



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

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2.3.4	Groups of workers who do not receive the minimum wage	73
2.3.5	Impact of wage-setting mechanisms on minimum wages	76
2.4	Wage-setting and posting of workers	77
2.4.1	Actual earnings of posted workers	77
2.4.2	Wage differences between posted workers and local workers	79
2.4.2.1	Debates surrounding the minimum wage for posted workers	79
2.4.2.2	Wage differences between posted workers and local workers: some trends	80
2.5	The potential impact of an extension of the instruments available for determining the terms of employment of posted workers	82
2.5.1	Overview of national practices	82
2.5.1	Stakeholders' views on extending the set of instruments	86
2.5.2.1	Company-wide agreements	86
2.5.2.2	Applying a broader protection level by collective agreements and public policy provisions	88
2.5.2.3	The specificity of the temporary agency work sector	89
2.5.2.3	Positions of stakeholders in major sending countries	89
2.5.3	Socio-economic impact assessment	90
2.3.5.1	Impact of an extension on the number of posted workers covered and the minimum rates of pay of posted workers	90
2.3.5.2	Administrative impact (implementation and control)	91
2.3.5.3	Impact on the competitiveness of the sending countries and on local undertakings and labour forces	93
3.	CONSTITUENT ELEMENTS OF THE MINIMUM RATES OF PAY FOR POSTED WORKERS	95
3.1	The host country perspective: the constituent elements of the minimum rates of pay	97
3.1.1	Basic salary	97
3.1.2	Overtime rates	100
3.1.3	Bonuses (and supplements)	101
3.1.4	Mobility-related payments	105
3.1.5	Annual holiday and other periods of leave related payments	107
3.1.6	Social protection <i>sensu lato</i>	108
3.2	The sending perspective: how to meet the host country requirements? ..	110
3.2.1	The position of the host country authorities	111
3.2.2	The sending employers' position	115
3.3	How do the differences in the definition of the minimum rates of pay impact income levels of posted workers?	116
3.4	Conclusion	117
4.	CONCLUSION	122
ANNEXES	127
ANNEX 1.	Nine country reports (separate annex)	128
ANNEX 2.	List of interviewees	128
ANNEX 3.	List of relevant publications	139
ANNEX 4.	National tables on data collection (separate annex)	167

INTRODUCTION

Political background

Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (hereinafter 'the Posting Directive' or simply 'the Directive') aims to promote the cross-border provision of services in the framework of the Single Market, while providing protection to posted workers and ensuring a level playing field between foreign and local competitors.

The adoption of the Posting Directive has not removed the controversy surrounding the topic of posting of workers. Fueled by the expansion of the EU from 2004 onwards and by a series of CJEU rulings (in particular the so-called 'Laval quartet') in 2007-2008, the Directive, and posting of workers in general, has consistently been the subject of an intense debate between EU and national policy makers, social partners and scholars – with some of these players contending that the legal framework in relation to posting is conducive to 'social dumping', results in displacement effects on local businesses and workers and limits trade unions' rights to take collective action.

Following an impact assessment and four ex-post evaluation studies¹, the European Commission (EC) came forward with a proposal for a separate directive aimed at improving the supervision and enforcement of employment and working conditions of posted workers. The so-called Enforcement Directive (Directive 2014/67/EU on the enforcement of Directive 96/71/EC and amending Regulation (EU) No 1024/2012) was adopted on 15 May 2014 and is due for transposition into national legislation by 18 June 2016. It is aimed in particular at remedying problems related to the implementation, monitoring and enforcement of the Posting Directive, as well as circumvention, fraud and abuse.

However, the adoption of the Enforcement Directive leaves largely unaffected a number of persisting problems, identified through the impact assessment as well as through the studies undertaken in its preparation, related to the controversial or unclear interpretation of the terms and conditions of employment referred to in Article 3(1)(c) of the Directive (constituent elements of the minimum rates of pay) and the ways in which Member States may establish these (wage-setting mechanisms).

Member States have different traditions when it comes to standard-setting in labour law, including minimum wages and wage-structures. They resort to a variety of mechanisms which are often combined and range from statutory regulation over various types of agreements to social clauses in procurement rules. The conventional way of standard-setting covers a wide array of agreements, depending on the level at which they are concluded (cross-sectoral, sectoral, company) and according to whether or not their applicability can be extended. The Posting Directive, in its Article 3(1) jo. (8), lays down the sources of the 'hard-core' protective rules for which it ensures posted workers'

¹ All available for download at <http://ec.europa.eu/social/main.jsp?catId=471>.

protection. Both through the wording of these provisions and through their interpretation by the CJEU (notably in *Laval* and *Rüffert*), the Posting Directive seems to be more apt at accommodating the systems in which wage-setting is operated through legislation or collective agreements that are comparable to delegated legislation rather than at accommodating autonomous systems.

In the wake of the said CJEU rulings, several countries (including those affected by the present study) have amended their legislation to conform to the CJEU case law. Nevertheless, the abovementioned studies have shown that a number of countries still face difficulties when it comes to bringing in line their system of establishing labour standards with the Posting Directive and the CJEU case law.

