stipulates in Article 41(2) on labour and social protection of labour that all employees have the right to social protection of labour. The protecting measures concern health and safety at work, working conditions for women and the young, **the setting up of a minimum wage per economy** (emphasis added), weekends, paid annual leave, and work carried out under hard conditions, as well as other specific situations. The Romanian Constitution is at the top of the hierarchy of legal norms. All other pieces of legislation and norms must comply with the Constitution.

The Labour Code (Law 53/2003)[357], regulates all relations between an employee and an employer and it is the compulsory base for concluding individual and collective agreements. According to Art. 159, Para. (1) of the Labour Code, the wage is provided for the work performed by the employee under an individual labour agreement. According to Art. 160, wages shall include:

- basic wages,
- allowances,
- increases,
- supplements.

This rule also applies to employees whose wage is partially fixed and partially variable, depending on the results of their work; the fixed part shall not be lower than the minimum wage (even if, for instance, the employee does not finish his/her work load). Similarly and according to Art. 165 of the Labour Code, if the employer provides food, accommodation and other incentives under either a collective or individual labour agreement, the wage in cash provided for the work performed shall not be lower than the minimum wage approved by Government Decision (GD).

Collective labour agreements may increase the minimum wage above the threshold established by GD, yet they may not modify the definition of the minimum wage in the sense of including certain fluctuating rights such as increases or allowances.

Collective agreements

Law No. 62/2011 on Social Dialogue lays out national and sectoral regulations regarding: general provisions, including general definitions; provisions on the establishment, organisation, functioning and representativeness of trade union organisations; provisions on the establishment, organisation, functioning and representativeness of employers' organisations; regulation of the establishment and functioning of a National Tripartite Council for Social Dialogue; regulation of the establishment and the functioning of the tripartite Social and Economic Council; regulation of the establishment and functioning of social dialogue committees at central public administration level and regional level; regulation of collective labour bargaining; regulation of methods for resolving labour conflicts; sanctions; final and transitional provisions. **Law No. 62 contains the minimum provisions for individual and collective agreements in all sectors of activity.**

The collective agreements in force from 31 December 2014 are presented in Annex 1.

[357] Organic laws are second in the legal hierarchy.

CONSTRUCTION

At the moment there is no collective agreement universally applicable within the meaning of Article 3(8) PWD.

In general, the industry sector relations in the Romanian Construction Sector are governed by two representative organisations:

- ARACO – the Romanian Association of Construction Entrepreneurs, representing employers;
- FGS FAMILIA – the FAMILIA General Federation of Trade Unions, representing employees.

Both organisations are involved in collective bargaining regulated by Law No. 62/2011 on Social Dialogue and have jointly funded a Self-Regulatory System in the Construction Sector (SASeC), governed by the Statutes of its component Foundations and Associations. Under Law No. 62 on Social Dialogue, trade unions and employers' organisations obtain Legal Personality and Representativeness in Court.

Industrial relations in the construction sector are determined, in particular, under:

- The Sectoral Agreement of Collective Agreement, which regulates the working relationships between employers and employees;
- The Sectoral Social Agreement in Construction, which regulates institutions created under FGS - ARACO.

The Sectoral Agreement of Collective Agreement covers all workers employed under an individual labour agreement by any company in the group of ARACO and FGS member companies and it is the minimum mandatory requirement for negotiating collective labour agreements at company level. Besides the traditional trades such as bricklayers, blacksmiths, concreters, scaffolders, etc., in the Romanian construction sector, crane operators, electricians, plumbers and fitters, plant operators and all kinds of drivers, etc. are also considered to be construction workers. The Sectoral Agreement takes into account the minimum provisions of Law No. 62/2011 and, as an agreement between the parties, it represents the minimum legal basis for the signatories' affiliated group of construction companies. **Workers not covered by this Agreement are subject only to the minimum provisions of Law no. 62/2011 and the Labour Code (Law 53/2003)**. The Sectoral Social Agreement in Construction regulates the management of all NGOs established by ARACO and FGS.

TRANSPORT

At the moment there is no collective agreement universally applicable within the meaning of Article 3(8) PWD.

Industrial relations in the Romanian Transportation sector are governed by these representative organisations:

- THE NATIONAL UNION OF ROAD HAULIERS FROM ROMANIA - UNTRR an employers' organization, set up in 1990 which promotes and protects the interests of road hauliers at both national and international levels;
- THE ROMANIAN UNION OF PUBLIC TRANSPORT - an employers' association of public utility recognition according to the GD 1139/2005;

- ROMANIAN TRANSPORT WORKERS' TRADE UNION CONVENTION a professional organization of transport trade unions, gathering at this moment organizations of all transport modes: rail transport, road transport, naval transport, air transport and underground transport;
- THE NATIONAL FEDERATION OF ROMANIAN DRIVERS' SYNDICATES (FNSSR) a member of CSNTR. At European level, FNSSR is affiliated to the EUROPEAN TRANSPORT WORKERS' FEDERATION (ETF);
- TRANSLOC FEDERATION is a non-political, federative union structure, with complete independence from the public authorities and employers' organizations.

Industrial relations in the transportation sector are determined, in particular, by collective labour agreements at the transportation sectoral level, which are regulating the working relationships between employers and employees. The sectoral collective agreement at the transportation sector covers all workers employed under an individual labour agreement by any company in the group of CNPR and UNTRR member companies and it is the minimum mandatory requirement for negotiating collective labour agreements at company level. **Workers not covered by this Agreement are subject only to the minimum provisions of Law No. 62/2011 and the Labour Code (Law 53/2003)**.

HEALTH CARE AND SOCIAL SERVICIES

At the moment there is no collective agreement universally applicable within the meaning of Article 3(8) PWD.

Industrial relations in the Romanian health care and social service sector are governed by these representative organisations:

- Sanitas Federation founded on 1 February 1990, representative for the health sector. Union members are mostly health care assistants, including medical assistants, nurses, midwives, etc.;
- The National Trade Union Federation "Ambulanţa" exists under this name since 1997. Its members come from all the professions in the ambulance service, namely physicians, medical assistants, stretcher bearers ambulance workers, call centre operators, administrative personnel, automotive mechanics, ancillary personnel, etc.;
- Free Trade Unions Federation from Sanitary Companies of Romania - FSLUSR;
- The National Trade Unions Central from Health and Social Care - CNS SAN ASIST represents all types of employees in the health system;
- National Free Trade Unions Federation of Technical, Business and Administrative Personnel of Healthcare and Spa Companies - TESA USB represents the interests of the technical, business, and administrative staff of medical companies. At National level, it is affiliated with the CNS Cartel Alfa;
- Ministry of Health is the main employer in the health sector and covers the entire health sector, and all the state-owned health facilities;
- The National Union of Romanian Employers - UNPR, a national scale representativeness employers' confederation, includes the Romanian Pharmaceutical Employers Union – PFDR;
- The General Union of Romanian Industrialists - UGIR is an employer organisation of national representativeness. UGIR takes part in the collective bargaining for the entire health sector;
- The National Union of Romanian Employers – CNPR;
- The General Union of Romanian Industrialists 1903 - UGIR 1903.

The collective agreement negotiated in the health sector is a sectoral multi-employer agreement signed by: MS, CNAS, as representatives of the Government and the employer confederations UNPR, UGIR, CNPR, CNIPMMR, UGIR 1903, on the one hand, and the following trade unions: Federation Sanitas (as a proxy of CNSLR Frăţia), the Federation TESA USB (as a proxy of CNS Cartel Alfa), Federation "Ambulanţa" (as a proxy of BNS), FSLUSR (as a proxy of CSN Meridian), and CNS SAN ASIST (as a proxy of CNS Cartel Alfa), as representatives of the employees, on the other. The latest agreement applicable to the health sector was the collective agreement concluded for the period 2008-2010, for the health sector, published in Official Journal, Part V, No. 16/2008.

After the Law no. 62/2011 came into force, and in accordance with its provisions, a healthcare collective labour agreement at companies' level was negotiated and concluded. The collective agreement was signed by the Ministry of Health, as employer and the trade union, represented by the Sanitas Federation, National Federation "Ambulanța" and - Central National Trade Union of Health and Social Service - CNS SAN. ASIST.

The collective agreement covers only the employees of companies subordinated to the authority of or coordinated by the Ministry of Health (public health departments; institutes and medical centres; hospitals; diagnostic and treatment centres; ambulance services; institutions and bodies employing health personnel and auxiliary health). Another collective labour agreement was negotiated separately at group level under the administration of Hospitals and Health Services Administration Bucharest for the period 2012 - 2014, (the agreement was published in the Official Journal). The provisions of this collective agreement apply to all health companies subordinated to the Bucharest Authority of Hospitals and Health Services Administration. A similar agreement was signed in Maramureș County.

A multi-employer collective agreement was negotiated separately for the group of sanitary companies belonging to the Ministry of Transport (MT), signed by the MT (as representative of the 15 hospitals for railway workers), the Federation Sanitas (recognised as representative at sector level) and the Alliance of Trade Unions from Romanian Railway Hospitals which covers for 14 hospital-based unions that gained recognition as bargaining partners. The last applicable collective agreement was concluded for the period 2012 – 2014 and was published in Official Journal, Part. V, 2012.

Workers not covered by this Agreement are subject only to the minimum provisions of Law no. 62/2011 and the Labour Code (Law 53/2003).

TEMPORARY WORK AGENCIES

At the moment there is no collective agreement universally applicable within the meaning of Article 3(8) PWD.

There have been up to the moment no collective agreements in this sector. In fact there are no employers' organizations and/or trade unions organized in this area.

Q8: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)**

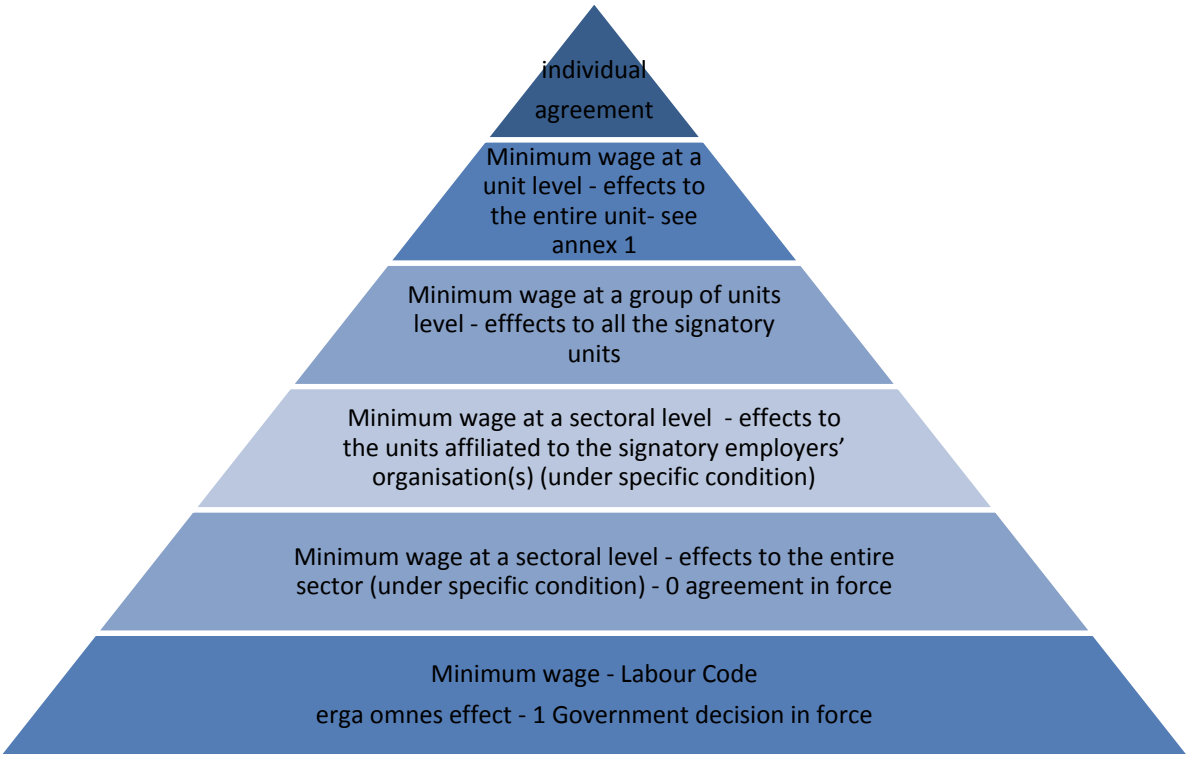
The first layer is the minimum wage-setting mechanism **established by the government's decision according to the Labour Code**. The minimum gross basic wage guaranteed for payment in Romania, according to the normal working schedule is established by Government Decision, following negotiations with unions and associations of employers and **it is applicable erga omnes, without any exception.**

The second layer is the minimum wage-setting mechanism **established by collective agreements**. These agreements irrespective of the level at which they are concluded, cannot contain rights inferior to those stipulated under the Labour Code, which are minimal rights. The employer neither can negotiate nor establish basic wages by the individual employment agreement lower than the minimum gross wage per country. The employer is obliged to guarantee in payment a gross monthly wage at least equal to the minimum gross wage per country.

The current Title VII of Law no. 62 has eliminated collective bargaining at a national level, which previously took place between the representative employers' and trade union confederations. At a sectoral level, negotiation is possible, although not compulsory, and agreements are only registered at the sectoral level if the sectoral employers' organisation(s) has/have affiliated more than half of the total number of employees within the industry sector concerned. If the above-mentioned conditions are not met, then the collective agreement is registered as an agreement for a group of companies. An index of such companies must be attached to the agreement. The companies must have the same economic classification code (NACE) in order to be declared part of the industry sector.

Industry sector agreements are binding to the whole industry sector if the signatory employers' associations employ more than half of the employees in the industry sector concerned and if the National Tripartite Council decides, at the request of the contracting parties, to extend the provision to the entire sector. If this is not the case, they will be registered as industry sector agreements that will cover only the companies of the industry sector which concluded the industry sector agreement and which are part of the employees' organisations signatory of the collective agreement

It is compulsory to negotiate collective labour agreements at company level, unless the company has less than 21 employees. Under the Social Dialogue Law, it is the employer's responsibility to negotiate. Collective employment agreements cannot contain any clauses establishing rights on a level inferior to the rights established by collective employment agreement concluded at a superior level, and individual employment agreements cannot contain any clauses establishing rights at an inferior level to those established by collective employment agreements. The individual work agreement must include, at a minimum, the following: the identity of the parties, the workplace and mobility of the workplace, individual performance goals, the employer's headquarters, the position/occupation, as per the Romanian Job Position Classification – COR, any specific risks of the job title, the effective starting date of the agreement, the duration of the agreement in the case of a CIM for a definite time period, the duration of holiday leave, the conditions and time for given notice, the basic wage, bonuses, allowances, etc., the standard working time – 40 hours per week and 8 hours per day, indication of the collective labour agreement regulating the employee's rights and obligations, the duration of the trial period, the non-competition clause, the vocational training clause, the confidentiality clause, the mobility clause. In practice, the labour agreement may have a higher minimum wage than the one set by the government. This usually includes basic wage and some bonuses (such as bonus for seniority).



Q9: **To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wage? What groups/what share of workers do not receive the minimum wage, and what reasons can be identified?**

Under the Labour Code (Labour Code Act 53/2003, as subsequently amended and supplemented), the national gross minimum wage guaranteed in payment, for a full-time working day of eight hours, is set by Government Decision, after consultations with the employers and trade union organisations. Since the enactment in 2011 of the new social dialogue legislation, the CNTDS[358] is the body vested to ensure the framework required for consultations in regard to the minimum wage. The minimum wage is the same for all workers, irrespective of age, level of education, or other criteria. When the working day is shorter than eight hours, the basic minimum wage is calculated as a ratio of the national minimum gross wages.

The industry sector collective agreements may set a higher minimum wage than the national one. In practice, although there is a legal possibility, the minimum wage at the sector level is usually set at the same level as the one set in the Government Decision. When differences are registered, these differences are very small (25 RON representing less than 5 Euro / month)[359].

An employer may not bargain and set, by individual employment agreement, a wage below the national gross minimum wage. The company collective agreements and

[358] National Tripartite Council

[359] See Annex 1

individual employment agreements may contain a minimum wage above the level stipulated by law. But these wages depend heavily on the economic branch (there are significant disparities between the hospital services sector - the worst remunerated in Romania and the oil industry sector, which, for example, is one of the best remunerated).

We consider that in Romania, the level of the minimum wage is more related to the economic sector of activity than to the legal minimum wage setting mechanism. Large labour force migration from Romania abroad has created a labour shortage in some sectors of Romania's economy. As a result, these shortages also have an impact in setting the minimum wage at company/individual level. The gaps in the labour market generate economic effects for businesses as they cause wage pressures, especially in the IT sector and others high skilled sectors.

The wage-earner or employee is defined in the applicable legislation as being the individual person who based on an individual labour agreement is obliged to perform labour for and under the authority of an employer, individual or legal person, in exchange of a remuneration named wage. According to the Government Decision on fixing the minimum wage, the employer who establishes a basic wage below the wage stipulated by legislation is fined 1.000 up to 2.000 RON.

In terms of respecting minimum wages in the case of posting workers, the number of labour inspection records cases finding violation of legal provisions is very low. This situation is obviously due to the low minimum wage in Romania.

In Romania no worker can receive a salary lower than the minimum wage. Paying a lower salary is considered a contravention. The situations identified by labour inspectors are rare and are punished by the law. No labour contract can be registered in the electronic system of employees without respecting the provisions on remuneration. When it occurs, the violation of the law is rather by using undocumented workers than by paying a lower income than as required by law. The check of the wage amount can be done online and determination of contravention is immediate.

Q10: To what extent do the wage-setting mechanisms differentiate rules on the minimum wage according to:

- Employee's conventional classification,
- Employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.),
- Employment policies: type of working contract (e.g. low number of hours /week), person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc.
- Other criteria

Under Article 155 of the Labour Code, **the wage includes the basic wage, the allowances, the bonuses and other benefits**. In the literature, the basic wage is defined as the main and fixed part of the total wage, to be paid to each employee, taking into account the professional qualification and training, and the professional skills. It constitutes a benchmark according to which other rights of employees are calculated, such as, for example, various allowances and bonuses.

According to **art. 40 (1) of the National Collective Work Agreement concluded for the years 2011-2014**[360], the contracting parties agree to include the bonuses in the basic wage. Therefore, bonuses were granted only in workplaces where they were not included in the basic wage. For 2011 the hierarchy coefficients applicable to the minimum wage, as part of the minimum rate of pay, were as follows:

- labourers: unskilled - 1 and skilled – 1.1;
- administrative with: high school education -1.1, post-secondary non-tertiary education – 1.15;
- specialised personnel: foremen = 1.3, short-term higher education, long-term higher education – 1.3.

Minimum increases to be granted under the agreement, as part of the minimum rate of pay, were as follows: (a) for particular, difficult, dangerous or embarrassing working conditions, 10% of the basic wage; (b) for occupations in noxious conditions, 10% of the minimum wage negotiated at the company level; (c) for overtime hours and for hours worked on free days and on public holidays which were not properly compensated with paid free hours, a bonus of 100% of the basic wage was granted; (d) **for work experience, minimum 5% for 3 years of seniority and maximum 25% for seniority of over 20 years, of the basic wage;** e) for night work, 25% of the basic wage; f) **for the exercise of another job a bonus of up to 50% of the basic wage of the replaced function may be granted; the amounts are established through negotiations of the national collective agreements at the branch level, groups of companies or individual companies**. Wage increases mentioned at bullets (a) and (b) abovementioned are not included in the basic wage and are no longer granted after the normalization of working conditions.

Based on this agreement there were no differences in terms of the type of working agreement or the person's employability, and the provisions of the agreement were applicable to all employees from all the companies in the country, irrespective their social capital.

Through the collective agreement at industry sector, groups of companies and at a companies' level, other wage hierarchy coefficients can be also negotiated. The same collective agreement regulates in art. 41 the allowances to the basic wage issue.

Constituent elements of salary /Sector	Construction	Transport	Health and social services	Temporary work agency[361]
Basic pay	x	x	x	
Bonuses	x	x	x	
Allowances and other supplements	x	x	x	

[360] Because of legislative changes, the Agreement was not registered by the Ministry of Labour and consequently it was not published in the Romanian Official Journal. Regarding the wage regime, this agreement reflects the provisions of the previous agreements. Currently the possibility to conclude a collective agreement at national level is no longer regulated by the legislation in force.

[361] No contract in this sector

CONSTRUCTION[362]

Within the group of companies affiliated to ARACO and FGS FAMILIA, the concept of "wage" comprises: basic pay, bonuses, allowances and other supplements. The forms of payment are: time-based, performance-related, flat-rate or a percentage share of income and other specific systems.

In the Construction sector, the minimum wage is set at 1.100 RON per month (including the worker's taxes, but not employer' taxes) and applies only to companies in the Group affiliated to ARACO and FGS. The hierarchy coefficients applicable[363], as part of the minimum rate of pay, the minimum wages are as follows:

- **labourers:** unskilled= 1 and skilled = 1,2;
- **administrative** with: high school education = 1,2; post-secondary non-tertiary education = 1,25;
- **specialised personnel:** foremen = 1,3; long-term higher education= 2.

These coefficients are applied to the basic wage of 1.100 RON per month. Under Law no. 62/2011, wage entitlements must be negotiated on a yearly basis.

Within the group of companies affiliated with ARACO and FGS FAMILIA in the Construction sector, standard working time is 10 hours per day from April to November and no additional bonuses are paid. However, in winter time, a winter allowance is paid through the SASeC member Construction Workers' Social Fund. This allowance corresponds to 75% of the average income during the three months prior to commencement of the allowance. Night working hours are taken to be between 10:00 p.m. and 06:00 a.m. and are eligible by national legislation for a bonus of 25%.

Other minimum bonuses[364] provided for in the Sectoral Agreement are:

- difficult working conditions = 10%,
- dangerous working conditions = 10%,
- humiliating working conditions = 25%,
- harmful working conditions = 10% and specific bonuses for working underground, in mining, etc., negotiated separately at company level.

TRANSPORTATION[365]

For the transportation sector, the concept of "wage" comprises: basic pay, allowances, bonuses and other. The forms of payment are: time-based, performance-related, flat-rate or a percentage share of income and other specific systems. The hierarchy coefficients applicable, as part of the minimum rate of pay, the minimum wages were:

[362]This information is according to the Sectoral Agreement on construction **2012-2013.**

[363] If the person is employed as an unskilled worker, the mandatory wage is at least equal to minimum wage. When the person is employed as a skilled worker, the mandatory wage is at least equal to MW*1.1. So, depending on the qualification/position, the mandatory wage is multiplied with specific coefficients.

[364] The revenue of a worker falling in these situations should be equal to the minimum wage plus the corresponding percentage. In the interviews, the authorities' underlined that, when they verify the minimum wage, they refer only to the basic wage which should be at least equal to the statutory minimum wage.

[365]This information is according to the Collective Agreement on transportation sector **2008-2010**

- labourers: unskilled - 1 and skilled – 1,5;
- administrative with: high school education – 1,4; post-secondary non-tertiary education – 1,45;
- specialised personnel: post-secondary non-tertiary education -1,5; short-term higher education; junior long-term higher education – 1,8 and senior -2.

These coefficients are applied to the basic wage of 700 RON per month[366].

Other minimum bonuses provided for in the Sectoral Agreement are:

- difficult working conditions -10% and special – 25%,
- dangerous working conditions = 10%,
- humiliating working conditions = 25%,
- harmful working conditions = 10% and specific bonuses for working underground, mining, etc., negotiated separately at company level,
- overtime work – 100%,
- Seniority 5%- 25% depending on working period,
- Night work - 25%.

HEALTH CARE AND SOCIAL SERVICES[367]

According to the Collective Agreement concerned with the health sector, the wage in public health facilities financed solely by the state is set by law and is not the subject of collective bargaining. In the public sector, the 2008–2009 economic crisis was an opportunity for Romania to reform the wage system for public sector. A single law for public sector employees with the objective of improving simplicity, transparency and fairness of public compensation was adopted. The law harmonized pay arrangements for the various employment categories within the system, putting emphasis on job responsibility and qualification, and reforming the productivity bonus system by folding all bonuses into the base wage. Law no. 284/2010[368] provides that the gross wage includes the basic wage, the payment for basic function, indemnities, compensations, as well as the other elements of the wage system appropriate to every personnel category of the budgetary sector.

The basic wages, function payments/wages and monthly indemnities of inclusion are differentiated by function according to the importance, responsibility, the complexity of the activity and the necessary study level for performing the activity.

TEMPORARY WORK AGENCIES

According to the provisions of art. 11 of GD no. 1256/2011 on operating conditions and the procedure for authorizing temporary work agents, basic conditions of work and employment concerning working time, overtime, daily and weekly rest, night work, holidays, public holidays and **remuneration** applicable to temporary employees are, for the duration of their assignment at a user, at least those which would have applied to the employees if they had been recruited directly by that user to take up the same job. The

[366] At the date of signing this Agreement, the minimum wage was set higher than in GD no. 1051/2008 – 540 LEI/month.

[367] This information is according to the Collective Agreement on health sector **2013-2015**

[368] Law Nr. 284 of 28 December 2010 regarding the unitary remuneration of personnel paid from public funds

last update of the Labour Code which took place in January 2015 by Law no. 12/2015 amending and supplementing the Labour Code has introduced clarifications regarding the wage level in the case of temporary workers. Thus, the wage received by the temporary employee for each assignment cannot be lower than the wage received by an employee of the user company who performs the same assignment or one similar to the temporary employee.

Currently, no collective work agreement on temporary labour work has been concluded. Therefore until 2011 the provisions of the collective labour agreement at national level and the Labour code were directly applicable and all wage hierarchy coefficients were directly applicable in case of temporary employees.

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

After 1989, the concept of the minimum wage was established by the **Law no. 14/1991 on remuneration**. To ensure effective enforcement of the minimum wage, the **Law no 68/1993 on the guaranteed payment of the minimum wage was adopted**, which in Article 1 (1) expressly provides that legal entities and natural people employing staff employed by an individual employment agreement are obliged to guarantee payment of a gross wage at least equal to the minimum gross monthly wage at national level. Taking into account the gross national minimum wage established by the Government, other levels of minimum wages can be negotiated and included in collective agreements.

According to the Labour Code **adopted in 2003**, the minimum wage set in the unique national collective bargaining agreement was the baseline for all employees in the Romanian economy. In July 2011, the Romanian government passed **Law no. 62/2011** on the new collective bargaining rules for all levels (from national to company level). One of major changes brought by the aforementioned law was the abolition of the national collective agreement, which had the effect of eliminating the minimum wage established by this agreement. After the Law no. 40/2011 and the Social Dialogue Law came into force, Romanian labour legislation no longer provides for the national level a bargaining level for collective labour agreements. Thus, although the system was maintained (setting minimum wages at national level and the possibility of establishing other levels of minimum wages negotiated and included in collective agreements at different levels) eliminating collective bargaining at the national level had a direct effect on the level of the minimum wage.

The last update of the Labour Code, which took place in January 2015 by the Law no. 12/2015 amending and supplementing the Labour Code, has brought clarifications regarding the wage level in the case of temporary workers. **Thus, the wage received by the temporary employee for each mission cannot be lower than the wage received by an employee of the user undertaking who performs the same job or one similar to the temporary employee.**

To the extent that the user undertaking does not have such an employee, the wage received by the temporary employee will be determined by taking into account the wage of a person employed with an individual labour agreement and providing the same or similar work, as established by collective agreement applicable to the user undertaking.

Q12: **How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce minimum wage?) Is there an automatic indexation rule? Which criteria are taken into account when deciding on changes to the minimum wage level?**
Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

There are various ways to apply legal provisions, the ones used most often being the issue of a collective decision applicable for all employees eligible to have their wage aligned with law provision.

At the same time there are employers that register this amendment into REVISAL[369] without issuing any document that states the actual change (considering the direct effect of the law). This approach is based on article 17 of the Labour Law ruling that any amendment brought to employees' gross wage requires a mandatory addendum within 20 working days from the effective date of the change, **except situations in which such an amendment is stated expressly by law.** Thus it can be interpreted that, as the minimum wage is established by Government Decision there is no need to issue a collective decision or individual addenda to enforce it.

For example, the minimum wage was increased starting from 1 July 2015 to 1.050 RON according to the Government Decision no. 1091/2014. This amendment involves procedures for companies which currently pay employees with a gross wage under 1.050 RON. Employers who currently pay employees under the new minimum wage must operate this change in the Electronic Register for Romanian Employees - REVISAL, according to GD no. 500/2011 no later than 27 July 2015.

II.2. Minimum wage-setting mechanisms in the context of the posting of workers

Q13: **What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of the minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?**

- **To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?**
- **To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?**
- **To what extent would the extension be easy to implement (and to control) from an administrative point of view?**
- **To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?**
- **To what extent would it reduce the displacement effect on local undertakings and labour force?**

[369] Electronic Register for Romanian Employees

Trade union/employers' organisation point of view

In most cases the Romanian workers posted to another country receive the minimum wage of the receiving country, so it is assumed that they will continue to be paid at the minimum wage level. From the perspective of the sending Members State, there will be no changes (according to construction and TWA representatives). From the perspective of the receiving Member State no changes will be recorded due to considerable differences in wage levels.

In case of Romania as a receiving state, differences between the minimum wage established at national level and minimum defined at the company level are not significant. This difference can be in some cases about 30% higher, but in real terms represent only 70 Euro/month (in terms of gross revenue).

In the case of posting, companies pay host-state rates to their posted workers as a means of preventing those workers from undercutting the local labour market. From the market perspective, this can be portrayed as a form of protecting the national market which can disadvantage firms and workers from low-wage states as Romania. However, interviewees (construction sector) appreciated that in the case of Romanian companies at this time, and given the information they currently have, they do not estimate negative effects. The construction companies estimated that the increase will be covered by the beneficiary but they were unable to make a realistic estimation on the impact on their competitiveness without carrying out a thorough analysis on how much exactly their payroll costs would increase.

The administrative perspective is different. Thus, in accordance with those referred to by the representatives of administration, the extension of the scope of Article 3, Paragraph (1), to collective agreements which do not meet the criteria set out in Article 3 Paragraph (8) of the Directive would raise problems related to the interpretation of the Directive as well as from the administrative and implementation point of view. Freedom to provide services includes the right of companies to provide services in another Member State, by posting their temporary workers, in order to provide services in that Member State. Directive 96/71/EC aims at ensuring the conciliation between fundamental exercise of the freedom of companies to provide cross-border services in accordance with Article 56 of TFUE, with the need to ensure a climate of fair competition and respect for the rights of workers.

To achieve this, Directive 96/71/EEC (1) lays down mandatory rules at the EU level applicable to posted workers in the host Member State (such as, for example, the obligation to pay minimum wages applicable in the host Member State). In this context, it is important to say that the differences existing between the wage rates of the Member States **do not constitute unfair competition** in the case of the freedom to provide services.

The aim of posting in another Member State to supply services is not the integration of posted workers in the labour market state of posting. These workers are sent to provide a service for a limited period of time and remain in direct connection with the provider of services for the entire time of posting.

Rules applicable to foreign providers of services should be imposed in total respect of equality of treatment, without any disadvantages compared to local providers.

Extension of the scope of article 3 paragraph (1) of the Directive on collective agreements which do not meet the criteria set out in Article 3, Paragraph (8) is likely to affect the equality of treatment applicable to foreign providers of services in the host Member State, to the extent that there would be a risk that **they should pay wages higher than those paid by national companies in a similar situation.**

Also, an extension of the scope of application could generate more uncertainty in the interpretation of the Directive, in particular with respect to Article 3, Paragraph 1, Letter a) as the Directive does not distinguish between a natural or legal person, and consequently the beneficiary may have either one of the two forms. At present, regardless of the legal form of the beneficiary of the services, collective agreements of general application within the meaning of Paragraph (8) of Article 3, is determined with certainty. An extension of collective agreements to agreements which do not meet the criteria laid down in Article 3, Paragraph (8) is likely to generate uncertainty with regard to minimum wage rules which should be met by the service provider if the beneficiary would be a natural person.

From the point of view of the national regulations on the negotiation of collective labour agreements, we appreciate that by extending to sectoral collective agreements (agreements with general application within the meaning of the Directive) the application shall cover companies of the sector level. The degree of coverage is much larger, when one takes into account the fact that collective bargaining at company level is mandatory only in the case of companies with more than 21 employees.

Moreover the extension also involves transparency. In the case of sectoral collective agreements, these agreements are published in the Official Journal of Romania, in accordance with the legal provisions in force, which makes them very accessible for all people concerned. In the case of collective employment agreements concluded at the level of companies, these agreements are only notified to the local Labour Inspectorates, which makes it difficult to disseminate at national level the concrete provisions of such agreements.

Specific aspects relating to the legal provisions:

- implementation of sectoral collective agreements with general application leads to an increase in the number of workers covered by the "minimum payment", more than the implementation of collective bargaining agreements at the level of companies.
- implementation of sectoral collective agreements with general application allows a more substantial (and in a more consistent and equitable basis) increase of the "minimum payment" of workers posted.
- provisioning of sectoral collective agreements with general application may be more transparent and easily accessible by stakeholders and easily monitored by administrative authorities for the registration/approval or publication. The effort of collecting and disseminating the information in the case of collective bargaining agreements at the level of the company would generate administrative costs difficult to cover in the context of budgetary crisis.
- for employers, the impact of the implementation of collective agreements, whatever the level, is difficult to estimate in relation to the costs, taking into account the microeconomic situation, the constraints related to the information and the absence of data networks.
- enforcement of sectoral collective agreements with general application can ensure a fair increase of "minimum payment", with the reduction of the effects generated by the mobility of companies and workers. The non-unitary practices approach of

legal collective agreements, irrespective of the level of coverage, generates barriers in the application, with an impact on administrative control and cross-border disputes.

From the administrative point of view, the following issue was identified: the employers who post workers incur significant costs arising as a result of compliance with provisions of the Directive (without taking into account relevant costs of posting such as transport, accommodation, meals and posting allowances paid directly to workers). These costs result in particular from the required formalities, translation of documents, and cooperation with a range of bodies and institutions in the case of an inspection (concerning the conditions of employment, insurance, taxes, etc.). At the same time, employers are subject to certain provisions in the legislation of the host country, including in many cases compliance with the standard minimum wage, with infringement punished by administrative fines.

In this context, it should be pointed out that, sometimes, certain irregularities do not result from intentional failure to comply with the provisions applicable to workers posted in accordance with the rules of the hosting Member State, but also from insufficient information concerning the rules applicable in the hosting Member State.