Despite some CJEU guidance, notably in *Commission v. Germany* (C-341/02) and *Isbir* (C-522/12), it is legally unclear which components of the wage paid form part of the minimum rate of pay in the host Member State. Rather than providing a substantive definition of the concept of 'minimum rates of pay' itself, and apart from the clarifications in paragraphs 1(c) (supplementary occupational retirement pension schemes are not covered) and 7 (allowances specific to the posting are part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging), Article 3(1) in fine of the Posting Directive refers for this definition to the national law and/or practice of the Member State to whose territory the worker is posted. It follows that the task of defining what are the constituent elements of the minimum rates of pay falls upon the Member States which should, however, in so doing respect the free provision of services as guaranteed by the TFEU. Previous analysis has shown that a variety of bonuses, allowances and other ancillary benefits are typically included in the applicable minimum rates of pay. A previous legal study identified the following issues as problematic: contribution to funds; exchangeability of special benefits; special payments related to the posting and the distinction between pay and reimbursements of costs; complications caused by taxes and premiums (the gross/net problem); withholding of costs from the wages due to the worker; the possibility to combine benefits from different systems, leading to a level of protection that is higher than that envisaged under either the home state or the host state law.

In the recent case *Sähköalojen ammattiliitto ry* (C-396/13) the CJEU held that the 'minimum rates of pay' that a host Member State can require to be paid to posted workers include: holiday allowances, daily flat-rate allowances for posted workers to compensate them for disadvantages entailed by the posting, and compensation for travelling time, on equal terms as local workers.

Further to a commitment taken in its Political Guidelines, the EC has initiated a targeted review of key provisions of the Posting Directive, covering notably the aforementioned problems, in order to assess whether further initiatives, including of a legislative nature, are necessary to combine a fair treatment of workers and employers with the free provision of services. The present study will be one of several inputs to this targeted review, next to a 'desk review' by EC services on several issues based on, inter alia, already available evidence and studies, consultation of Member States and stakeholders, recent case-law and an analysis of the latest figures on posting. The EC will report on the review as part of the "Labour Mobility Package", which is due before the end of 2015.

Purpose and scope of the study

The central point of the study is the concept of 'minimum wage/ minimum rates of pay' and its interrelation with the diversity of wage-setting mechanisms used in the Member States. The study presents an overview of wage-setting mechanisms in relation to the Posting Directive, analyses the impact of these mechanisms on various aspects of minimum wages and reports on the interpretation of the concept of 'minimum rates of pay' within the meaning of the Posting Directive. In so doing, the study attempts to provide an answer to the research questions which have been formulated by the European Commission and which can be grouped along two axes, one dealing with wage-setting mechanisms and posting, and the other with the concept of 'minimum rates of pay'. With regard to wage-setting mechanisms, the study is to provide, in particular:

- a mapping of such mechanisms;
- an investigation of the impact of the differences in wage-setting mechanisms:
 - on the level of minimum rates of pay and on how these minimum pay rates relate to the host State's general/average wage conditions;
 - on the share of workers earning above and at the minimum rates of pay, including an investigation of any groups/share of workers not receiving the minimum rates;
- an examination of any trends in collective bargaining;
- an assessment of the socio-economic effects, in the relevant sample countries, of an extension of the means included in Article 3(1) jo. (8).

With regard to the '*minimum rates of pay*', the study should provide:

- a mapping of what are considered to be constituent elements in this notion, including those that are of 'a social protection nature';
- an examination of the impact of the differences in the definition of the minimum rates of pay on income levels of posted workers.

Since the deadline for its transposition is pending, the Enforcement Directive is not part of the study. However, some references will be made in the report to enforcement matters which remain, as is apparent from the country reports but also from the interviews with EU-level stakeholders, a key question at national level.

The scope of the study is confined to the following nine Member States, selected by the Commission according to the prevalence of posting (both receiving and sending) and wage-setting tradition:

- Belgium
- Denmark
- France
- Germany
- Italy
- the Netherlands
- Poland

- Romania
- Sweden

Furthermore, the study's scope is restricted to four different economic sectors. The choice of these sectors was made by the Commission and is dictated by several elements, notably the fact that they are characterized by a high number of postings, that they display particular features in terms of posting and have witnessed a recent focus on working conditions for posted workers. The focus sectors are:

- construction
- road transport (covering both passenger and freight transport)
- health and long-term care services, whether or not in institutionalized settings
- temporary work agencies.

The analysis has both a legal and a socio-economic dimension and will be presented in three main parts. The first part, intended to set the scene, offers a description of the legal and the practical frameworks in relation to wages and posting of workers.

The second part is wholly devoted to (minimum) wage-setting mechanisms in relation to the Posting Directive. In addition to providing a mapping of such mechanisms in the focus countries and sectors, it investigates the interactions between wage-setting mechanisms and minimum wages, reports on trends in collective bargaining and assesses the socio-economic impact of a possible extension of the instruments allowed to set rules in terms of minimum rates of pay applicable to posted workers.

The third part deals with the interpretation given in the focus countries and sectors to the concept of 'minimum rates of pay' within the meaning of Article 3(1)(c) of the Posting Directive. It seeks to provide an answer to the question as to which components are considered constituent elements of the minimum pay rates, thereby approaching this question from the perspective of both the host country and the sending employer. In addition, an attempt will be made to describe how the differences in the definition of minimum rates of pay impact income levels of posted workers.

Methodology

The study, which relies on both quantitative and qualitative assessments, is the result of research undertaken both at national level, by national experts in each of the focus countries, and centrally, by an inter-disciplinary team of thematic experts. The work of the national experts has resulted in nine country reports, based on a common, questionnaire-like template. This template was elaborated by the team of thematic experts and its three-part structure broadly corresponds to that of the present study. The country reports are included in Annex 1.