Therefore, the Directive 2014/67/EU introduces, among other things, an obligation of Member States to ensure better information with regard to the legislation, including the rules laid down by sectoral collective employment agreements generally applicable, in case such rules exist. Thus, the new Directive reinforces the responsibilities of Member States for ensuring transparency in providing information with respect to the conditions of employment and applicable in each Member State. At present, it is difficult for employers who post a worker to find information regarding the rules and procedures which they must comply with in the hosting Member State. We consider that an extension of the scope of application of Article 3 (1) to collective agreements which do not meet the criteria set out in Article 3 Paragraph (8), will lead to additional barriers.

Therefore, on the one hand, the efforts for self-information purposes will be increased significantly, and the employers are forced to inquire about any change at the level of beneficiary of services, even if the posting takes place in the same Members State. These additional efforts to gain information may be reflected in additional costs that are likely to have in the end a negative impact on employers' competitiveness.

Also for the authorities of the hosting Member State the burden to provide information to foreign providers relating to the conditions of employment, including wages, could be excessive and difficult to carry out.

In Romania the Labour Inspection as a liaison office shall cooperate with the authorities of public administration in other Member States regarding the terms and conditions of employment of transnational workers, in accordance with Article 4 of Directive 96/71/EC. According to the legislation in force, the collective agreements concluded at the level of the company shall be registered only at the local labour inspectorates. Because of the large number of such provisions (almost 10,000), comprehensive and appropriate information would be difficult to obtain.

At this moment, the staff of the liaison offices do not have direct access to the content of the agreements of employment concluded at company level and will not be able to provide information with respect to the conditions of employment and/or minimum wage applicable to company level.

In the case of extending the scope of application of Article 3 (1) of Directive 96/71/EC the authorities underlined that problems might appear also for Romanians providers, who will experience difficulty in accessing information with respect to the conditions of work and employment applicable during the period of the posting in the host State.

Currently, the Romanians providers complain that they do not have access to information with regard to the legislation applicable in the host Member State, namely the collective agreements with general application. In the case of extension of the field of application of Article 3 (1) of Directive 96/71/EC to the collective agreements which are not of general application, it will be more difficult for them to reach the useful information.

As regards the impact of a possible extension of Article 3 (1) of Directive 96/71/EC on an increase/decrease in the number of workers posted from Romania in other Member States of the EU, we have to mention that we cannot fully appreciate but taking into account the conditions of socio-economic and financial strength of Romanian employers it may result in a reduction in the number of posted workers in other EU states.

We appreciate that such a measure will not have a significant impact on the number of posted workers employees on the territory of Romania (anyway the number is low i.e. 4.672 posted employees at the level of 2014).

III. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

III.1. Constituent elements of the minimum rates of pay: the host country perspective

Q14: **Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).**

The provision of the Law no. 344/2006, transposing the Directive 96/71/CEE, stipulates the following:
Art. 6 – In the framework of the trans-national provision of services, whatever the law applicable to the employment relationship, the employees posted in the Romanian territory benefit from the labour conditions established by the Romanian law and/or by collective agreement concluded at the sectoral level, with applicability extended to the whole sector of activity, according to the law, concerning to the following:
(a) maximum work periods and minimum rest periods;
(b) minimum duration of the annual paid holidays;
(c) minimum wage, including overtime pays or compensations;
(d) conditions of employees' hiring-out agreement, especially by the temporary employment companies;
(e) health and safety at work;

(f) protective measures applicable to the labour conditions for pregnant women or women who have recently given birth as well as for children and for young people,
(g) equality of treatment between men and women as well as other provisions on non-discrimination.

For the purposes of this law, the concept of the minimum wage applicable to employees posted in the Romanian territory is provided in Romanian law and/or collective agreement concluded at the sectoral level, with applicability extended to the whole sector, according to the law.

The Government Emergency Ordinance no. 28/2015 which amends and supplements Law no. 344/2006 on the posting of workers in the framework of the provisioning of transnational services brings new provisions defining terms such as:

- "employee posted in the Romanian territory",
- "employee posted from the Romanian territory",
- "minimum wage" - Minimum wages applicable on the territory of Romania for the employed posted on the territory of Romania, namely minimum wages applicable in the territory of a Member State of the European Union or the European Economic Area, or in the territory Swiss Confederation, for the employee posted on the territory of Romania,
- "posting related expenses",
- "posting allowance".

The amendments to Law 344/2006, introduced by the above-mentioned Ordinance, have been in effect as of 30 June 2015.

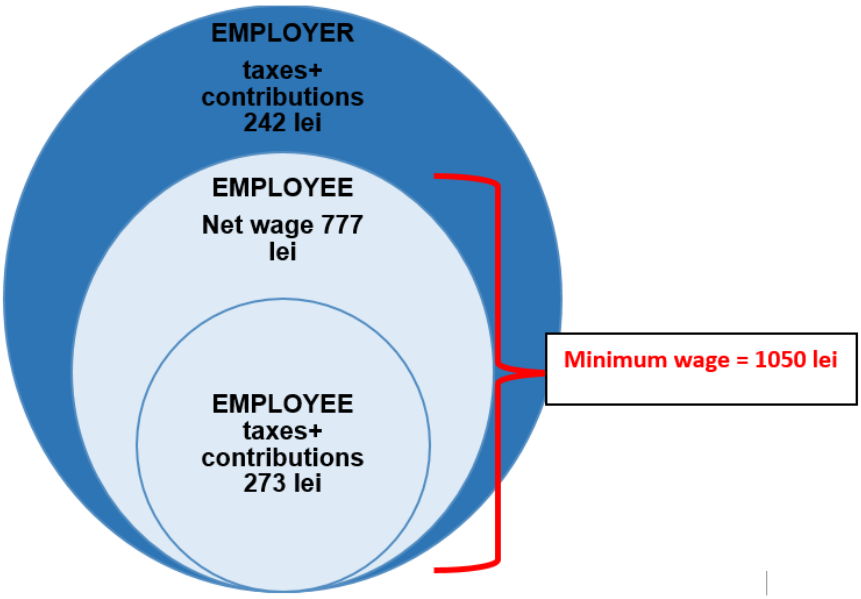
Considering the fact that in Romania there are currently no collective agreements applicable at national level or sectors generally applicable for the entire sector, it follows that the **Law no 344/2006 relates to conditions established by national legislation.** In Romania, minimum wage is determined annually by Government Decision at national level, after consulting the social partners. Only one minimum wage is determined by law and is updated twice a year, usually in January and in July. The mechanism to establish the minimum wage in Romania and the current level of the minimum gross wage were presented in detail under Question 1 above.

The minimum wage as defined in the Government Decision **includes undoubtedly the social contributions and income tax.** This minimum wage must correspond to the person's employment wage (basic wage) and represents the minimum income verified by labour inspection.

In Romania, there are several mandatory social contributions that must be paid by employees:

- Contributions to the social insurance budget (pension scheme): the individual contribution owed by the employee is 10.5% of the gross monthly income;
- Contributions to the unemployment insurance scheme: the individual contribution owed by the employee is 0.5% of the gross monthly wage;
- Contributions to the health insurance fund: 5.5% of the employee's gross monthly income.

The income tax rate is 16% of gross wage, which is withheld by the employer.



According to Article 9 of the Law no. 344/2006, allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid to the employee as covering posting expenses, such as travel, lodging and board expenses. **Thus, clearly it follows that the allowances specific to the posting are considered to be part of the minimum wage.**

Under the new legislation, "posting related expenses" designate any transport costs, accommodation and meals, incurred for the purpose of posting and "posting allowance" designates the allowance paid in order to compensate for the inconvenience of posting.
In Romania the national legislation and/or collective agreements provide that national workers, in addition to the basic wage may be entitled to receive supplementary allowance or bonus assimilated to wages. The components of the wage system are the components of the wage itself, namely the basic wage/wage, increases and additions to the basic wage, as part of the minimum rate of pay.

The basic wage/wage - fixed part of the employee's monthly income - cannot be lower than the national minimum wage approved by Government Decision. The basic wage is the main part of the total wage that is appropriate to every employee, usually taking into account their education level, professional training and qualification, the importance of the job, the characteristics of the duties and the professional competences. It does not only constitute the fixed and main part of the wage but also a landmark according to which the other rights of the employee are calculated such as different indemnities, increases, etc. In the public sector (which includes the health and social care sector) the Law no. 284/2010[370] provides that the gross wage, the gross monthly payment, includes the basic wage, the payment of the basic function/ wage of the basic function, increases, indemnities, compensations, as well as the other elements of the wage system appropriate to every personnel category of the budgetary sector. The basic wages, function payments/wages and monthly indemnities of inclusion are differentiated by function according to the importance, responsibility, the complexity of the activity and the necessary study level for performing the activity. The basic wage, payments of the

[370] The Framework Law Nr. 284 on the unitary remuneration of personnel paid from public funds

basic functions/ wages of the basic functions and the monthly indemnities, is based on the evaluation of the posts, the differentiation being made according to the following criteria:

- knowledge and experience;
- complexity, creativity and diversity of the activities;
- judgment and impact of the decisions;
- influence, coordination and supervision;
- contacts and communication;
- incompatibilities and special treatment.

Within every job, and in order to ensure the possibility to differentiate the basic individual wages according to the level of professional training of every person and to the person's work experience, the basic wages are differentiated by:

- levels in the case of higher education and short term higher education studies;
- professional stages in the case of secondary education or professional levels for public servants.

Usually 2 or 3 levels and 2 or 3 professional stages are used. Within every level or every professional stage the differentiation of the basic wages is usually made on a number of 5 gradations according to the 5 stages of seniority:

- from 3 to 5 years,
- from 5 to 10 years,
- from 10 to 15 years,
- from 15 to 20 years,
- Over 20 years.

The differentiation of the basic wages, function payments/wages and of the monthly indemnities of inclusion is made by multiplying the hierarchy coefficients provided by every function (ranging from 1,00 for the function with the least responsibility to 15,00 for the function with the greatest responsibility in state) by the value of the coefficient 1,00. Within the basic wage of the management positions the management indemnity is included.

For trading companies the basic wage is established by the collective labour agreement and the individual labour agreement, and for the budgetary institutions by law or other legislative acts. According to the legislative acts the basic wage cannot be lower than the minimum gross wage of the country established by Government Decision. The basic wage has a great importance to the wage system and wage policies of all states because it is not only the fixed and main part of the wage but also a standard of reference.

Indemnities - beside the increases and supplements, they represent the variable part of the wage. Indemnities are sums paid to the workers over the basic wage with the purpose of compensating the expenses that they have to make in order to fulfil some labour duties or in other work conditions. Indemnities can be: for fulfilling a management function, for delegation, assignment/secondment, resettlement, permanent missions abroad, etc. The allowances granted with this purpose should not be mistaken for the indemnities appropriate to people that perform labour based on other categories of legal relations than the individual labour agreement, when there is a perfect correspondence with the wage.

The indemnity is regulated as an obligation of the employer in the following conditions:
Temporary interruption of the activity if the employee is at the employer's disposal, the indemnity is at a minimum 75% of the basic wage appropriate to the occupied work

place; participation to courses or professional training stages initiated by the employer, if the participation requires complete removal from work;

For annual holiday that represents the sum that the employees receive during rest leave, and is calculated as an average of the wage rights of the past 3 months prior to the leave and cannot be lower than the total value of the wage rights appropriate for that period.

The delegation or secondment/posting is the sum appropriate for covering the personal expenses of the seconded or delegated employees. The delegated employees of the companies in the country or abroad will benefit from the reimbursement of the transportation, insurance and accommodation expenses according to the conditions established by the collective labour agreements for the other levels; travelling allowance, the amount of which is established by negotiation at branch, groups of companies or company level. The detached employees maintain all the rights they had per secondment day, aside from the ones regarding health and safety at work safety, even if such conditions cannot be met at the work place where the employees have been seconded. If at the secondment posts the equivalent rights are higher, other rights are granted as well, the seconded level benefit from them, including all the rights regarding health and safety at work to the new work place.

The monthly indemnities provided by law are in gross sum and are taxed according to the legal dispositions in force.

Increases are also a variable part of the wage to which the employee is entitled if s/he performs the activity under certain conditions or if s/he meets certain special requirements. Under the current legislation, bonuses are legal increases (regulated by law – Labour Code, with erga omnes applicability) and conventional increases (included in collective agreements applicable only to the employees covered by the agreement).

The increases are established as a percentage that is applied to the basic wage when the conditions provided by law are met or, as appropriate, the collective or individual labour agreement. Regarding the wage increases, e.g. the variable and accessory elements of the wage, The Supreme Court of Cassation and Justice states that: "the increases are only granted in the work places where they are not part of the basic wage, being provided by the Labour Code, laws and ordinances, by the collective labour agreement at the national level and the collective labour agreements at branch, groups of companies and companies' level. In the present legal system the increases are not rewards or gratifications, they mainly constitute a compensatory factor for certain work conditions or for fulfilling some special requirements (professional or of seniority) that provides increased efficacy to the performed labour."

The increases to the basic wage are granted if the following conditions are met:

- the employee must have a vacancy job in a specialization that entitled him/her to a certain increase;
- the employee must effectively work according to the conditions provided by law, the collective labour agreement or, as appropriate, the individual labour agreement. In other words, regardless of the study level, the importance, complexity and work duties, function (post), performed profession, quantity, quality and work value, the branch, sphere or level of activity and the amount of the basic wage (indemnity) of an employee, s/he has to be given a certain increase if s/he works effectively according to the conditions provided by law for granting that certain increase.

The Labour legislation provides the following 'increases' categories:

Increase for overtime are only granted if the performed work over the normal labour schedule (overtime) could not be compensated with the appropriate free time during the following 30 calendar days.

Increase for the work performed during the weekly repose. When labour is performed during the weekly repose the employees benefit from an increase that is negotiated between Parties and for which the amount is determined according to the collective labour agreement.

Increase for working during the legal holidays is granted only if the work performed during these days could not be compensated by the appropriate free time during the following 30 calendar days. The granted increase cannot be lower than 100% of the basic wage.

Increase for working at night is granted if the working time is within the hours of 22:00 – 6:00 and the duration of this work is of at least 3 hours. The increase is granted only if the employer does not have the possibility to reduce the work programme by one hour. The amount of this increase established by the collective labour agreement at national level is 25% of the basic wage corresponding to every hour worked during the mentioned period of time. The employees who work in special conditions where the work schedule is under 8 hours per day also benefit from such an increase.

Other types of increase may be awarded by collective labour agreement, such as[371]:

Increase for seniority. According to the various collective labour agreements this increase is at least 5% for 3 years seniority and maximum 25% for over 20 years seniority, of the basic wage. The seniority stages and the amount of the afferent increase of every stage are negotiated by every employer.

The increase for also exercising another job position is, according to the various collective labour agreements up to 50% of the basic wage concerning the job position replaced.

Increase for special, tough, dangerous or uncomfortable conditions of labour is, according to the various collective labour agreements 10% of the basic wage. The increase for hard labour conditions is granted when the physical effort necessary for performing the tasks is much higher than normal or if the labour is performed in difficult conditions such as travelling on rough terrain, uncomfortable work position, and outdoor labour with great temperature variations. In the budgetary sector an increase of up to 30% of the basic wage is used from which only the sanitation and canalization workers benefit.

The increase for harmful work conditions is, according to the various collective labour agreements, 10% of the minimum wage negotiated on a company level. This increase is used when on the premises where the employee works there are performed, during the production process, certain harmful substances, either powder (asbestos,

[371] Please keep in mind that at this moment there is not any collective agreement universally applicable in Romania within the meaning of Article 3(8) PWD.

silicon, coal, certain metals) vapours or gas (acids, thinners, Sulphur dioxide, ammonia, other harmful substances) and/or if at the workplace there are registered powerful noises or vibrations.
Granting these increases and indemnities depends on specific work conditions, the duration of the activity of the person, and the checking of their granting is done on a case by case basis by labour inspection.

Q15: **Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)**

According to Article 9 of the Law no. 344/2006, posting specific allowances shall be considered part of the minimum wage, unless they are paid to the employee for covering posting expenses, such as travel, lodging and board expenses. Under the new legislation, "posting related expenses" means any transport costs, accommodation and meals, incurred for the purpose of posting. The latter costs are clearly excluded from the minimum wage.

The national legislation details that the following bonuses/payments are not considered as a wage:

- the profit share distributed to employees;
- meal tickets - the employees employed under individual employment agreements, may be the beneficiaries of an allowance of food given under the form of vouchers issued in paper or electronic format. Meal tickets shall be issued only by authorized companies, by the Ministry of Finance, or by employers who have organized canteen or cafeterias;
- insurance compensation - replacement income to total or partial loss of professional income due to accidents, illness or maternity;
- unemployment benefits**;**
- indemnities for moving to another location and installation allowances;
- remuneration rights for Romanian personnel sent abroad - calculated and awarded according to Government Decision no. 518/1995 on some rights and obligations of Romanian personnel sent abroad in the interest of carrying out missions with a temporary character, with subsequent amendments;
- paternity leave allowance - paid to the father;
- per diem - is a daily allowance granted for posting or delegation.

These rights aforementioned granted in cash, are not included in the notion of the wage. Consequently, they are clearly excluded from the calculation of the minimum rates of pay applicable to workers, including posted workers.

The following amounts are not included in income/ wages and are not taxable, under the income tax, and hence are not taken into the calculation of the minimum rates of pay:

- funeral aid, aids for household damages as a result of natural disasters, aids for serious and incurable diseases, aids for child birth, incomes representing gifts for the minor children of the employees, gifts granted to female employees, equivalent cost of transportation to and from the place of work of the employee, costs of the benefits representing treatment and holiday including transportation for employees and their family members granted by employers for their employees or for other people, as provided by the labour agreement. Gifts granted by employers for the benefit of minor children of the employees, on the

occasion of Easter, 1st of June, Christmas and for similar holidays of other religious cults, as well as gifts granted to female employees on the occasion of 8th March, shall not be taxable to the extent that the value of the gift granted for each person, for any of the above mentioned occasions, does not exceed 150 RON. Income types derived by individuals having the nature of those provided above, shall not be included in the wage income and shall not be taxable income if these incomes are received on the basis of special laws and are financed from the budget;

- meals granted by employers to employees, according to the law;
- equivalent monetary value of the free service consisting of using a company accommodation or an accommodation within the premises of the company; compensation of the rent for national defence, public order, and national security personnel; compensation of the rent difference borne by individuals according to special laws;
- accommodation and value of the rent for apartments made available to public officials, consular and diplomatic employees working abroad, according to law;
- value of technical equipment, individual protection and working equipment, protective food, medicines and hygienic-sanitary materials, other labour protection benefits, and mandatory uniforms and equipment, which are granted according to law;
- value of the travel expenses for the transportation between employee's domicile locality and the locality where the employee's place of work is located, at the level of a monthly subscription, for situations where apartments or the equivalent value of the rent is not provided for, according to law;
- amounts received by the employees to cover transportation expenses and accommodation, allowance received for the period of delegation or temporary secondment in another locality, in the country or abroad, for business purposes. Amounts exceeding 2.5 times limitation over the allowance granted to governmental employees by legal persons without a patrimonial purpose and by other entities which are not profit tax payers shall be excepted from these provisions;
- amounts received according to law to cover the expenses related to resettlement for business purposes;
- setting up allowances which are granted only once, at the employment in a company located in other locality different from the residence locality, during the first year of activity after graduation, within the limit of one basic wage at the employment, and as well setting up and resettlement allowances granted according to special laws, to personnel of public institutions and to those resettling their domicile in localities within a disadvantaged area, established according to law, where they have their place of work;
- wages derived by people with severe or serious disabilities;
- incomes from wages as a result of creating computer software; determination of what represents the activity of creating computer software shall be made according to a joint Order of the Minister of labour social solidarity and family, the Minister of communication and information technology and the Minister of public finance;
- amounts or benefits received by individuals from dependent activities carried out abroad, regardless of the fiscal treatment in the foreign state. Exceptions are wage incomes paid by or on behalf of an employer who is a Romanian resident or who has a permanent establishment in Romania, and who are subject to taxation regardless of the period for carrying out activities abroad;
- expenses incurred by an employer for the professional training of the employees in connection with the activity carried out by the person for the employer;

- cost of telephone subscriptions and telephone calls, including telephone cards, incurred for business purposes;
- benefits representing rights to stock option plans, at the moment of granting and at the moment of exercising such rights;
- favourable differences between preferential interests established following negotiation and market interest for credits and deposits.

Q16: **Which components (NB: use the indicative list above) are in the "grey area"? (not clearly belonging or excluded for the calculation of the minimum pay rates)**
Explain your response and give examples. Describe concrete difficulties encountered per sector.

Provisions of the Romanian Labour Code and Romanian Fiscal Code contained detailed provisions regarding components of remuneration which may or may not be considered wages. As well, the collective agreements that are currently in force provided details on the mandatory minimum rights (including wages) for the employee. In this context, in practice, at national level, there are no interpretation difficulties regarding which components of remuneration do or do not belong to the minimum wage amount.

Under the Fiscal Code of Romania, the following elements are inter alia assimilated to wages for taxation purposes:

- use of any good, including any type of vehicle from the business patrimony, for personal purposes, with the exception of transportation from home to the place work and back;
- accommodation, food, clothes, personnel for household works, as well as other goods or services provided free of charge or at a price lower than the market price;
- non-reimbursable loans;
- cancellation of a debt claim of the employer over the employee;
- telephone subscriptions and the cost of telephone calls, including telephone cards, for personal purposes;
- travel permits by any means of transportation, used for personal purposes;
- insurance premiums paid by the payer for its own employees or for another beneficiary of wage income, at the moment of the payment of such premium, other than mandatory premiums.
- gift tickets granted according to the law.

The benefits aforementioned are not to be taken into the calculation of the minimum rates of pay applicable to workers, including posted worker.

Q17: **In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?**

In terms of discrimination, the principle of equal treatment for all employees and employers is one of the principles set in the labour law system in Romania. This principle is included in the Constitution, making it obligatory to comply with all regulations issued in Romania. Thus the provisions of Labour Code shall apply to all Romanian citizens under an individual employment agreement, and to all persons employed in any gainful activity in Romania; employed in an activity abroad, under agreements concluded with a Romanian employer, unless the legislation of the third state where the individual

employment agreement is performed is more favourable; to all foreign nationals, stateless persons and persons having acquired the refugee status engaged in an activity for a Romanian employer on Romanian territory. As any other worker, the specific category of posted worker is equally protected by the legal provisions and legislation makes no differentiation in their case.
Also in terms of positive discrimination, **the wage-setting mechanisms do not include specific rules applicable to posted workers for the determination of the constituent elements of the minimum rate of pay.**

Q18: How do the differences in the definition of the minimum rates of pay impact income levels of posted workers (also taking into account compensation of expenses)?

Q19: In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)

From the perspective of the receiving state, it is obvious that the minimum wage is not an obstacle for posting. Although there are no statistics in this regard, according to unofficial information, the wages for posted workers in Romania are considerably higher than those received by Romanian workers and the employers do not have recourse to the "specific posting allowance" as a way to reach minimum wage. In terms of observing minimum wages in the case of posting workers, there are no labour inspection records for cases of violation of legal provisions. This situation is obviously due to the extremely low minimum wage in Romania. It is obvious that an employer established in an EU or EEA Member State that posts employees to provide services in Romania will equally respect the labour legislation of the sending State. This legislation imposes a minimum wage, and as we have seen previously, only in the case of Bulgaria this minimum wage it is inferior to that established in Romania. In this situation it is almost impossible to violate the legal provisions on minimum wages in Romania.

The prior notification registered by Labour Inspection and the obligation to provide all documents relating to posting both facilitate the monitoring and control mechanisms in the case of posting.

III.2. Constituent elements of the minimum rates of pay: the sending country perspective

Q20: **In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

Usually, in the case of private employers, workers posted from Romania receive a wage (a wage which has the value of at least the legal minimum wage in Romania) and a "posting allowance". Construction employers' representatives have stated that the wage

for skilled workers is usually much higher than the minimum wage. The implementation of construction contracts abroad involves the use of performant workers which do not affect in any way the business competitiveness. Given that the labour market in Romania shows shortages of skilled workers (especially in construction), the performant workers must be stimulated including rendering of proper wages. Consequently, the employers must provide a motivating income for the workers concerned so as to ensure that they remain employees of Romanian companies (and will not leave to work abroad) and at the same time that they want to go for a determined period far from their family. In this situation, the primary motivation is a financial motivation.

The legal level of external per diem established for employees of public institutions is established by Government decision (GD 518/1995 with subsequent amendments). For all the EU countries the level is 35 euro/day. This amount is important because it represents the basis for calculating the amount that can be awarded in the private sector without tax and social contributions.

ANNEXES

I. Background of the 2015 amendment of the law

Regarding the posting made by employers from Romania to other EU countries, there was no specific regulation in place, but a similar institution e.g. 'the delegation' was available under the Labour Code. The absence of a specific legal framework, led in practice, to a heterogeneous and diverse interpretation and application by employers.

During ANAF inspections in 2014 some irregularities in terms of fiscal discipline were discovered. In terms of tax sums paid by way of maintenance, i.e. the difference between the minimum wage declared and registered in Romania to whom taxes and contribution must be paid, and the value of the minimum wage granted to the worker in another Member State of the European Union. Some discrepancy was noted between the incomes on which tax liability was vested in Romania and the real revenue paid to the employees. In some cases, according to the ANAF, the real revenue was significantly higher (approximately 1.500 euros per month compared to the minimum wage of 975 RON).

Thus, according to ANAF, the amount to be awarded to employees as a daily subsistence allowance, have been appreciated by the inspection bodies as assimilated to wages, in accordance with the provisions of Article 55 and Article 296 of Law No 571/2003 - Fiscal Code, in conjunction with the provisions of Article 1 and in Article 17 of GD No 518/1995 and Article 43 of Law No 53/2003 - Labour Code.

In an attempt to provide clarification as to how posting of Romanian workers in other EU Member States occurs, the text of the transposition law was changed. The field of application includes now both the situation of posted workers in Romania and those posted from Romania. However, the law has not clarified the interpretation of the income situation of posted workers.

Moreover, ANAF has initiated a tax amnesty law (Law no.209/2015). The Explanatory Memorandum states that this law is necessary to straighten situations arising in practice because of different interpretations of the current legislation on granting the rights to posted workers abroad, the interpretation which implies correlation between the Tax Code and labour law. The main purpose is to cancel certain fiscal liabilities related to

fiscal periods ending by the 1st of July 2015 as a result of the reclassification of amounts representing allowances received for periods of delegation and secondment by employees that carried out their activity on the territory of another country. These differences related to fiscal periods ending by the 1st of July 2015 and unpaid until this Law came into force (the 23rd of July 2015) are cancelled. The fiscal authority does not reclassify this type of income and has not issued a tax decision in this regard for periods prior to the 1st of July 2015.

This amnesty law cancels all punitive measures taken by ANAF on the presumed violation of legislation, but provides no solution for the future status. Otherwise neither modification to the law on the posting offers such a solution. A common point of view of fiscal bodies and labour law authorities is necessary, in accordance with the provisions of European legislation and the Court of Justice case-law, in order to ensure a clear and unequivocal legal framework. The current legislation, even with all changes made in 2015, allows for further different interpretations.

II. Posting versus delegation

For Romania, the notion of posting used by EU regulations differs from the national meaning established by the organic law (Labour Code). Posting of the Labour Code and the EU transnational posting use the same term (posting) but the meaning of each notion is different and, in practice, this is creating some confusion.

POSTING

1. The term "**posted**" as used in the transnational provision of services is not related to the posting situation governed by the Law no.53/2003 - Labour Code. According to the Labour Code, the posting **(this regards only the posting in Romanian territory)** is the act of changing temporarily the workplace of an employee, at the unilateral decision of the employer, for the benefit of another employer, in order to execute work in the interest of the latter. The individual employment contract with the employer that posts the employee is suspended for the period mentioned above. Posting, in the meaning of the Labour Code, may be ordered for a period of one year. Exceptionally, the posting period may be extended for objective reasons which require the presence of the employee to the employer seconding to the agreement of both parties of a maximum 6 months. The employee posted is entitled to per diem (allowance posting) pursuant to Art. 46 para. (4) of the Labour Code. The employer will reimburse all travel expenses and accommodation and will also provide per diem payment.
2. Posting according to European Directive has a different meaning than the 'delegation' in the national law, as it is defined strictu sensu. The situation defined in Directive no 96/7 is different from those covered by Romanian internal law under which the employee posting involves passing under the authority of another employer on whose behalf they operate. Unlike the regulation of the Labour Code, in the transnational posting, the employee can continue to work for his/her employer.

DELEGATION

1. **Delegation** is, according to art. 43 of the Labour Code, the temporary exercise by the employee, on employer's direction, of works or tasks similar to his/her usual tasks, outside his/her workplace. So the delegated employee temporarily works for the same employer, undertaking appropriate tasks duties outside his workplace. **This case fits perfectly in the provisions of Law No. 344/2006 (posting situation as defined in EU Directive**). If the employee is to work

abroad, the employer is obliged to communicate in good time before departure, information such as the time to perform work abroad, the currency used for payment, the remuneration and payment method - an option is that while transnational posting the salary to be paid by the employer who ordered such a deployment, but this should be specified in the amendment of the employment contract.

The interaction of the national legal systems on posting (posting, delegation) and European regulation (transnational posting) can create conflicts of application not sufficiently clear at present.

	Law	Period	Labour contract	Coordination	Salary and other rights	More favourable conditions
Posting	art. 45 of the Labour Code	Maximum 1 year, extendable for successive periods of max. 6 months only with the employee's agreement	The employment contract is always suspended	work for the employer to whom the worker is posted	Payment of wages, costs of transport, accommodation and delegation allowance is covered by the employer to whom the worker is delegated	More favourable conditions will apply
Posting (trans-national)	Law no. 344/2006		The employment contract shall not be suspended	continue to work for his/her employer	Payment of wages, costs of the transport, accommodation and delegation allowance is covered by the employer who decided posting	More favourable conditions will apply
Delegation	art. 43 of the Labour Code	Maximum 60 days, extendable for successive periods of max. 60 days only with the employee's agreement	The employment contract shall not be suspended	continue to work for his/her employer	Payment of wages, costs of the transport, accommodation and delegation allowance is covered by the employer who decided delegation	Are always applicable the conditions of the individual employment contract signed with the employer who decided delegation

III. Per diem granted to employees

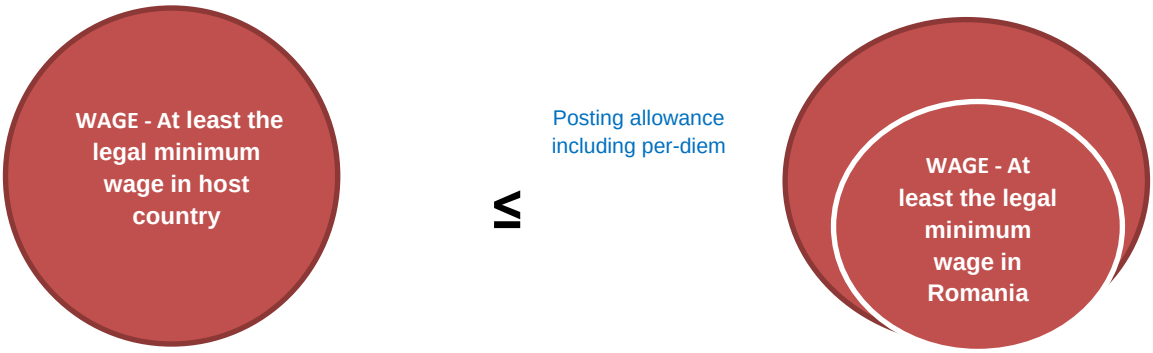
The delegation and posting allowance for state employees is a benchmark for calculating taxable per diem for private companies (Government Decision 518/1995 on certain rights and duties of Romanian personnel sent abroad in the interest of carrying out missions with a temporary character, with its subsequent modifications and completions.). As per

provisions of article 296 of the Fiscal Code, "the amounts received by employees to cover their transport and accommodation expenses as well as the allowance received for a delegation and travel period in another location, in the country and abroad, for professional purposes, in the limit of 2.5 times the allowance granted to public institution employees" are not included in the base of mandatory social contributions.

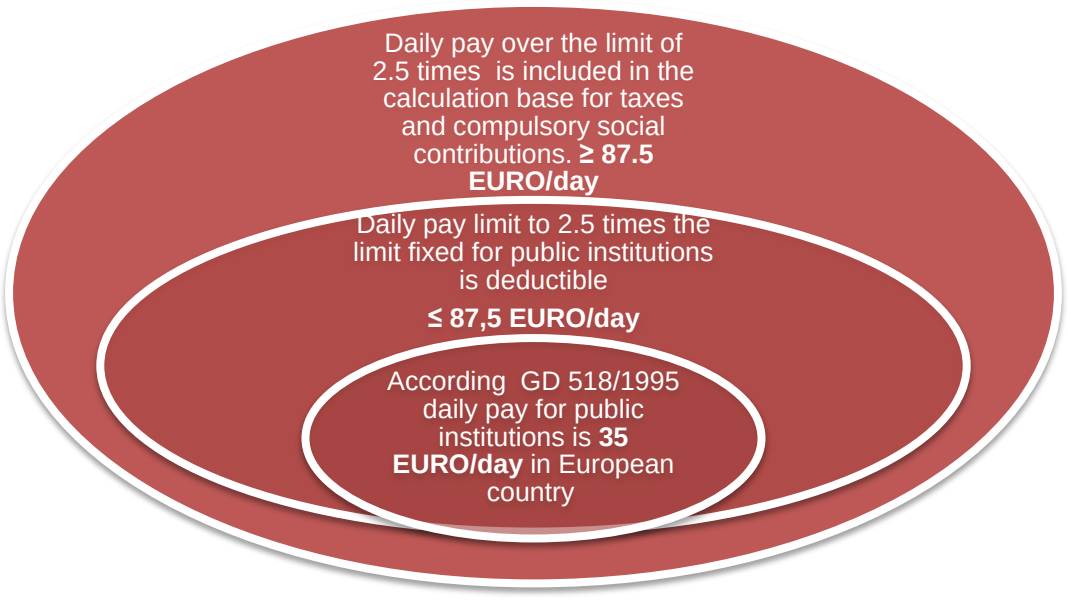
According to the provision in art. 21 of Fiscal Code, the rules regarding daily pay are the following:

- The daily pay offered to employees within the limit of 2.5 times the legal limit fixed for public institutions is considered the deductible expense on income tax calculation;
- The daily pay offered to employees over the limit of 2.5 times the legal limit fixed for public institutions (the difference) is included in the calculation base for taxes and of compulsory social contributions.