Interviews with key stakeholders at national and EU level constituted a crucial source of information for the study. Overall some 130 interviews have been conducted by the

national and thematic experts, on the basis of a common (yet flexible) interview questionnaire developed by the thematic experts and discussed beforehand with the country experts. A wide range of stakeholders have been interviewed, with a focus on representatives of trade unions, employers' federations and authorities charged with implementing and enforcing the Posting Directive. Care has been taken to ensure that each of the four sectors under focus have been appropriately covered by interviews. A list of interviewees is included in Annex 2 to this study. Next to a commonly understood questionnaire template and a balanced coverage of interviewees (on this, see also the last paragraph of this sub-section), a reserved approach towards interviewees' responses was promoted among the country experts, who were encouraged, where possible, to confront statements with information obtained from different sources, be they other interviewees or literature, and to complement their research with personal expert opinions. Particular attention was paid to an appropriate analysis and formulation of data deriving from interviews with different stakeholders; this implies, among other things, that interviewees' views and assessments are represented accordingly and that their origin or background (i.e. the sector and the type of interviewee) is clearly indicated. Together, these elements should ensure a sound survey-based data gathering.

Next to interviews, the present study heavily relies on desk research. At national level, this research is based on a qualitative review of different sources, including standard-setting instruments (laws, regulations, collective agreements, procurement rules etc.), literature (books, articles, academic studies, reports from authorities, social partners and other stakeholders) and case law. This is complemented, at central level, by a review of existing sources of quantitative data, such as recent official statistics (at EU, international or national level), as well as of relevant literature, whether of a legal or socio-economic origin. A list of relevant publications, both at EU and national level, is included in Annex 3 to this report. This literature review also serves to enrich the analysis in those instances where field results appear to be insufficient or vague - which was the case, notably, when it comes to stakeholders' views relating to the socio-economic impact of an extension of the instruments available for setting the "hard-core" of worker protection in the host country - or, more generally, in case of data shortages. The latter have been identified particularly with regard to quantitative information pertaining to posted workers' actual earnings and wage differences between posted and local workers. These data limitations were exemplified in the study, and due caution was observed in the drafting of the replies to the corresponding study questions.

Finally, and with a view to further illustrating the (country-specific) information gathering undertaken for the present study, Annex 4 consists of national experts' replies to a number of questions pertaining to data collection for their country reports, clearly and schematically presented in the form of country tables.

Specifically, the tables provide information about the numbers of interviews conducted per sector and the division of the interviewees by type of stakeholder. Generally, the replies reveal a comprehensive coverage both by sector and type while at the same time demonstrating significant differences among the countries. Overall, it turns out employers' organisations have supplied the largest number of interviewees, which may be explained by a greater degree of diversity, in a number of countries, of the landscape of (sectoral) employer organisations compared to that of employees' organisations. It is also apparent from the overview that authorities have been extensively inquired in some

countries, but not as much in others, which most probably attests to the variety of wage-setting mechanisms used by the different countries.

In addition, and for each of the sectors, the tables also inform about the topics for which the national experts have been able to find the most relevant information, as well as the main source of that information. Here as well, there is inter-country diversity all round. In general, however, wage-setting mechanisms as will be discussed in the second part of the present report, constitute the theme in respect of which the country experts have managed to collect the most useful information. Interviews clearly stand out as the prime information source for the different themes, although it is equally clear that regulatory (legal and conventional) texts have been extensively used for the purposes of the country reports' preparation as well.

Finally, the table summarises the main findings by the different national experts for each of the three main themes and points to the existence or not of quantitative data regarding posted workers' numbers.

EXECUTIVE SUMMARY

Overview of wage levels and patterns of posting

Wages differ between countries due to differences in the costs of living, productivity, the working environment, and in the overall (im)balance between the supply of and the demand for labour. Sectoral minimum wages are typically the results of the overall collective bargaining processes and thus directly connected to the overall wage developments. In contrast, universal minimum wages are more indirectly connected to the overall wage developments.

With regards to patterns and trends of posting in the EU the study confirms the gaps between quantitative data and statistical figures. Where national data and monitoring instruments exist, it becomes evident that the PD A1 data structurally underestimates the actual amount of postings and the number of posted workers. The inquiry amongst stakeholders in nine EU member states also showed that the knowledge about overall numbers of postings and certain employment characteristics of posted workers is very limited, including at the sector level.

With this context in mind, the study identifies a number of qualitative features of posting in the EU and in regard to the four focus sectors, e.g. the overall important role of posting in the construction sector for Belgium, Denmark, Germany and France, a strong increase in the number of postings in the road transport sector and the quite varied overall situation and sectoral patterns with regards to the posting by temporary agency workers. In the health and care services sector, sectoral stakeholders were not able to provide any significant information or assessments.

Wage-setting mechanisms and posting

The countries covered by the study are representative of the broad variety of wage-setting mechanisms and industrial relations framework conditions within the EU-28. They exhibit significant differences regarding key aspects such as single- or multi-level bargaining, centralised versus decentralised wage-setting or the extension of collective agreements. These fundamental differences have to be taken into account when assessing structural changes in wage-setting mechanisms such as decentralisation and the introduction of statutory minimum wages.

There is a large variety of minimum wage-setting practices in the EU. Within the two main systems – universal minimum wages set by law or by collective agreements – there are further elements of differentiation, for example regarding the role of social partners and tripartite consultation as our sample of nine countries illustrate.

With regards to the coverage of workers by minimum wages the study finds that sector-related systems of minimum wage-setting contain a larger variety of differentiation than statutory and universal systems. This differentiation not only reflects a stronger “sector-relatedness” of minimum wage-setting and possibilities to take into account sector-

specific characteristics but also matches a longer-term trend of structural change within collective bargaining and wage-setting towards more decentralised and company-based practices of differentiation that in countries with a strong system of sector-related bargaining takes the form of 'controlled' or 'centralised' decentralisation.

With regard to wage-setting mechanisms and practices and their impact on posted workers, the study strongly indicates, on the basis of stakeholder assessments and experiences, that in the older Member States and major receiving countries in the EU posted workers earn low wages or at least lower wages than the comparable local workers. Hence, some of the posted workers earn less than specified in the collective agreements that cover their given sectors – sometimes because their employers have chosen not to sign such an agreement.

In contrast, workers posted to the newer Member States, Poland and Romania, are assessed to be relatively highly qualified compared to the average local workers and, in general, earn above the average local wages. Accordingly, compliance with minimum wage requirements will rarely be an issue. A lack of information about posted workers' pay makes it difficult however to assess the precise extent of wage differences between posted and local workers.

The question of the extent to which the wage-setting mechanisms influence the level of the minimum wages is not easy to answer. It is not feasible to establish significant statistical relationships on the basis of information from the nine selected EU countries – not least because the levels of the minimum wages are determined by many other factors, such as the costs of living, rather than solely the wage-setting mechanisms applied.

The study states that the subject of posted workers' wages has been an issue of concern in all the selected countries, though in quite a polarised way. In the main sending countries, in particular Romania and Poland, employer organisations and government actors are concerned about the likely effects of increasing minimum wages and basic terms of employment to be respected in the receiving countries that may result in stronger barriers for posting. In contrast, the national analysis we conducted in the Western European countries indicate that there has been a growing concern about social and wage dumping and poor labour and working conditions.

Based on the assessment of possible scenarios of an extension of the scope of Article 3(1) jo. (8) of the Posting Directive with regard to the instruments allowed to set rules in terms of the minimum rates of pay applicable to posted workers, the study comes to the conclusion that the impact of an extension would be quite marginal and less relevant for the countries which only have a universal system of minimum wage-setting. With respect to wage-setting regimes which are based on collective agreements declared generally binding (or where functional equivalents are in place, as in Italy) various scenarios, however, would be possible that would have a real effect. According to stakeholder views, an extension of the instruments available to set the hard-core (e.g. company-wide collective agreements, inclusion of further collectively-agreed provisions) would not have an effect on the number of posted workers covered in the respective countries but on the minimum rates of pay and other terms of employment of posted workers. The study also finds that the effects would differ significantly between sectors, reflecting the differences

in economic framework conditions, coverage by sectoral collective bargaining or minimum rates of pay regimes as well as public regulation (e.g. equal pay provisions in the temporary agency sector).

The study reveals that – not surprisingly – there are significant differences between stakeholders over the issue of an extension of instruments that are allowed to set rules in terms of employment conditions for posted workers. While trade union organisations are in favour of strengthening the general equal treatment principle ('equal pay for equal work at the same place'), employer organisations as well as public authorities have highlighted that any extension of the instruments would have significant consequences in practice and stressed the need to focus on an efficient and effective application of the currently existing rules as the most important challenge. Furthermore, stakeholders in Poland and Romania have underlined the fact that an extension of instruments and provisions that would be allowed to set minimum rates of pay and other terms of employment may result in situations of unfair treatment of posting companies.

Apart from these differences in assessment, an important result of the study is a strong consensus between stakeholders across countries on the fact that the current challenges arising in the field of 'posting of workers' are not resulting from the narrow definition of the hard-core but from the poor enforcement, lack of information on existing rules and 'creative' ways of circumventing existing rules with regard to determining and actually paying the minimum rate of pay of posted workers. Here, the study also highlights significant sector-related differences of enforcement, e.g. massive problems in the road transport sector.

Constituent elements of posted workers' minimum rates of pay

Few national law or collective agreements provide specific rules determining the elements of the minimum rates of pay due to posted workers. As a consequence, there is confusion between the neighbouring expressions of "minimum wage" (national concept) and "minimum rates of pay" (EU concept) which countries have a tendency to consider as being equivalent. Furthermore, the distinction between two key questions – the establishment of the components of the minimum rates of pay of the host country on one side and, on the other side, the sums paid by the sending employer that can be compared to the minimum rates of pay of the host country - is not always made by countries.

These situations contribute to uncertainty and misunderstandings. With regard to the notion of minimum rates of pay there is only a narrow area of well-settled solutions: the minimum rates of pay refer to the gross salary; they include overtime rates. There is no tangible solution in many other cases: depending on countries and/or sectors the classification, mobility-related costs, bonuses, holiday pay, social protection advantages are/are not constituent elements of the minimum rates of pay. From an instrumental point of view (statutory versus collective agreements), social partners are more likely to address the matter of the constituent minimum rates of pay than the law.

Not too much attention is paid to the question relating to the comparative method between the remuneration actually paid to the posted worker and the minimum rates of

pay due in the host country. The posting allowance is the usual way – accepted by host countries - for the sending employer to meet the minimum rates of pay of the host country. Actual expenses are usually excluded for the calculation of the host country's minimum rates of pay. Various types of payment such as *per diem* compensation, wage supplements, one-off payments may typically be accepted by host countries for the calculation of whether the minimum rates of pay are complied with.