At present, the upper limit of per diem set for public institutions for Germany was 35 Euro per day, a private company being able to grant a daily allowance up to 2.5 times this upper limit, i.e. a per diem capped at 87.5 Euro per calendar day.



Per diem



SWEDEN

I. BACKGROUND INFORMATION

Q1: **To what extent is the minimum wage amount connected to:**

- **(local) living costs?**
- **average salaries (general / sectoral)?**
- **social policies?**
- **fight against social dumping and protective measures? (e.g. fair competition at national or international level between companies?**
- **other national/international matters?**

Because minimum wages are regulated exclusively by collective agreements the answer would vary between sectors/professions.

Q2: **How much do posted workers earn in practice in each sector considered (compared to the minimum wage in place in each sector considered)?**

There are no statistics of the incomes specifically of posted workers and there is no qualified research on the issue. Neither are there any public institutions which monitor that workers receive the right pay or other terms and conditions of employment laid down in collective agreements. Consistent with the strong Swedish tradition of self-regulation, the effectiveness of labour legislation and collective agreements is dependent on monitoring and enforcement through trade unions and employers' organisations. It works well in the national context, but is less effective in relation to posted workers, of which only a small minority join Swedish trade unions. This means that even the social partners can only give estimates of how much these workers earn, but do not know exactly.

Q3: **In practice, what are the wage differences between posted workers and local workers? Provide an answer per sector. Is there evidence that posted workers earn (per sector) generally less/more than local workers?**

The following estimates can be made from my interviews:

<u>Construction</u>

The Building Workers Union, Byggnads, and the Swedish Construction Federation, BI agree that, in most cases, posting employers in construction undertake to applying Swedish collective agreements on their posted workers, either by entering into 'application agreements' (*hängavtal*) with, Byggnads and other relevant blue-collar unions or by becoming temporary members of BI. This means that they should pay their workers the same as Swedish workers at the same workplace, not only the minimum wage. However, Byggnads and BI have divergent views on to what extent posting employers actually do so.

'I would say that workers posted from Denmark, Norway, Germany or the United Kingdom get what they should have, those from the Nordic countries may even be paid more', says Torbjörn Hagelin, Byggnads' chief negotiator. *'Workers from Eastern*

European countries get less, but wages for those who come from Estonia and Latvia are beginning to increase. A Polish worker is paid more than a Rumanian or Bulgarian worker and so on. I would say that they earn at least 50 per cent less than Swedish workers.'

One of Byggnads' local ombudsmen recently discovered a group of Rumanian workers who were paid 7 Euros per hour, which is less than half of the collectively agreed basic wage.
'And that was before deductions', says Torbjörn Hagelin*. 'Because when they go home, their employers force them to pay back part of the wage, for example as a refunding of the costs for travel and accommodation. Another example is that workers from Poland have to pay social security contributions themselves when they get back, while such costs are paid by the employer in Sweden.*

Mats Åkerlind, chief negotiator at BI, says that Byggnads exaggerates the problems. He agrees that there are examples where workers have not been paid in accordance with the collective agreements, but this goes for Swedish as well as for posted workers, and is explained by the complexity of the collective agreement. Mr Åkerlind characterises this as mistakes, and says that in all reported cases, BI or its member enterprises have acted so as to indemnify the workers.

Mats Åkerlind refers to a study made by PA Consulting Group on behalf of BI, whose members are by far the most dominant enterprises in the Swedish construction market. The study was made at 42 building sites belonging to six BI members.
The authors of the report wrote:

'The results of this study does not support the assumption that there is a general problem with inferior working conditions for posted workers in construction. Very few disputes concerning working conditions for posted workers were found, and the site engineers of building sites where there were posted workers had not heard that they would not have the working conditions to which they are entitled.'

'However, our interviews indicate that there are problems in certain parts of the construction sector – for example in smaller enterprises, in companies that work for "once-only builders" and private people, enterprises not bound by collective agreements, companies that do not work at BI's sites and enterprises on the black market.' ('Lyft debatten! Om utstationerad arbetskraft inom byggsektorn' 2014. My translation).

The authors underline that the respondents have based their answers primarily on their own experiences and what they have heard from media and other people, not on research, studies or statistics, and that many of them in fact did not think they had enough knowledge to answer many of the questions. One should add that the authors' main sources of information were the site engineers and that only one (1) posted worker was among the respondents.

Thus it is easy to concur with the author's own conclusion that '*access to objective facts regarding posted building workers' working conditions seems to be very limited'* ('Lyft debatten! Om utstationerad arbetskraft inom byggsektorn' 2014. My translation).

<u>Road transport</u>

Neither the Transport Workers Union (Transport) nor the Road Transport Employers' Association (Biltrafikens arbetsgivarförbund, BA) can give an answer. They are both very aware of the fact that lorry drivers employed by enterprises from other Member States

drive in Sweden for wages far below the amount that domestic drivers are paid, to the extent that it is a market disturbance. But they do not know which of these drivers – if any – are posted workers.

In case they are driving cabotage transports, they are usually not posted as defined by the Posting of Workers Directive. The reason is that in most cases, the receiver of the service does not have a contract with their employer but with a foreign forwarding agent, which means that the situation is not a posting according to the Directive.

Foreign drivers who come with tractor units to pick up loose trailers after a transport by sea could be posted workers, but when the trade union tries to approach their presumed employers it cannot find out if the drivers are employed by the haulier that has its name on the lorry or by a temporary work agency, or if they are self-employed contractors.

Temporary agency work

Hanna Byström, chief negotiator at the employers' association Swedish Staffing Agencies (Bemanningsföretagen) estimates that, in general, there is a large difference between the earnings of local and posted agency workers, unless the latter are covered by Swedish collective agreements.

'The absolute majority of workers employed by Swedish agencies are paid between 120 and 170 SEK, while those who are posted by foreign work agencies may earn 30 – 50 SEK', says Hanna Byström.

Health and care services

As stated earlier [*in the paper on EU level data*] posting to health and care services is not very frequent in Sweden. So far, it has in principle been limited to three temporary work agencies that post workers in qualified professions, i.e. doctors and trained nurses. However, due to the severe shortage of labour in the sector, posting by foreign temporary work agencies seems to be increasing. Thus, Swedish clients' primary reason for turning to work agencies in other Member States instead of domestic ones seems not to be that they are cheaper (which they might be), but that there is such a great shortage of labour that the domestic agencies cannot meet the demand for doctors and nurses ('Sjuksköterskor arbetar utan avtal'; 'Svar på interpellation').

Without having any figures on the actual wages, I would say that at least so far, the risk that these posted workers are paid considerably less than local workers is lower than in other sectors, due to the specific circumstances of the case.

First, the two dominating agencies are established in Denmark. On the whole, Danish wages are on a par with Swedish levels, and it is not likely that doctors and nurses employed by Danish agencies would agree to work in Sweden if they would not gain something from it.
Second, before a Swedish client who is bound by the collective agreements for these professions enters into a contract with the Work Agency (irrespective of its nationality) the client has to take up negotiations with the local trade unions according to Section 38 of the Co-determination Act (Lag (1976:580) om medbestämmande i arbetslivet, MBL). If the trade union has reason to assume that the realisation of the employer's plan to engage that contractor would entail violations of legislation or of a collective agreement, it has the right to veto it (MBL Section 39). The veto right is never used in practice, but the mandatory consultation forces the employer to give the trade unions – in this specific

case the Association of Health Professionals (Vårdförbundet) and the Swedish Medical Association (Läkarförbundet) – all kinds of information that they may need in order to decide whether the projected contractor is reliable or not. At the same time, it gives the trade unions an opportunity to set some conditions for approving the contractor.

Contractors who are bound by a collective agreement are normally approved off-hand.

However, the third agency that have posted nurses to Sweden, UAB Orange Group Baltic, had no collective agreement neither in Sweden nor in Lithuania. As a result of the negotiations with Vårdförbundet according to MBL Section 38, the Skåne Region (which was the client) agreed to include labour clauses in its contracts with temporary work agencies. Accordingly, during the performance of the contract, UAB Orange Group Baltic should pay its nurses wages in line with the wages paid to nurses employed directly by the Region.

Nevertheless, Vårdförbundet still saw reasons to assume that UAB's nurses were paid far below the wages of local nurses. According to the trade union, UAB Orange Group Baltic tries to escape application of the collective agreement. The company, which is owned by the Norwegian Orange Group AS, has a 'sister' company in Sweden. The Swedish company is bound by the relevant collective agreement and is marketing its services to county councils and regions giving them the impression that the nurses will be covered, Vårdförbundet claims. But they are employed by the Lithuanian, not the Swedish, company.

Q4: **In the temporary work agencies sector, could you describe who the "final users" of posted workers are?**

The Work Environment Authority's Posting register includes some information on the clients, but it is not specific enough to give an answer to this question.

I only have indications from Health and care services and from Construction:

Construction

According to Torbjörn Hagelin, chief negotiator at the Building Workers Union, large domestic construction companies tend not to use agency work as *'they want to keep their hands clean'*. Therefore, agency work appears a bit further down in the subcontracting chains.

Health and care services

As stated above, doctors and nurses are posted by foreign work agencies to work for care centres and hospitals. It is not always clear from the register which of them are run by private companies and which are run by the government, but it is obvious that county councils as well as local governments are among the users, and in fact seem to be the main users.

Q5: **Is 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 (hereafter "PWD") implemented in your country so as to comply with minimum protection set by Article 3(1)(c) or is a broader protection granted to posted workers?**

Is the PWD applied in all sectors to the same extent or does implementation vary according to specificities of certain sectors?

Sweden has made use of the possibility in Article 3(10) of the posting of Workers Directive to extend seven provisions in the Co-determination Act to posted workers. Thus in addition to the minimum protection in Article 3(1)(c), rules on freedom of association, the right to collective bargaining, the peace obligation for parties bound by a collective agreement with each other and liability for damages in case of breaches of the said rules are applicable in cases of posting according to the Posting of Workers Act (Lag (1999:678) om utstationering av arbetstagare, Section 7).

Apart from that, Sweden was very careful not to do anything that might be contrary to the Directive when it amended its legislation after the *Laval* judgment (C-341/05). The trade unions even thought the legislator was overly careful (Ahlberg 2013). One controversy concerns the interpretation of what is included in 'the hard nucleus'. All three trade union confederations claim that foreign employers should be obliged to apply the terms of certain insurances in the collective agreements, notably those on compensation for accidents at work and the occupational group life insurances, arguing that they are terms covering health, safety and hygiene at work (Article 3(1) (e) in the Directive). However, the Government deemed that this would not be consistent with the CJEU's statements in *Laval* (Regeringens proposition 2009/10:48).

SFS 2010:228, which is the official notation for 'Lex Laval', came into force on 15 April 2010 and amended the Posting of Workers Act and the Codetermination Act, which is the general legislation on industrial action. The amended Posting of Workers Act still does not impose any obligations as regards pay or other terms and conditions regulated in collective agreements on foreign employers. As before *Laval*, it is based on the assumption that, as a rule, foreign employers will still be bound by the normal Swedish collective agreements, either through temporary affiliation to a Swedish employers' organisation or as signatories to an 'application agreement'. The novelty is that the Act introduces restrictions on the trade union's right to take industrial action in order to bring the foreign service provider to sign a collective agreement if it does not do so voluntarily.

Thus, Section 5a of the Act lays down four conditions that must be fulfilled:

Industrial action for the purpose of regulating conditions for posted workers through a collective agreement may be taken only if the conditions demanded:
1. correspond to conditions contained in a central collective agreement that is applied throughout Sweden to corresponding workers within the sector in question;
2. refer solely to minimum rates of pay or other minimum conditions in matters referred to in Section 5 of the Act (that refers to 'the hard nucleus' of the Posting of Workers Directive); and
3. are more favourable for the workers than those following from Section 5.

There is a fourth condition as well: industrial action must not be taken if the employer 'shows' that the posted workers already have conditions that are for everything essential at least as favourable as the conditions in the collective agreement referred to above. It is not necessary that these terms and conditions are regulated in a collective agreement in the worker's home state (which was the case in *Laval*), an employment contract is sufficient.

The Posting of Workers Act itself does not define what elements may constitute the minimum rates of pay – a legal definition would in fact be contrary to the Swedish perception of collective autonomy. Due to an unfortunate translation of this notion in the Swedish version of the Directive, the Act in fact uses the Swedish term corresponding to 'minimum wage', which seems to have contributed to disputes over its interpretation.

In order to better understand its meaning you need to go to the preparatory works. Here it is explained that 'the minimum wage' is not necessarily synonymous with 'starting wage', 'basic wage', 'commencing wage' and the like, but can include other types of remuneration that are usual in Sweden, such as overtime pay and bonuses for unsocial hours, night work and shift work. Also, nothing prevents differentiation based on for example, the worker's tasks, education, experience, competence and responsibilities. The Government bill adds that the minimum wage for posted workers can be different depending on where in Sweden they work, if the central agreement differentiates between geographical areas.

The responsibility for defining what constitutes the minimum rates of pay in each collective agreement rests on the social partners themselves.

The effective implementation of the Posting of Workers Directive varies between sectors, depending partly on the capacity of the trade unions, partly on the specificities of the sectors. For example, the Building workers union, which has representatives on most building sites, can monitor working conditions for posted workers more effectively than the Transport workers union can do in road transport, where every driver has his or her own workplace which is on the move most of the time.

It would require immeasurable resources to spot all these drivers, stop them and investigate whether the Posting of Workers Directive is applicable or not. Probably, not even the driver him-/herself would know for sure, and if the trade union manages to find and contact a representative of the possible employer, that person will say that the driver is a self-employed contractor, according the trade union's experiences. 'We started to try to enforce the Posting of Workers Act, but we gave up', says Marcel Carlstedt, legal advisor by the Transport Workers Union.

Q6: **To what extent is the subject of the minimum wage for posted workers (both directions: as hosting state and sending state) an issue of particular concern for social partners, policy makers, companies (domestic/foreign)? For which fields of study is it a research topic (economics, law, sociology…)? Provide concrete examples.**

Ever since the *Laval* judgment, the subject of wages for posted workers has been of great concern for social partners, policymakers and domestic companies. The debate has centred more on the fact that EU law on freedom of services does not allow Member States to treat foreign workers equally with local workers and on foreign service providers' alleged abuse of the rules, rather than on the meaning of the concept minimum rates of pay.

First of all, many trade unions will not accept that posted workers will have to be content with the minimum rates of pay. Thus, rather than trying to define what it is, they try to negotiate 'application agreements' with posting employers in order to have them apply the provisions of the central collective agreement in its entirety. This entails paying 'normal' rates of pay and other collectively agreed terms and conditions plus, not

forgetting, to pay premiums to occupational pensions and to insure the workers in the event of occupational injury, sickness, redundancy and death. (The terms of insurances are regulated in a special collective agreement and were modified 2005, in order to protect foreign service providers from having to pay twice for the same type of insurance.) In sum, they go on as before the *Laval* judgment, except that after *Laval*, they cannot use industrial action if the employers refuse to sign the agreement. In that case, they have to accept that the posted workers are only guaranteed the minimum protection defined in the 'hard nucleus.

The Swedish Parliament were worried about reports of posted workers who did not get their pay and asked the Government to consider the introduction of some kind of responsibility for subcontractors' debts. In 2012 the Government responded by setting up a parliamentary inquiry to evaluate *lex Laval*. According to its remit , the Inquiry is to investigate whether *lex Laval* works so as to safeguard the rights of posted workers, and consider what amendments may be necessary to defend 'the Swedish model' in an international perspective. After a change of government in October 2014, the Inquiry was given an extended remit, in which the Government explicitly states that *lex Laval* does not protect the position of collective agreements well enough, and that the legislation must be such as to promote the application of terms and conditions agreed by the social partners in collective agreements (Dir. 2014:149). The Inquiry will present its report this autumn.

Another issue of concern has been the lack of transparency as regards the minimum rates of pay for foreign service providers. Because Swedish collective agreements are private law contracts, there is no obligation for the parties to register or publish them. However, Section 9 a of the Posting of Workers Act as amended by lex Laval lays down that trade unions shall submit the minimum conditions in collective agreements that they may demand with the support of industrial action (i.e. the 'minimum rates of pay' and other minimum conditions included in 'the hard nucleus') to the Work Environment Authority, which is the liaison office for posting purposes. The liaison office could then inform foreign service providers about the conditions that they are supposed to apply. It is no secret that this has not worked at all because very few trade unions have submitted their 'posting conditions' to the Work Environment Authority. Interviews with trade union representatives indicate that this is a strategic choice. Since their ambition is still to try to persuade foreign service providers to sign 'full' Swedish collective agreements voluntarily, the trade unions do not want to give much publicity to the 'minimum conditions. And as long as they do not intend to take industrial action, no one can force them to publish.

However, the trade unions' resistance towards defining what are the minimum rates of pay for the sector/profession seem to have decreased after CJEU's judgment in Sähköalojen Ammattiliitto (C-396/13), which was welcomed by the Swedish Trade Union Confederation as 'the best that has happened after the *Laval* judgment'.