SYNOPSIS

Remarques préliminaires

Le point central de l'étude est le concept de « taux de salaire minimal » des travailleurs détachés et ses interactions avec la diversité des mécanismes de définition des rémunérations mis en œuvre dans les États membres. L'étude présente un aperçu des mécanismes de fixation des salaires dans le contexte de la directive sur le détachement. Elle analyse l'impact de ces mécanismes sur les différents aspects du salaire minimum, et traite de l'interprétation du concept de « taux de salaire minimal » à la lumière de la directive sur le détachement. L'étude se limite à neuf États membres, choisis en fonction de leur familiarité avec les mécanismes de détachement et de leurs approches diversifiées au regard de la définition des salaires. Il s'agit de la Belgique, du Danemark, de la France, de l'Allemagne, de l'Italie, des Pays-Bas, de la Pologne, de la Roumanie et de la Suède. En outre, l'étude se limite à quatre secteurs économiques, caractérisés par un nombre élevé de détachements et présentant des spécificités. Ces secteurs sont les suivants : bâtiment, transports routiers, services de santé et de soins de longue durée, agences de travail temporaire.

L'étude repose sur une évaluation quantitative et qualitative ; elle inclut une double dimension juridique et socio-économique. Elle expose le résultat de recherches menées, au niveau national, par des experts de chacun des pays cibles et, de façon centralisée, par une équipe interdisciplinaire d'experts. Des rencontres avec des intervenants clés au niveau national et européen ont constitué une source d'information cruciale et sont venues s'ajouter aux recherches documentaires qui alimentent le travail.

Modèles de détachement et problématiques liées aux salaires

En 2013, les travailleurs détachés représentaient entre 0,1 pour cent et 3,0 pour cent de l'emploi dans les neuf États membres couverts par l'étude - avec le taux le plus élevé en Belgique et le taux le plus bas en Pologne et en Roumanie. Dans l'absolu, l'Allemagne présente le plus grand nombre de travailleurs détachés avec 373 666 personnes, suivie par la France avec 182 219. A l'autre extrémité, se situent le Danemark avec 10 763 travailleurs détachés et la Roumanie avec 10 894. La Pologne a détaché 262 714 travailleurs vers les autres États membres, suivie par l'Allemagne avec 227 008. La Suède et le Danemark ont détaché 4 026 et 5 320 travailleurs, soit le plus petit volume de travailleurs.

Dans la mesure où les données sur les travailleurs détachés, basées sur le nombre de documents portables (PD A1) émis, ne sont disponibles que pour les années 2010 et 2013, l'aperçu sur l'évolution des détachements reste incomplet. Les différentes procédures nationales relatives à l'octroi du formulaire PD A1 et le fait que de tels formulaires puissent être délivrés *a posteriori* contribuent à la difficulté de l'analyse. Selon les informations statistiques nationales provenant d'autres sources (ex : le fonds bipartite du secteur du bâtiment en Allemagne ou LIMOSA en Belgique) mais également selon les avis des experts ayant travaillé sur l'étude, les données relatives aux PD A1

sous-estimeraient le nombre de travailleurs détachés. Ainsi, même si le chiffre doit être appréhendé avec précaution, l'augmentation des missions de plus de 27 pour cent entre 2010 et 2013 observée par le biais des PD A1 révèle à tout le moins une tendance à l'augmentation du nombre des détachements.

Les informations provenant des PD A1 fournissent des informations parcellaires sur les tendances sectorielles du recours au détachement. Les informations disponibles démontrent, cependant, des différences entre les États membres. La Belgique, l'Allemagne et les Pays-Bas détachent principalement des travailleurs destinés au secteur des services, tandis que la Pologne et la Roumanie détachent majoritairement des travailleurs dans le secteur du **bâtiment**. Les entretiens menés dans les neuf États membres suggèrent que le volume de détachement est élevé dans le secteur du bâtiment. Ces entretiens confirment que les détachements sont de moindre importance pour le secteur des **transports routiers** : même si nombreux sont les travailleurs franchissant les frontières intra-UE, la plupart d'entre eux travaillent de façon temporaire selon les règles du cabotage. L'image du détachement dans le secteur des **services de santé et de soins** est assez floue, en partie parce que la plupart des missions de ce type peuvent avoir lieu par l'intermédiaire d'agences de travail temporaire. En tout état de cause, aucun rapport national n'indique de volumes de détachement significatifs au sein de ce secteur. Enfin, concernant les **agences de travail temporaire**, il ressort de l'étude que les utilisateurs finals sont généralement des entreprises du secteur du bâtiment, le secteur agricole étant également un destinataire habituel.

Même si les niveaux de rémunération et les éléments constitutifs des taux minimum de salaire des travailleurs détachés sont analysés ci-dessous, force est de constater qu'il n'existe pas de statistiques officielles sur les revenus réels des travailleurs détachés. En outre, les données Eurostat disponibles ne font pas état, de façon précise, des rémunérations moyennes relatives aux quatre secteurs couverts par l'étude - en dehors de celui du bâtiment - et les niveaux de rémunération varient considérablement entre les États membres concernés en raison des différences de coût de la vie, de la productivité, des conditions de travail et du (dés)équilibre entre l'offre et la demande de travail. Par conséquent, il est impossible de tirer des conclusions quant aux rémunérations versées aux travailleurs détachés sur la base des seules sources officielles. Les analyses plus subjectives des personnes interrogées ont donc été également pris en compte dans l'étude.

Ainsi, les analyses quant aux raisons des différences de rémunération entre travailleurs locaux et travailleurs détachés restent pour l'essentiel empiriques et proviennent de résultats et de données de l'inspection du travail, d'actions syndicales, de rapports des médias, etc. Les intervenants des principaux États membres accueillant des travailleurs détachés (voir en particulier les rapports nationaux sur la Belgique, les Pays-Bas, le Danemark et la Suède) ont mis en évidence que les travailleurs détachés dans le secteur du bâtiment ainsi que dans le secteur des transports gagnent généralement moins que les travailleurs locaux. Ceci peut s'expliquer par le fait que les taux de salaire minimal ne sont pas correctement appliqués, mais également par d'autres raisons (ex : la tendance à classer les travailleurs détachés au bas de l'échelle de classification conventionnelle comme c'est le cas pour les travailleurs du bâtiment en Allemagne). Bien que les données sur les niveaux de rémunération des travailleurs détachés soient limitées et qu'apparaissent des différences d'appréciation par rapport aux salaires moyens selon que

sont interrogés syndicats de salariés ou organisations patronales, l'étude montre que les différences de rémunérations sont comprises entre 10-15% (au Danemark, selon l'opinion des organisations d'employeurs), et qu'elles peuvent atteindre jusqu'à 35% (pour les groupes de travailleurs dans le secteur du bâtiment, d'après la fédération patronale sectorielle), voire 50% (dans le secteur des transports routiers belges, conformément aux informations transmises par les syndicats du secteur des transports). Il convient de noter que les différences de rémunération résultent non seulement de pratiques de paiement des salaires par les employeurs non conformes aux règles applicables mais également de mécanismes structurels tels que les différences dans les cotisations de sécurité sociale et les écarts entre ces cotisations et les niveaux d'imposition dans les États membres procédant au détachement et accueillant les travailleurs.

En outre, l'étude a révélé que les partenaires sociaux et les services d'inspection des secteurs des transports et du bâtiment ont mis en évidence des différences de rémunérations importantes entre les travailleurs détachés et locaux. Dans d'autres secteurs (ex : soins de santé en Allemagne ou travail temporaire en Allemagne, mais également aux Pays-Bas ou au Danemark), les différences semblent moins prononcées. Cette situation paraît résulter principalement des raisons variées pour lesquelles les employeurs ont recours au détachement, qu'il s'agisse par exemple de réduire les frais de personnel ou de compenser la rareté de main-d'œuvre qualifiée. Les entretiens menés par les experts nationaux ont également montré que, dans tous les États membres, existent des différences entre les niveaux de salaire des travailleurs détachés selon le pays de provenance (par exemple, les conducteurs de camions en provenance de Pologne ont des salaires plus élevés que ceux de Roumanie). Ceci indique que les niveaux moyens de salaire dans les États membres d'envoi semblent avoir une influence sur les niveaux de rémunération des travailleurs détachés.

Mécanismes de définition des salaires et détachement

Les neuf États membres concernés par l'étude illustrent le large éventail des diverses formes de détermination des salaires ainsi que des mécanismes de fixation des rémunérations minimales au sein de l'UE. Cette diversité est non seulement marquée par des différences propres à chaque pays, mais également par des spécificités sectorielles. Plus précisément, en ce qui concerne le salaire minimal, deux mécanismes de base ont été mis en exergue : les salaires minima couvrent l'ensemble de la population salariée et sont fixés par les autorités publiques dans le cadre d'une consultation/négociation bipartite/tripartite ou par une combinaison des deux (comme c'est le cas en Belgique, en Allemagne, en France, aux Pays-Bas, en Pologne et en Roumanie) ; les salaires minima sont intégralement négociés par accord collectif au niveau sectoriel, comme c'est le cas au Danemark, en Italie et en Suède. Du point de vue des travailleurs détachés et des entreprises de détachement, cela signifie que les taux de salaire minimal peuvent être déterminés soit par des techniques couvrant l'ensemble de la population soit par des accords au niveau sectoriel. L'étude montre également que, dans la mesure où les systèmes salariaux sectoriels (tels que dans les secteurs du bâtiment ou des transports routiers) comprennent souvent d'autres composantes de rémunération (tels que les primes de pénibilité et la classification selon la qualification et l'expérience professionnelle), les mécanismes de fixation des rémunérations propres à chaque secteur

sont pertinents par rapport au taux de salaire minimal qu'un travailleur détaché est en droit d'attendre. Par conséquent, il peut être conclu que les travailleurs détachés travaillant dans ce secteur sont mieux traités que ceux d'un autre secteur.

Dans ce schéma général de fixation des salaires des travailleurs détachés, l'étude a identifié un certain nombre de difficultés concernant certains États membres en particulier ou certains secteurs.

Tout d'abord, dans les États membres et dans les secteurs où les taux de salaire minimal ne sont fixés ni par réglementation de portée générale, ni par un accord sectoriel (comme par exemple dans le secteur des transports allemand avant 2015), le niveau de rémunération réel est entièrement défini par l'entreprise de détachement, ce qui est susceptible d'entraîner des écarts importants entre les travailleurs locaux et détachés.

Deuxièmement, l'étude montre que dans les régimes sectoriels où les taux de salaire minimal sont fixés par des conventions collectives par nature plus diverses, les travailleurs détachés sont souvent exposés à des désavantages par rapport aux travailleurs locaux, soit parce qu'ils ne sont pas correctement classés en fonction de leur expérience professionnelle et sont généralement intégrés à un groupe de rémunération minimum inférieur (ex : en Belgique, au Danemark ou en Allemagne), ou encore parce que les entreprises procédant au détachement n'ont pas conscience des taux de salaire minimal applicables et des éléments constitutifs à prendre en compte pour son calcul (tel que rapporté par les organisations d'employeurs en Pologne et en Roumanie).