Considering that the subject of the minimum rates of pay for posted workers is of such great concern, it is surprising that it has not attracted the interest of academic researchers. The only example I have found is a report from the Swedish Institute for Social Research at Stockholm university that deals with the working conditions for workers posted to Sweden (Stina Persson 2013). It is based on ten interviews with trade union representatives and does not give much information on posted workers' actual conditions. Neither does it discuss the definition of the concept of minimum rates of pay.

On the other hand, it may not be surprising after all. Conducting empirical research on the working conditions of posted workers is an extremely challenging task. The majority are not liable to Swedish income tax and only some of their employers are members of a Swedish employers' association, both of which could otherwise be sources of information for statistical purposes. What remains is to collect information from the posted workers and their employers. While the latter may have reason to make things look better than they are, the workers themselves may not want to disclose what their real terms and conditions are. Even if they are paid considerably less than local workers, they earn more than they would do at home. All trade unions bear witness that posted workers are afraid of talking to them, because they fear that they will be fired if the trade union contacts the employer. '*They don't come to us unless they are not paid at all'*, says Torbjörn Hagelin, chief negotiator at Byggnads. In some cases they do not want to talk to the trade union for other reasons. For example, they prefer to be treated as self-employed contractors even if they are employees according to Swedish law, because this is more favourable from a taxation perspective in their home country.

II. WAGE-SETTING MECHANISMS

II.1. A better understanding of minimum wage-setting mechanisms

Q7: **Which types of legal instruments/practices are used to set minimum wages? Describe in details the mechanism(s) used.**

- **Statutory provisions**
  - **Law, regulations or administrative provisions**
  - **other administrative practices (e.g. "social clauses" in public procurement rules)**
- **Collective agreements**
  - **collective agreement with "statutory" value (e.g. procedure of extension)**
  - **cross-industry**
  - **multi-sectoral, sectoral**
  - **local (regional, community…)**
  - **company or infra-company (e.g. establishment level)**
- **management unilateral rules**
- **arbitration awards**
- **other mechanisms/practices**

Which collective agreement are (or may be) universally applicable within the meaning of Article 3(8) PWD?

There are no statutory provisions on rates of pay – minimum or other. Minimum wages are set exclusively by collective agreements covering a certain sector or profession.

The collective agreements do not have 'statutory value' but are binding only to the parties of the agreements and their members. In addition, at workplaces where the employer is bound by a collective agreement, it has a normative effect for non-unionised workers as well, unless the employer and the individual worker agree otherwise.

Collective agreements on wages are negotiated between employers' associations at sectoral level on the one hand and trade unions organising workers in a certain sector or

profession on the other. Thus the confederations (cross-industry) do not bargain on wages other than occupational pensions (which are not included in minimum rates of pay according to the Posting of Workers Directive).

Sections 5a and 5b of the Posting of Workers Act (which restricts the trade unions right to take industrial action against foreign service providers) indirectly define universally applicable collective agreements as *'a central collective agreement that is applied throughout Sweden to corresponding workers within the sector in question'*. This description is meant to identify collective agreements with sufficient coverage to be 'generally applicable to all similar undertakings' within the meaning of the first indent of the second subparagraph of Article 3(8) of the Directive.

Q8: **If there are several layers of minimum wage-setting mechanisms, how do they interact? (e.g. which one applies by priority? Are they combined and if so, how?)**

There is only one layer of minimum wage-setting mechanisms for each sector/occupation.

Q9: **To what extent do differences in wage-setting mechanisms influence the level of minimum wages? To what extent do wage-setting mechanisms influence whether all workers are effectively ensured to receive the minimum wages? What groups/what share of workers do not receive the minimum wages, and what reasons can be identified?**

There is only one kind of wage setting mechanism.

All workers of employers who are bound by central collective agreements that include pay minima are effectively ensured this minimum wage. Some central agreements do not include any fixed minimum, but refer wage-setting exclusively to local bargaining. While no formal minimum wage is applicable in these cases, these types of collective agreements are most frequent in the public sector and cover categories of workers with a comparably strong position on the labour market, whose trade unions believe that they will profit more from local bargaining.

Around 10 per cent of the working population are not guaranteed a minimum wage. The reason is that their employers are not bound by a collective agreement. They are mainly workers employed by small and/or newly established enterprises, and the coverage of collective agreements varies between sectors depending on the business structure. Even employers that are not bound by collective agreements may agree with their employees to apply the provisions of the relevant collective agreement.

Q10: **To what extent do the wage-setting mechanisms differentiate rules on minimum wage according to:**

- **Employee's conventional classification,**
- **Employee's personal situation (e.g. young/old age, seniority, skills, specific working conditions, etc.),**
- **Employment policies: type of working contract (e.g. low number of hours /week), a person's employability (e.g. back-to-work measures leading to lower minimum wages), labour market situation (e.g. lower minimum wages in regions affected by a high unemployment rate), etc.**

- **Other criteria**

Minimum wages in collective agreements often differ according to the employee's conventional classification, age, seniority and skills/training. As regards the sectors covered by this study, I will give details further down.

Q11: Over the last 20 years, what have been the structural evolutions in the recourse to minimum wage-setting mechanisms? (e.g. a move from centralised to company agreements or vice-versa, the emergence of specific rules for posted workers etc.) What are the underlying causes of these evolutions?

A characteristic feature of Swedish industrial relations is that collective bargaining on wages takes place at local as well as central level. Trade unions are well organised and capable at both levels, and local collective agreements are complements, not alternatives, to the central agreements. However, there has been a structural change during the previous decades in the sense that 'the division of labour' between the two interfacing levels have changed. The central level has referred bargaining on wages more and more to the local trade unions and the individual employers, and wages have been more individualised. This is explained by a completely new approach to wage policies, originally pushed by the employers and gradually accepted by trade unions. Looking at the number of workers covered, most collective agreements today explicitly aim at, or in practice lead to, individual wages, albeit within a collective framework.

Still, in all sectors wages and other terms and conditions of employment are negotiated at central level, but the substance of the central agreements have changed, for some categories of workers with the effect that individual wages are now set entirely at workplace level according to procedures and criteria laid down in the central agreement. The most far reaching examples are found among the agreements for white-collar workers in the public sector, where trade unions believe that, on the whole, their members will gain more from local bargaining.

However, the blue-collar trade unions organising workers in construction and road transport, are marked exceptions from this trend.

<u>Construction</u>

A Swedish employer bound by the Construction agreement between Byggnads and BI always has to enter into negotiations with the local trade union branch with a view to reaching a local collective agreement on wages for each workplace.

Most work covered by the Construction agreement are paid by results, that is piece-rate or merit wages. It will be based on the performance of the whole gang, and calculated as an hourly wage for its members. Usually, the work starts before the local negations are finished. Therefore, the workers will receive an advance payment, '*utbetalningsnivån'*, ('payment level') laid down in the central agreement until the employer and the trade union have reached an agreement, or if they cannot do so. 'Utbetalningsnivån' varies between 26 geographical areas and is calculated on the basis of last years' average payment by results in the geographical area in question.

For some works covered by the central agreement, time-based pay is the primary wage form. This too is negotiated by the individual employer and the local trade union branch. However, there are clear minima in the central agreement, which they cannot undercut.

In other words, the workplace is the decisive level for wage setting and Byggnads has not adopted the general trend towards individual wages. This practice has a long tradition.

Road transport

The central collective agreement between the Transport Workers Union and the Road Transport Employers' Association may be the only collective agreement in Sweden that still includes a complete system of tariffs. In other words, the wages agreed for different categories of workers are not only minima but also maxima. Thus, it would be very easy to apply to posted workers, if only the trade union could find out who they are.

Health and care services

On the contrary, health and care services is one of the sectors where decentralisation and individualisation of wage setting has gone very far. The central collective agreements for doctors and trained (registered) nurses do not set any minimum wages. Even the Municipal Workers Union which organises staff nurses and nursing auxiliaries has accepted decentralisation and individualisation of wage bargaining, but its central agreements still include minima that cannot be undercut.

Temporary agency work

Development in the temporary agency work sector is a special case. Until 1991, temporary agency work was still prohibited. When the ban was lifted, it was quickly integrated in the industrial relations system (Ahlberg and Bruun 2008). Today, the employers' association Bemanningsföretagen has central collective agreements for all types of work, and the rate of organisation on the employers' side is incomparably high, the collective agreements are said to cover 97 – 98 per cent of domestic agency workers. Wages are set at agency level, but the central agreements for blue-collar workers and for white collar workers in the private sector have provisions on minimum wage.

Q12: **How is the monitoring and adjustment (re-evaluation) of minimum wages organised within each wage-setting mechanism? (e.g. when and how is it decided by the law or by the relevant sectoral collective agreement to increase/reduce minimum wage?) Is there an automatic indexation rule? Which criteria are taken into account when deciding on changes to the minimum wage level?**
Illustrate with concrete examples taking into account the four sectors and the various wage-setting mechanisms.

There are no fixed rules for when and how minimum wages in the collective agreements should be adjusted or what criteria should be taken into account, although there may be traditions developed between the social partners in a certain sector. For example, the basic wage in the agreement between Byggnads and BI is raised every year and normally it is increased by the same amount as all other hourly wages laid down in the central collective agreement.

In general, the size of the rise is a matter of each party's bargaining strength. Automatic indexation rules have been weeded out from Swedish collective agreements.

II.2. Minimum wage-setting mechanisms in the context of posting of workers

Q13: **What could be the impact of an extension of the scope of Article 3(1) PWD with regard to the instruments allowed to set rules in terms of the minimum rates of pay applicable to posted workers (i.e. extension to collective agreements that do not meet the criteria as laid down in Article 3(8) second subparagraph first and second indent PWD)?**

- **To what extent would it increase/decrease in practice the number of posted workers covered by the minimum rates of pay?**
- **To what extent would it increase/decrease in practice the minimum rates of pay of posted workers? If so, would the increase/decrease be significant in terms of income?**
- **To what extent would the extension be easy to implement (and to control) from an administrative point of view?**
- **To what extent would the extension be a source of additional costs for the sending companies and would impact their competitiveness in your country?**
- **To what extent would it reduce the displacement effect on local undertakings and labour force?**

Most activities where posting from low wage countries is frequent are covered by central agreements with provisions on minimum rates of pay. An extension of the scope of Article 3(1) would therefore have little effect, if any, on the number of posted workers covered by minimum rates of pay.

As a consequence, it would not have any effect on the actual incomes of posted workers. The possibilities to implement and control that posted workers receive the pay they are entitled to are not dependent on what instruments are allowed for setting the minimum rates of pay, but on two other circumstances in combination. The first circumstance that obstructs implementation is the fact that different rules apply depending on the worker's status: Is he or she posted to work for his/her own employer (in which case only minimum conditions apply) or by a temporary work agency (in which case the principle of equal treatment applies) or is he/she a self-employed contractor (in which case there is no lower limit to what the worker can be paid)? The second circumstance that obstructs implementation is the fact that the CJEU tends to see control measures as unjustified restrictions to the free movement of services (Ahlberg, Johansson and Malmberg 2014). The consequence is that it is difficult to judge in practice whether minimum rates of pay should be applied, and that it is easy for an employer who engages in 'rule shopping' to escape from control.

In addition, neither my interviewees nor I can see what this additional instrument could be in the Swedish context. You can hardly imagine that the minimum rates of pay agreed in a local collective agreement between an individual employer and the local trade union should be applicable to another employer – unless the workers are posted by a temporary work agency. On the other hand, that should not require any extension of the scope of Article 3(1) of the Posting of Workers Directive, as this should be possible already under Article 3(9) in the present Directive compared to Article 5(1) of the Directive on Temporary Agency Work.
To sum up: From a Swedish perspective it is not important to allow other types of collective agreements for setting the minimum rates of pay.

The present Government shares the opinion of the trade unions that posted workers should be treated equally with local workers as long as it does not amount to double burdens on their employers. This means that terms and conditions for posted workers should not be limited to 'minimum' conditions, and that the 'hard nucleus' in Article 3(1) should be expanded to include additional conditions, such as insurances on occupational injuries and the like (interview, Assistant Undersecretary Karin Söderberg).

III. CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS

III.1. Constituent elements of the minimum rates of pay: the host country perspective

Q14: **Which components (NB: use the indicative list above) are undoubtedly included for the determination of the minimum rates of pay applicable to a posted worker? Are social security contributions and /or income taxes included? Which constituent elements are of a "social protection nature"? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements).**

Some starting points:

- Rates specified in collective agreements are always gross rates, and the worker should pay his/her income tax from this money. If the worker is liable to Swedish income tax, the employer is obliged to deduct preliminary taxes before paying him/her, and forward the tax to the Swedish Tax Agency.
- Social security contributions are never part of wages. They are an additional cost for the employer and should not be paid by the worker.
- Some central collective agreements are extremely detailed. I will limit my record of their contents to provisions that may be of practical importance in posting situations. For example, I will leave out provisions on wages for apprentices.
- Similarly, in certain activities (such as construction and health and care services) there is a large number of collective agreements. To describe them all within the context of this project would not be possible. Thus, I will focus on the most important examples.
- Even if there are many collective agreements and their provisions differ in detail, provisions on certain issues, such as subsistence allowances and maternity pay, appear in most of them irrespective of sector. I find it more useful to discuss these provisions together and describe their general features, instead of describing them in detail per sector. In that way I can focus on features that (as I see it) are decisive for the question of whether they can be part of the minimum rates of pay or not.
- What is referred to below as 'minimum wage' (in quotation marks) is the lowest hourly/weekly/monthly remuneration laid down in the collective agreement, i.e. the main component of minimum rates of pay in that collective agreement.

<u>Construction</u>

There are six employers' associations and seven trade unions concluding altogether fifteen central collective agreements for different works in the construction sector. The most important in terms of workers covered are the three collective agreements between

the Swedish Construction Federation, BI, on the one hand and the Swedish Building Workers Union (Byggnads), the Union for Service and Communications Employees (Seko), and the Swedish Association of Graduate Engineers (Sveriges Ingenjörer), Unionen and Ledarna on the other. In other words: the Construction agreement, the Road and Rail Agreement and the Agreement on general terms for salaried employees. The first two cover blue-collar workers and the third is a collective agreement for white-collar workers.

'Minimum wage'
The Construction agreement includes tables clearly specifying basic wages ('grundlön') per hour for nine categories of workers, from skilled workers who hold an occupational certificate over 'other workers' (i.e. non-skilled workers) and machine operators to 'warehousemen and others'. In addition, for the category 'other workers' wages differ depending on their age and work experience. For example: At present, the hourly basic wage for a skilled worker is 149 SEK (~ 16 Euro). The basic wage for a non-skilled worker who is 19 years old and has worked at least 12 months in the sector is 88 per cent of the skilled worker's wage.

As the employers association sees it, this basic wage is the main component of the minimum rates of pay for a posted building worker. However, BI and Byggnads disagree over the interpretation of the concept of minimum rates of pay.

The trade union argues that, in practice, no Swedish employer will ever be allowed to pay as little as the basic wage and that the basic wage is only applied in three specific situations, in particular when the workers are temporarily laid off or cannot continue working due to factors beyond their own control. For work actually done, Swedish employers will have to pay the higher rates agreed for different geographical areas in the central agreement, 'utbetalningsnivån' (see answer to question 11). As a consequence, 'utbetalningsnivån' should be the 'minimum wage', for posted workers, Byggnads argues. At a workplace in Stockholm this would be 189 SEK (~ 20 Euro) – 25 per cent more than the basic wage.
For an outsider it is difficult to judge which of them is right. It is a question of interpretation of the collective agreement rather than of the Posting of Workers Directive. One also has to keep in mind that most foreign companies in construction sign application agreements (see question 3) or join the employers association, which means that they have to apply the 'normal' rates of pay in the central collective agreement. Therefore, the interpretation of the legal concept of minimum rates of pay is of little practical importance.

Another controversial issue is in which cases posted workers should be paid as skilled workers. In a domestic context, a skilled worker is a worker who has a certificate of professional qualifications issued by BI's and Byggnads joint committee for vocational training. The question is how to validate a foreign worker's qualifications.

The Road and Rail Agreement, which covers the construction of roads, motorways and railways, includes tables on basic salaries for different categories of workers, similar to that in the Construction agreement. However, under the Road and Rail Agreement the basic salary is a monthly wage, and there is no doubt that the basic salary is the main component of the minimum rates of pay. At present, the basic salary for skilled workers and machine operators is 25 926 SEK (~2 748 euro).

The table also includes hourly supplements for on-call duty.

The Agreement on general terms for salaried employees covers managers and, in the context of posting, all sorts of experts. It is one of the 'modern' collective agreements that does not lay down any minimum wage and refers negotiation on wages to workplace level.

Other components of minimum rates of pay

Other components of the minimum rates of pay that should be uncontroversial in the Construction agreement and the Road and Rail Agreement are:

- Extra pay for overtime work
- Unsocial hours supplement
- Holiday pay
- Supplement for shift work
- Supplement for working in rock chambers/underground excavation work
- Supplement for diving work, for example in construction of quays, bridges, sewage treatment works etc.

After the judgment in *Sähköalojen Ammattiliitto* it also seems clear that the provisions on subsistence allowances are part of the minimum rates of pay. They are at a flat rate, and should be paid in case work is located more than 70 kilometres from the worker's residence/location of assignment and he/she has to stay overnight.

Road transport

'Minimum wage'

The only relevant collective agreement in the road transport sector is the Transport agreement between the Transport Workers Union and the Road Transport Employers' Association. As we have seen, it includes a complete system of tariffs with standard wages for different categories of workers. In other words, the wages agreed are not only minima but also maxima.

From there you can see that the starting wage for a driver in Stockholm or Gothenburg with a license for transport with a heavy lorry will be 24 608 SEK per month, 5 657 SEK per week or 141.43 SEK per hour. Corresponding figures for drivers in other parts of the country is 23 498 SEK per month, 5 632 SEK per week or 140,80 SEK per hour.

Starting wages for drivers without a license for a heavy lorry are lower for the first twelve months of employment. After that, they will be paid in accordance with the same table.

Wages for workers with two or four years' experience as drivers are a bit higher.

Other components of the minimum rates of pay

The standard rates can be supplemented by a bonus based on the worker's performance. However, this is not appropriate for all types of work, and it is possible only where the local trade union branch and the haulier reach a local collective agreement on a bonus system. If not, which would typically be the situation in cases of posting, the workers are instead entitled to 'bonus compensation' as a supplement to his/her standard wage. The minimum 'bonus compensation' is clearly defined in the central collective agreement and varies between 2 and 7 SEK per hour, depending on type of work, geographical area and the worker's seniority.

Due to the specificities of the sector, the Transport agreement also includes some special benefits to compensate for the fact that transporting is mobile work.

A full-time employee is entitled to a meal ticket worth 80 SEK for each day of work, unless he/she receives a subsistence allowance. The employer pays a little less than half of the cost for the ticket, and the worker pays the rest of its worth.

Subsistence allowances are payable in case the worker has to stay overnight outside the location where he/she is stationed, and the employer does not provide satisfactory board and lodging. The size of the allowance varies with the length of the trip and whether it is a domestic or an international transport, but is always at a flat rate.

Temporary agency work

Formally, the Swedish Staffing Agencies, Bemanningsföretagen, has 17 collective agreements, covering all types of activities. 14 of them are in fact identical collective agreements with the trade unions affiliated to the Swedish Trade Union confederation, LO. Thus, in practice there are not more than four sets of rules.

There are two common general principles for all 17. As a main rule agency workers will have open-ended contracts of employment and they should be paid even between assignments.

'Minimum wage'
The fact that the Temporary Agency Work sector is not like other sectors, but rather posts its employees to work in other sectors, makes the situation a bit complicated. Terms and conditions of employment have to relate to those in the other sectors.

Thus the starting point for the 14 identical agreements between Bemanningsföretagen and the trade unions affiliated to LO is that the collective agreement applicable by the customer (=user enterprise) will regulate terms and conditions for the agency worker when he/she is on an assignment. But wages will be calculated in accordance with specific provisions in the collective agreement for temporary agency work. That collective agreement includes a 'Guarantee' which is 108 SEK (~ 11 euro) for skilled workers and 100 SEK for other workers, and it explicitly states that no worker must be paid less than that.

Thus, the Guarantee is the minimum wage for posting purposes, according to Bemanningsföretagens chief negotiator Hanna Byström. Ombudsman Kent Ackholt who negotiated the collective agreement on behalf of LO's affiliates does not agree. Similar to the situation in the construction sector, their divergent views seem to be a matter of difference between theory and practice.

According to the collective agreement, the Guarantee should be paid for periods when the employee is not assigned to a customer but works inside the Agency or participates in training. In other words, no Agency is allowed to apply the Guarantee all the time. During periods of assignment, its employees should be paid hourly or monthly wages corresponding to the average earnings for comparable groups by the customer, in line with the principle of equal treatment in the Directive on Temporary Agency Work.

Because posted workers are always assigned to a user enterprise, they are always entitled to a wage corresponding to the average earnings for comparable groups employed by the user, and this average could in practice never be as low as 108/100 SEK, Kent Ackholt argues. This is explained by the fact that the minimum level set by the collective agreement for the user's own employees is never as low as that, Ackholt says.

Terms and conditions for white-collar agency workers are regulated in two collective agreements between Bemanningsföretagen on the one hand and the trade unions Unionen and Akademikerförbunden on the other. They are independent of other collective agreements and do not refer to wage levels in the user enterprises. Here again, we see the new type of collective agreement that refers negotiation on wages to company level. Nevertheless, members of Unionen are guaranteed a monthly minimum wage of 16 471 SEK (~1 746 Euro) at the age of 20, and 19 085 SEK (~2 023 Euro) when they have reached the age of 24. For members of the trade unions cooperating in Akademikerförbunden, no minimum wage is guaranteed.

Other components of the minimum rates of pay
All collective agreements for the Agency Work Sector, including the one for members of Akademikerförbunden, lay down the same types of additional components of the minimum rates of pay as collective agreements in other sectors, i.e. extra pay for overtime work, unsocial hours supplements, holiday pay, supplements for shift work and on-call time etc.

Health and care services

Health and care services encompasses a wide variety of activities, pursued by the state, county councils, regions, local authorities and private enterprises and engaging a large number of different professions. Accordingly, it is impossible to map all the possible components of the minimum rates of pay applicable for all these activities and professions. Because posting to Sweden in this sector is limited to a comparably small number of doctors and nurses posted by three foreign temporary work agencies, I will focus on the collective agreements that could be applicable to them.

And here the answer is short. Since they are posted by temporary work agencies, their minimum wage would have been regulated by the collective agreements between Bemanningsföretagen on the one hand and the Association of Health Professionals (Vårdförbundet) and the Swedish Medical Association (Läkarförbundet) on the other – had there been any such provisions there. But again, this is a collective agreement that refers negotiation on wages entirely to the workplace and which does not guarantee any 'minimum wage'.

Q15: **Which components (NB: use the indicative list above) are clearly excluded from the calculation of the minimum rates of pay applicable to a posted worker? Describe the system as precisely as possible and per sector. Provide concrete examples (in particular from collective agreements)**

All collective agreements include provisions on sick-pay. This is because Swedish employers are obliged by law (Lag (1991:1047) om sjuklön) to continue to pay the worker 80 per cent of his/her wage from day 2 to day 14 during a period of sick-leave. The public health insurance steps in only if the worker is still ill after 14 days. Thus, the workers right to sick-pay follows from legislation, but the collective agreements regulates how it is calculated. The legislation is based on the idea that workers' health is to a large extent dependent on the work environment, and that it will stimulate employers to improve working conditions if they have to pay workers when they are ill, and at the same time relieve the pressure on the social security system. In other words, sick-pay interrelates with Sweden's statutory social security, and is not payable to people who are not insured by it. Because posted workers normally remain in the sending state's social

security system and will be paid from that system when they are ill, sick-pay is not part of the minimum rates of pay for posted workers.

Q16: **Which components (NB: use the indicative list above) are in the "grey area"? (not clearly belonging or excluded for the calculation of the minimum pay rates)**
Explain your response and give examples. Describe concrete difficulties encountered per sector.

In all four sectors, collective agreements include provisions on maternity pay. Workers who have been employed for a rather long qualifying period are entitled to maternity pay if they go on maternity leave in accordance with the social security legislation implementing Directive 92/85/EEC on improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Thus, like sick-pay, it has a link to social security, but the legislation does not oblige the employer to pay workers when they are on maternity leave. This is something that the social partners have negotiated between themselves. But is it included in the minimum rates of pay? Circumstances that speak in favour is that it is pay (not an insurance), and that the rules are clear and binding for all employers covered by the collective agreement. What speaks against may be that in this case, the worker is compensated for not working. On the other hand, she has earned it by working for the employer for a long qualification period before she takes a leave. Similar rules on parental pay have existed in the same collective agreements, but in the private sector of the labour market parental pay seems to have been replaced by an insurance – established by a collective agreement between the confederations on both sides.

Two other examples of compensation for time off work are 'public holiday allowance' and 'working time reduction', which appear in the collective agreements for blue-collar workers in construction, road transport and temporary agency work. In practice they both mean that workers have the right to leave without losing their wages.

The first means that if a public holiday (Epiphany, Good Friday, Easter Monday, 1 May, Ascension Day, the Swedish National Day, Midsummer Eve, Christmas Eve, Christmas Day, the Day after Christmas Day, New Year's Eve or New Year's Day) falls on a weekday, the employer has to pay wage as if the worker had worked (which they otherwise do on weekdays).

As seen from its wording, 'working time reduction' is not even phrased as a provision on pay, but the parties to these agreements know that it is. According to these provisions, full-time employees who have worked a full year are entitled to 34 hours paid time off, which they can claim the following year. Evidently, if they were not paid for these 34 hours, it would not be a working time reduction, only time off from work at their own expense. Thus, the trade unions definitely see it as part of the minimum rates of pay. Judging it from its function, I am inclined to agree.

From my interviews I noticed a third issue where there seems to be some disagreement over the interpretation of the concept of the minimum rates of pay. As noted earlier, there is no doubt that extra payment for overtime work, supplements for work during unsocial hours and holiday pay as such can be part of the minimum rates of pay.

However, the normal way of regulating holiday pay and similar supplements in Swedish collective agreements is that they should be a percentage of the worker's actual wage.

So what if a posted worker is actually paid more than the 'minimum wage'? Should the supplements still be calculated on the basis of the 'minimum wage' only? Or expressed in another way: must every single component of the minimum rates of pay be a minimum?

The question is occasioned by a statement by the CJEU in Sähköalojen Ammattiliitto: *'Accordingly, Article 3 of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that the minimum pay which the worker must receive, in accordance with point (b) of the second indent of Article 3(1) of the directive, for the minimum paid annual holidays corresponds to the minimum wage to which that worker is entitled during the reference period,'* (C-396/13, Paragraph 69).

In addition, as regards holiday pay in particular, all Swedish collective agreements 'overcompensate' the workers – even those who do not earn more than the 'minimum wage' – so they can have some extra money to spend when they are on vacation. Would it be contrary to the CJEU case law to extend these provisions to posted workers?

Q17: **In any of the wage-setting mechanisms, are there specific rules applicable to posted workers for the determination of the constituent elements of the minimum rates of pay?**

None of the central collective agreements include specific rules applicable to posted workers.

Q18: How do the differences in the definition of the minimum rates of pay impact income levels of posted workers (also taking into account compensation of expenses)?

As there is no information on how much posted workers actually earn, I am not able to answer this question.

Q19: **In practice, when employers from another country (sending country) post employees to your country (host country), how do they comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach the minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

None of my interviewees has any information on this.

III.2. Constituent elements of the minimum rates of pay: the sending country perspective

Q20: **In practice, when employees are posted from your country (sending country) to another country (host country), how do their employers comply with requirements of the host country for the minimum wage? (e.g. do they have recourse to the "specific posting allowance" as a way to reach the minimum salary? Do they incorporate various components such as those listed above? If so, which ones?)**

None of my interviewees has any information on this. According to Byggnad's chief negotiator Torbjörn Hagelin, this is probably agreed on a case-by-case basis.

ANNEX 2. National tables on data collection

BELGIUM

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

	numbers by sector	*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	4	1	2		1
road transport	4	2	2		
temp. agency work	1		1		
health & care s.	(3)	(1)	(2)		
cross-sector / other	2		1	2	
total	*12 (15)*	*3 (4)*	*6 (8)*	*2*	*1*

2° For which of the three main research topics (a practical overview of wages and posted workers / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. wage-setting mechanisms (regulation/ collective labour agreements) 2. constituent elements of MRP (interviews with authorities and social partners) 3. practical overview (interviews with social partners)	1. wage-setting mechanisms (regulation/ collective labour agreements) 2. practical overview (interviews with social partners and authorities) 3. constituent elements of MRP (interviews with authorities)	1. wage-setting mechanisms (regulation/ collective labour agreements) 2. constituent elements of MRP (interviews) 3. practical overview (interviews)	1. practical overview (Interviews with social partners and authorities – *no relevant application of the Directive*) 2-3: n/a

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking elements.

A practical overview of wages and posted workers:
When it comes to the *road transport sector*, even if there is formal agreement that cabotage operations are governed by the Posting Directive, the application thereof remains purely theoretical. The reason for this seems to lie in the sheer difficulty of applying, let alone enforcing, the Belgian labour and wage conditions in respect of these transport operations, whose duration is often a matter of one hour or a couple of hours

	maximum. In the *health and care services* sector, stakeholders are unaware of any significant occurrence of posting. It is apparent from LIMOSA statistics that companies established in the Netherlands represent by far the main source of posted workers to Belgium, before Poland, Germany, France, Portugal and Romania. When considering the breakdown by economic sector, it appears that the *construction* sector is by far the sector that attracts the largest number of posted workers. These numbers have increased drastically in the past years, and so has the share of posted workers in the construction sector in relation to that in the total economy. Wage-setting mechanisms: The dominant instrument of minimum-wage setting in Belgium clearly is the sectoral collective labour agreement concluded within the joint (sub-)committees. Such CLAs are, moreover, consistently declared universally applicable. It follows that (minimum-)wage setting in Belgium is effectively and comprehensively "caught" by the current formulation of Article 3(8) of the Posting Directive. Generally speaking, CLAs concluded at company level are rare, mainly occur in larger companies and often deal with other elements than wages. It is therefore not surprising that according to the interviewees, extending Article 3(8) PWD to company agreements would have little effect and, in any case, would not solve the problems that are experienced with posting of workers to Belgium. These problems, insofar as they could be avoided by a correct application of the Directive (and hence are not the result of the basic principles underlying the legal framework in relation to posting), are essentially related to the enforceability of the wage conditions which fall within the 'hard core' (be it on account of the broad Belgian delineation), rather than to the fact that some wage conditions would, under the current terms of the Posting Directive, not be covered. Constituent elements of the MRP: The dichotomy between the maximalist transposition of the Posting Directive in the Belgian legal order and the minimalistic enforcement in practice is the most striking finding. Belgian legislation declares virtually the full set of wage conditions applicable to foreign employers across the sectors. Social partners have different opinions as to which wage conditions should effectively apply to foreign employers posting workers to Belgium, but all agree that the legislation is not applied in practice. At the end of the day, and in principle across the sectors, only a few components are effectively enforced as being part of the minimum rates of pay: the minimum wage scales, overtime payments and, under strict conditions, a limited number of supplements directly related to the work performed. However, and despite major efforts, enforcement faces serious challenges.
4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers:	Thanks to data stemming from the LIMOSA reporting duty, the mandatory prior declaration system of temporary assignments in Belgium, authorities have a fairly detailed picture about the phenomenon of posting to Belgium, among others the number of postings per sector, the sending country, the (declared)

- per sector, - per country of origin / destination, - any other relevant breakdown?	duration of the posting and the nationality of the posted workers. For more information, see the Belgian country report and its annex.

GERMANY

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

numbers by sector		*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	3	1	2		
road transport	2	1	1		
temp. agency work	3	2	1		
health & care s.	2	1	1		
cross-sector / other	6	1**	1**	2**	2
total	*16*	*6*	*6*	*2*	*2*

2° For which of the three main research topics (a practical overview of wages and posted workers* / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. practical overview (interviews with social partners) 1. wage-setting mechanisms (regulation, collective labour agreements, interviews with social partners) 2. constituent elements of MRP (collective labour agreements / interviews with social partners) 3. -	1/2. - 3. wage-setting mechanisms 3. constituent elements of MRP 3. practical overview *All: regulation, interviews with public authorities and social partners*	1. wage-setting mechanisms (regulation, collective labour agreements, interviews with social partners) 2. practical overview (interviews with social partners) 3. constituent elements of MRP (interviews with social partners and public authorities)	1.wage-setting mechanisms (regulation, collective labour agreements, interviews with social partners) 2. constituent elements of MRP (regulation, collective labour agreements, interviews with social partners) 3. practical overview (literature, interviews with social partners)

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking

A practical overview of wages and posted workers:

- Statistical data and figures on the number of posted workers is very poor with the exception of the construction industry

elements.	- Against the lack of data, wage gaps between posted and domestic workers cannot be quantified but evidence and experience from stakeholders (quite uniformly) indicate that there are significant structural (mainly resulting from the social security provisions and the classification in the lowest wage groups irrespective of the actual professional qualification) gaps as well as gaps resulting from malpractice - These gaps seem to be smaller in agency work and health care (in both sectors posting is however not very widespread) than in construction - In the transport sector it seems that the wage reference is actually the host country average wage level that is topped up by posting allowances - Posting in temporary agency work is a largely undiscovered field - Posting – also in the context of other new and low-paid forms of employment is a growing concern in Germany, it has also resulted in the debate that led to the introduction of the statutory minimum wage Wage-setting mechanisms: - Also thanks a broad literature on minimum-wage setting and collective bargaining practice, there is plenty information on different systems of wage setting, including at the sector level - There is also sufficient research evidence that indicate positive effects of sectoral minimum wages on the level of basic wages - however, no reliable data exist with regard to workers that are eligible but do not receive the minimum wage – such data seem also extremely hard to collect - Q13 on the possible extension of an extension of the 'hard core' of the PWD has caused confusion amongst stakeholders and quite different replies Constituent elements of the MRP: - While the information on what constitutes element of the minimum wage of pay – also with regard to the four sectors – is quite sufficient (including 'grey'/controversial elements), the other research questions regarding the practice are extremely difficult or even impossible to answer - According to stakeholders and in particular trade unions it is very important to differentiate between legal requirements and practical experience - Again, significant gaps of knowledge and existing information exist between sectors: While with regard to construction (the most important sector for posting with the longest experience) the information basis is quite good regarding practices of MRP (including challenges and problems), the information on the other three sectors is very problematic
4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers: - per sector,	- See above, the data are very insufficient, in particular with regard to issues such as wage incomes, professional background, previous employment status, duration of posting, total of postings each year - The situation regarding countries of origin and destination is better in construction than in the

- per country of origin / destination, - any other relevant breakdown?	other sectors - According to stakeholders, existing data are not sufficient in order to make any reliable assessments, e.g. on crowding-out effects, working or pay conditions and other characteristics that would be important from a labour and social policy perspective

** Group interviews with the Ministry of Labour and Social Affairs (6 persons), cross-sector employers' organisations (4 persons) and DGB trade union confederation (2 persons).