En revanche, les travailleurs détachés à partir de Pologne et de Roumanie sont évalués comme étant hautement qualifiés par rapport à la moyenne des travailleurs locaux et perçoivent des rémunérations, en général, supérieures à celles des travailleurs locaux. Par conséquent, le respect des critères en matière de salaire minimal sera rarement un problème. Une situation similaire a été rapportée par les parties prenantes dans les États membres destinataires de travailleurs détachés et dans les secteurs faisant face à une pénurie de main-d'œuvre qualifiée, par exemple dans le secteur de la santé au Danemark ou en Allemagne. Dans ce contexte, il a été rapporté que l'écart salarial entre les travailleurs locaux et ceux détachés est relativement faible et résulte principalement des différentes cotisations de sécurité sociale.

Considérant les quatre secteurs analysés dans notre étude, le panorama qui se dégage en termes de détachement et d'application des taux de salaire minimal est relativement polarisé. Le détachement dans les secteurs du bâtiment et des transports routiers, souligné ci-dessus pour diverses raisons par les intervenants dans les principaux États membres d'accueil, est une source de préoccupation pour les partenaires sociaux ainsi que pour les autorités publiques, lesquels ont souligné, en particulier, d'importantes disparités salariales et des problèmes dans la mise en œuvre des critères légaux concernant les taux de salaire minimal et les durées d'emploi des travailleurs détachés. Ce constat contraste avec les deux autres secteurs où la rémunération des travailleurs détachés - dans le contexte de la pénurie de compétences dans le secteur de la santé et de l'existence de règles relatives à l'égalité de salaire dans le secteur du travail intérimaire - semble un sujet moins problématique.

L'étude évalue les scénarios possibles concernant une extension de la portée de l'article 3(8) de la directive sur le détachement relatif aux instruments autorisés à fixer les règles en termes de taux de salaire minimal applicables aux travailleurs détachés. En d'autres termes, une enquête a été menée auprès des parties prenantes sur le thème de l'impact d'une extension de la directive à des conventions collectives ne répondant pas aux critères énoncés dans les dispositions susmentionnées, à savoir les conventions collectives n'ayant pas été déclarées universellement applicables, ou, en absence d'un tel mécanisme d'extension, n'étant pas généralement applicables à toutes les entreprises similaires dans la région/secteur concerné(e) et/ou n'ayant pas été conclues par les partenaires sociaux les plus représentatifs et non appliquées à l'échelle nationale.

L'étude parvient à la conclusion que l'impact d'une extension serait marginal et moins pertinent pour les États membres ayant uniquement un système général de fixation du salaire minimal, sans aucune différenciation sectorielle, à savoir la Pologne et - *de facto* - la Roumanie. En ce qui concerne les États membres où sont en place des accords sectoriels de salaire minimal, l'impact pourrait être très important selon les personnes interrogées, en particulier dans les États membres et les secteurs où il n'existe aucune convention collective au niveau national et/ou sectoriel mais dans lesquels les taux de salaire minimal et autres conditions d'emploi sont régis dans une large mesure au niveau régional ou/et où des accords d'entreprise ont une forte influence sur le niveau des salaires. Comme l'expose l'étude, il existe des différences importantes entre les États membres ainsi qu'entre les secteurs en ce qui concerne le rôle de la fixation des salaires au niveau régional/local. Cette observation est pertinente, par exemple, dans le secteur des transports ou de la santé en Allemagne ou dans le secteur des travaux publics en France, tandis que dans les autres États membres, les personnes interrogées ont trouvé cette observation moins pertinente pour la raison que les taux de salaire minimal sont déterminés par des conventions collectives de portée nationale, par secteur, et sont considérées comme contraignantes pour tous les employés. Ceci a plus particulièrement été souligné par les personnes interrogées dans les deux États membres nordiques, mais également en Belgique, en Italie et aux Pays-Bas.

Indépendamment du contexte sectoriel, un résultat frappant de l'étude est l'importante variété de points de vue parmi les intervenants issus des principaux États membres d'accueil des travailleurs détachés en ce qui concerne les scénarios possibles d'extension de l'article 3(8) de la directive sur le détachement. À la différence des Pays-Bas, la couverture des travailleurs détachés au Danemark et en Suède est présentée comme étant le résultat d'une action efficace résultant de conventions collectives, plutôt qu'en raison du système institutionnel. La plupart des intervenants des autres États membres ont souligné que l'impact d'une extension de la couverture et du niveau des taux de rémunération minimum serait faible et qu'elle aurait pour principal effet une complexité croissante : l'extension des instruments capables de contenir le « noyau dur » serait difficile à mettre en œuvre pour les entreprises étrangères, créatrice de difficultés pour les services d'inspection, et finalement conduirait à des processus renforcés d'externalisation, de contournements et autres pratiques inappropriées. Cela a été souligné en particulier par les autorités nationales, les services d'inspection et les organisations patronales, dans le contexte intersectoriel ainsi que des secteurs du bâtiment et des transports routiers.

Ce constat est également partagé par les personnes interrogées représentant des organisations syndicales dans les principaux États membres d'accueil. Elles ont en effet fortement préconisé le renforcement du principe d'égalité suivant : « rémunération identique pour un même travail dans un même lieu ». En revanche, les organisations d'employeurs ainsi que les autorités publiques dans la plupart des États membres d'accueil, craignant que l'extension ne conduise à une plus grande complexité et à des exigences accrues, ont souligné la nécessité de se concentrer prioritairement sur une application efficace des règles actuellement en vigueur. En outre, les pouvoirs publics ainsi que les organisations patronales en Pologne et en Roumanie ont souligné le fait que l'extension des instruments utiles pour la définition du taux de salaire minimal et autres conditions d'emploi pourrait entraîner un traitement inéquitable des entreprises envoyant des travailleurs détachés vis-à-vis des entreprises nationales.