DENMARK

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

numbers by sector		*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	2	1	1		
road transport	2	1	1		
temp. agency work	3	3	(see cross-sector)		
health & care s.	1		1		
cross-sector / other	2	1	1		
total	*10*	*6*	*4*		

2° For which of the three main research topics (a practical overview of wages and posted workers / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. wage-setting mechanisms (literature, interviews with social partners)	1. wage-setting mechanisms (literature, interviews with social partners)	1. wage-setting mechanisms (literature, interviews with social partners)	1. 2. 3.
2. constituent elements of MRP (interviews with social partners)	2. constituent elements of MRP (interviews with social partners)	2. constituent elements of MRP (interviews with social partners)	
3. practical overview (literature, interviews with social partners)	3. practical overview (literature, interviews with social partners)	3. practical overview (literature, interviews with social partners)	

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking

A practical overview of wages and posted workers:
Social partners in the construction sector assess that there is a high coverage of posted workers. The main

elements.	challenge is to get employers to comply with the collective agreements. Posted workers still receive lower wages than average, even when working under collective agreement. Social partners in temporary agency work in the green sector disagree on whether the main part of the workers are posted or self-employed. Generally they agree that workers not covered by a collective agreement in general receive much lower wages. There are few areas in which foreign temporary agency work is actually used. Instead, these companies register as Danish companies. Social partners in the road transport sector agree that there officially are almost no posted workers in the sector, though many foreign workers actually do work as posted workers. Adoption agreements have to their knowledge never been used. Wage-setting mechanisms: For those covered by a collective agreement they – to a large extent - follow these wage-setting mechanisms. However, decentralised wage-bargaining seems to be rare amongst posted workers. Constituent elements of the MRP: Same as for employees working for Danish companies, though often not a decentralised wage-bargaining element. Adoption agreements use 'deprivation of chord'. Allowances specific to the posting can be used as a component to reach the minimum wage.
4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers: - per sector, - per country of origin / destination, - any other relevant breakdown?	Not beyond what is explained in the country report.

FRANCE

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

numbers by sector		*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	5	2	2		1
road transport	4	1	2	1	
temp. agency work	3	2	1		
health & care s.	1		1		
cross-sector / other	4			4	
total	*17*	*5*	*6*	*5*	*1*

2° For which of the three main research topics (a practical overview of wages and posted workers / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. practical overview (interviews with social partners and labour inspection) 2. wage-setting mechanisms (literature and interviews with social partners) 3. constituent elements of MRP (interviews with social partners and labour inspection)	1. practical overview (interviews with social partners and public authorities) 2. wage-setting mechanisms (literature) 3. constituent elements of MRP (interviews with social partners and labour inspection)	1. practical overview (interviews with social partners) 2. wage-setting mechanisms (literature) 3. constituent elements of MRP (interviews with social partners and labour inspection)	1. wage-setting mechanisms (literature, interviews with employer organisation) 2-3. n/a

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking elements.

A practical overview of wages and posted workers:
The main idea is that posted workers actually earn much lower wages than those they are entitled to according to the legal provisions (Posting Directive and national provisions). In the transport sector in particular it seems that the Posting Directive does not apply at all (or almost) in practice.

Wage-setting mechanisms:
Sector-wide collective agreements are generally applicable, and therefore applicable to posted workers. However, with the exception of the temporary work sector (from a sending country perspective), they do not

	provide for specific provisions regarding posted workers. As a result collective agreements apply by analogy to posted workers. Constituent elements of the MRP: It is rather unclear which are the constituent elements of the posted workers' minimum rates of pay. It seems that they are entitled to the basic sector-wide minimum wage (basic salary), overtime increments, posting allowance, holiday pay and conditions of work increments. By contrast, posed workers are not entitled to incentive/activity bonuses. Last but not least, it is questionable whether they are entitled to seniority increments and displacement bonuses.
4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers: - per sector, - per country of origin / destination, - any other relevant breakdown?	There is data deriving from the Ministry of Labour's survey based on posting workers' declaration analysis. As a result these data are only relative to the receiving country perspective and they do not take into account undeclared posted work. Overall, there were 111,320 declared posted workers in France in 2010 and 212,641 in 2013. During 2013, 28.309 workers were posted in the construction sector and 15.715 in the temporary work sector. The main countries of origin are: Poland, Portugal, Romania, Germany and Bulgaria. See http://travail-emploi.gouv.fr/IMG/pdf/Bilan_PSI_2013.pdf and the French country report on EU data for France.

ITALY

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

numbers by sector		*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	2		1		1
road transport	2		2		
temp. agency work	1				1
health & care s.	2		2		
cross-sector / other	6	2	1	3	
total	*13*	*2*	*6*	*3*	*2*

2° For which of the three main research topics (a practical overview of wages and posted workers / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. practical overview (interviews)	1. practical overview (interviews)	1. practical overview (interviews)	1. practical overview (interviews)
2. constituent elements of MRP (interviews)	2. wage-setting mechanisms (interviews)	2. wage-setting mechanisms (interviews)	2. constituent elements of MRP (interviews)
3. wage-setting mechanisms (interviews)	3. constituent elements of MRP (interviews)	3. constituent elements of MRP (interviews)	3. wage-setting mechanisms (interviews)

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking elements.

A practical overview of wages and posted workers:
The posting employer has to apply to its posted employees the "same" labour conditions set forth by the laws, regulations and/or NCBAs applicable to local workers who carry out similar activities. The notion of similarity ("same conditions") is under examination. Case law and scholars indicated a way to interpret the notion. Unfortunately there is currently no evidence of consistency under this interpretation. The most important case law is Consiglio di Stato March 1, 2006, no. 928. However, by means of the interviews we carried out, we understood that posted workers are usually remunerated by their employer through a wage lower than the mandatory minimum wage set forth by the NCBAs in force, in the considered sector. They also do not benefit from the minimum labour protection level applicable to the local workers.

Wage-setting mechanisms:

	Under the Italian legislation a collective bargaining agreement that could be considered universally applicable under the meaning of Article 3(8) of the Posting Directive does not exist. This is because of Article 39 of the Italian Constitution (under which "the collective labour agreements are mandatory for all who belong to the respective industry of these agreements") has not been implemented and, therefore, collective bargaining agreements do not have a "binding" nature in relation to all workers, both the members and non-members of the unions negotiating them (the principle known as erga omnes). However, based on our experience, the core of the problem under the Italian legislation is not the lack of instruments allowed to set rules in terms of minimum rates of pay applicable to posted workers, but the lack of surveillance over the social dumping phenomenon. Constituent elements of the MRP: The wage-setting mechanism does not include any specific rules applicable to posted workers for the determination of the minimum wage.
4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers: - per sector, - per country of origin / destination, - any other relevant breakdown?	Not available.

THE NETHERLANDS

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

numbers by sector		*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	2	1	1		
road transport	2	1	1		
temp. agency work	3	1	1		1
health & care s.	2	1	1		
cross-sector / other	1			1	
total	*10*	*4*	*4*	*1*	*1*

2° For which of the three main research topics (a practical overview of wages and posted workers / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. wage-setting mechanisms (collective agreements)	1. wage-setting mechanisms (collective agreements)	1. wage-setting mechanisms (collective agreements)	1. wage-setting mechanisms (collective agreements)
2. constituent elements of MRP (collective agreements)	2. constituent elements of MRP (collective agreements)	2. constituent elements of MRP (collective agreements)	2. constituent elements of MRP (collective agreements)
3. practical overview (interviews with social partners)	3. practical overview (interviews with social partners)	3. practical overview (interviews with social partners)	3. practical overview (interviews with trade unions)

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking elements.

A practical overview of wages and posted workers:
That we only in theory are able to know what posted workers should receive as a wage, but we do not know what these workers are actually paid, except for the few examples mentioned in the country report.

Wage-setting mechanisms:
Difficult to determine from a Dutch perspective. The dual wage-setting mechanism is of course interesting because the long-term experience thereof. However, it has been stable since then.

Constituent elements of the MRP:
The diversity of the collective agreements' wage provisions, which makes it, depending on how transparent it has been implemented, sometimes difficult for service providers and posted workers to establish the

	amount they should pay or receive.
4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers: - per sector, - per country of origin / destination, - any other relevant breakdown?	Not available.

POLAND

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

numbers by sector		*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	2		2		
road transport	1		1		
temp. agency work	1			1	
health & care s.	1		1		
cross-sector / other	7	3	1	3	
total	*12*	*3*	*5*	*4*	

2° For which of the three main research topics (a practical overview of wages and posted workers / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. wage-setting mechanisms (legislation, literature) 2. constituent elements of MRP (interviews with trade unions) 3. practical overview (interviews with authorities)	1. wage-setting mechanisms (legislation, literature) 2. practical overview (interviews with employers' organisations) 3. constituent elements of MRP (interviews with employers' organisations)	1. wage-setting mechanisms (legislation, literature) 2. practical overview (interviews with authorities) 3. constituent elements of MRP (interviews with authorities and social partners)	1. wage-setting mechanisms (legislation, literature) 2. constituent elements of MRP (interviews with trade unions and authorities) 3. practical overview (interviews with employers' organisations.)

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking elements.

A practical overview of wages and posted workers:
It was a difficult task to present a practical overview of wages and posted workers due to the lack of official statistics in this regard. Employers are very reluctant to answer this question. Other obstacles include a small number of controls of the working conditions of posted workers made by the National Labour Inspectorate in the Pomerania district. In the opinion of the trade unions, so-called white-collar-workers usually earn much more than the minimum wage in the host country so trade unions were unaware of infringements in this respect. The situation of blue-collar-workers is different, but unfortunately social partners did not provide any examples of infringements of the Posting Directive.

	Wage-setting mechanisms: There is only one minimum wage-setting mechanism in Poland determined at national level. It covers all the employees. For that reason all analyses have been based on legislation, i.e. the Act of Minimum Wage, and literature. Constituent elements of the MRP: The interviews have proved an unreliable source of information and reveal a lack of agreement among respondents.
4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers: - per sector, - per country of origin / destination, - any other relevant breakdown?	Not available.

ROMANIA

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

numbers by sector		*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	3	1	2		
road transport	1		1		
temp. agency work	2		2		
health & care s.	1	1			
cross-sector / other	10	1	1	8	
total	*17*	*3*	*6*	*8*	

2° For which of the three main research topics (a practical overview of wages and posted workers / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. wage-setting mechanisms (literature) 2. constituent elements of MRP (interviews with authorities and social partners) 3. practical overview (interviews with authorities)	1. wage-setting mechanisms (literature) 2. constituent elements of MRP (interviews with authorities) 3. practical overview (interviews with authorities)	1. wage-setting mechanisms (literature) 2. constituent elements of MRP (interviews with authorities and social partners) 3. practical overview (interviews with authorities)	1. wage-setting mechanisms (literature) 2. constituent elements of MRP (interviews with authorities and social partners) 3. practical overview (interviews with authorities)

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking elements.

A practical overview of wages and posted workers:
On this topic there is a clear understanding (and a clear application) of the legislation on minimum wage. Regarding posting, there are some issues that have been distorted by different actors. In this regard two elements deserve attention:

- The ANAF position on the interpretation of posting
- The position of employers in the road transport sector regarding the exclusion from the provisions of Directive.

Both these positions are not based on the law and were not properly explained.

Wage-setting mechanisms:
There was no doubt on the wage-setting mechanism and the role of different actors in the process. The

<table>
<tr>
<td></td>
<td>mechanism has not undergone major changes over time and was well assimilated by all stakeholders.

Constituent elements of the MRP:
This topic gives rise to some confusion. There is a clear confusion between minimum wages and minimum rights due in case of posted workers as part of minimum rates of pay. Even if the legislation is clear and sufficiently extended, the understanding is different depending on the interviewees. This lack of experience is mainly due to the very small number of posted workers in Romania, which in turn is a direct consequence of low wages in Romania.
Informally, many of the people interviewed appreciate that the issue of Romanian posted workers is a false problem, as the number of posted workers are limited and the problems associated with them are minor.</td>
</tr>
<tr>
<td>4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers:
- per sector,
- per country of origin / destination,
- any other relevant breakdown?</td>
<td>Sending country – based on number of European PDs A1

<table>
<tr><td>Year</td><td>total</td><td>Construction</td><td>Transport</td><td>TWA</td><td>Social sector</td></tr>
<tr><td>2014</td><td>57,135</td><td>17,427</td><td>5,028</td><td>0</td><td>2,191</td></tr>
<tr><td></td><td>Main destination</td><td>DE-8,881</td><td>IT - 3304</td><td>0</td><td>FR-603</td></tr>
<tr><td>2013</td><td>51,939</td><td>14,241</td><td>3,628</td><td></td><td>2,102</td></tr>
<tr><td></td><td>Main destination</td><td>DE-4,962</td><td>IT-1,974</td><td></td><td>FR - 621</td></tr>
<tr><td>2012</td><td>44,459</td><td>12,201</td><td>3,411</td><td></td><td>1,091</td></tr>
<tr><td></td><td>Main destination</td><td>DE – 5,082</td><td>IT-2,075</td><td></td><td>IT-278</td></tr>
<tr><td>2011</td><td>34,503</td><td>10,192</td><td>1,238</td><td></td><td>1,093</td></tr>
<tr><td></td><td>Main destination</td><td>DE – 4,105</td><td>IT - 463</td><td></td><td>IT - 596</td></tr>
</table>

Receiving country – based on Labour Inspection statistics
<table>
<tr><td>Year</td><td>total</td></tr>
<tr><td>2014</td><td>4,672</td></tr>
<tr><td colspan="2">Main occupation : auditor 457, manager 237, technician 319, construction worker 255, electrician 240</td></tr>
<tr><td>2013</td><td>5,898</td></tr>
<tr><td colspan="2">Main occupation : auditor 543, technician 621, construction worker 519, locksmith 287</td></tr>
<tr><td>2012</td><td>4,851</td></tr>
<tr><td colspan="2">Main occupation : technician 612, construction worker 302, locksmith 269</td></tr>
</table>
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</table>

SWEDEN

1. How many interviews did you actually* carry out? Please specify the numbers by sector as well as the division by type of organisation the interviewees represent (trade union, employers' organisation, public authorities (incl. inspection services), other).

** whether in person, in writing or by phone. Unsuccessful interview requests were not listed.*

numbers by sector		*division by type of interviewee*			
		trade union	employers' org.	authorities	other
construction	2	1	1		
road transport	2	1	1		
temp. agency work	2	1	1		
health & care s.	5	3	2		
cross-sector / other	5	1		3	1
total	*16*	*7*	*5*	*3*	*1*

2° For which of the three main research topics (a practical overview of wages and posted workers / wage-setting mechanisms / constituent elements of the minimum rates of pay) have you been able to find the most useful information? Rank them by decreasing order (1 = most, 3 = least useful information) and specify for each topic the main source of information. Please specify per sector.

construction	*road transport*	*temporary agency work*	*health and care services*
1. constituent elements of MRP (interviews with social partners) 2. wage setting mechanisms (interviews with social partners) 3. practical overview (literature, interviews with authorities and social partners)	1. constituent elements of MRP (interviews with social partners) 2. wage setting mechanisms (interviews with social partners) 3. practical overview (literature, interviews with authorities and social partners)	1. constituent elements of MRP (interviews with social partners) 2. wage setting mechanisms (interviews with social partners) 3. practical overview (literature, interviews with authorities and social partners)	1. practical overview (interviews with authorities and social partners) 2. wage setting mechanisms (interviews with social partners) 3. constituent elements of MRP (interviews with social partners)

3° For each of the three main research topics, could you explain in a few lines which in your view are the main findings /or the most striking elements.

Practical overview of wages and posted workers:
The most striking finding is that access to objective facts regarding posted workers' actual working conditions is very limited and that there is almost no academic research on the issue, even though it has been a matter of great concern among all stakeholders.

Wage-setting mechanisms:
The main 'finding' (which was already well known) is that there is only one type of wage-setting mechanism, i.e. collective agreements, and that central collective agreements cover 90 per cent of the

	working population. Most central collective agreements for the private sector include some kind of pay minima, but they seldom use the term 'minimum wage', Constituent elements of the MRP: The constituent elements of minimum rates of pay are defined by the parties to the central collective agreement for each sector/profession. The social partners in construction and in the agency work sector disagree over the interpretation of the concept minimum rates of pay. Provisions on certain issues, such as subsistence allowances, unsocial hours supplements and maternity pay, appear in most collective agreements, irrespective of sector. Rates specified in collective agreements are always gross rates. Social security contributions are never part of wages.
4° This question deals with available information about the number of posted workers (both from a receiving and a sending perspective). Are there any data or reliable assessments about posted workers' numbers: - per sector, - per country of origin / destination, - any other relevant breakdown?	The Work Environment Authority's register includes data about the number of posted workers per • Economic activity (NACE) • Country of origin • Length of posting period

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