Outre ces différences d'appréciation, un des résultats importants de l'étude est un fort consensus entre les personnes et autorités interrogées en ce qui concerne le fait que les défis actuels posés dans le domaine du détachement des travailleurs ne font pas suite à la définition étroite du noyau dur mais plutôt à la mauvaise application, au manque d'information sur les règles existantes et aux manières « créatives » de contourner les règles existantes en matière de détermination et de paiement effectif du taux de salaire minimal aux travailleurs détachés. Ici, l'étude met également en évidence d'importantes différences d'application en fonction du secteur, avec par exemple des problèmes massifs dans le secteur des transports routiers en termes de contrôle du taux de salaire minimal ou de réglementation du temps de travail.

Éléments constitutifs du taux de salaire minimal des travailleurs détachés

Seules quelques lois nationales ou conventions collectives prévoient des règles spécifiques déterminant les éléments du taux de salaire minimal à payer aux travailleurs détachés. Cette situation accentue le risque de confusion entre les expressions de « salaire minimal » et de « taux de salaire minimal » que les pays ont tendance à considérer comme étant équivalentes. La directive détachement elle-même contribue à la confusion en ayant recours - au moins dans la plupart des versions linguistiques - aux deux termes. De même, la jurisprudence de la Cour de Justice de l'Union européenne emploie les deux termes. Cependant, l'expression « taux de salaire minimal » ne devrait désigner que les éléments de rémunération que l'État membre d'accueil doit garantir aux travailleurs détachés sur son territoire conformément à l'article 3(1) de la directive sur le détachement. En d'autres termes « taux de salaire minimal » est un terme autonome définissant la somme minimum à garantir aux travailleurs détachés par l'État d'accueil, comme l'exige la directive sur le détachement. « Salaire minimal » a, au contraire, une signification purement nationale : dans un contexte national, il correspond à la plus faible rémunération que les employeurs peuvent légalement payer aux travailleurs. Cette différence d'approche signifie que, dans la pratique, le « taux de salaire minimal » (concept de l'UE) n'est pas identique au « salaire minimal » (concept national). En d'autres termes, le salaire minimal ne correspond pas nécessairement au taux de salaire minimal auquel les travailleurs détachés sont soumis.

En outre, la distinction entre les deux questions clés - la définition des éléments constitutifs du taux de salaire minimal du pays d'accueil d'une part, et les sommes versées par l'employeur procédant au détachement pouvant être considérées comme entrant dans le calcul du salaire minimal de l'Etat d'accueil, d'autre part - n'est pas toujours opérée par les pays. Cette confusion ressort également de la jurisprudence de la CJUE. Le résultat est que, dans la plupart des cas, il est difficile d'évaluer si les éléments constitutifs des taux de salaire minimal sont applicables du point de vue du pays d'accueil, de celui de l'employeur procédant au détachement, ou des deux. Beaucoup de pays ne sont pas conscients du fait que la notion de taux de salaire minimal doit être examinée selon les deux points de vue - chaque perspective menant à une portée différente.

Cette confusion concernant les principes clés contribue à un état général d'incertitude et d'incompréhension. Une meilleure orientation de la part de la jurisprudence de la CJUE pourrait améliorer la mise en œuvre des règles relatives aux taux de salaire minimal. À cet égard, deux choses seraient nécessaires : une utilisation plus rigoureuse des concepts clés et un plus grand volume d'affaires portées devant la CJUE. Cet objectif sera difficile à atteindre, tout au moins à court terme.

Dans l'ensemble, du point de vue des pays d'accueil, il existe seulement quelques principes bien établis : le taux de salaire minimal se réfère à la rémunération brute et il comprend le taux majoré pour heures supplémentaires. Il n'existe aucune interprétation uniforme concernant de nombreux autres éléments : classification conventionnelle (ex : catégorisation en groupes de paie), coûts liés à la mobilité, primes, congés payés et avantages en termes de protection sociale sont, ou ne sont pas, considérés comme des éléments constitutifs du taux de salaire minimal. Les doutes sont accrus par la circonstance que certains éléments de rémunération prévus par le pays d'accueil supposent une relation de longue durée d'emploi, à un point tel qu'il est difficile de concevoir leur application dans des situations de détachement transfrontalier. Du point de vue des sources, les partenaires sociaux sont plus susceptibles que la loi pour aborder la question des éléments constitutifs du taux de salaire minimal.

Du point de vue de l'Etat procédant au détachement, le défi consiste à garantir que les travailleurs détachés reçoivent une rémunération au moins égale au taux de salaire minimal de l'Etat membre d'accueil. Cependant, la mise en œuvre d'une méthode comparative entre la rémunération effectivement versée au travailleur détaché et le taux de salaire minimal dû dans le pays d'accueil est largement ignorée ou limitée aux principes de base. L'indemnité de détachement est la méthode habituelle - acceptée par les pays d'accueil - permettant à l'employeur d'envoi de se conformer aux taux de salaire minimal du pays hôte. Le remboursement des dépenses réelles est généralement exclu du calcul du taux de salaire minimal. Différents types de paiement tels que les indemnités journalières, les compléments de rémunération et les paiements ponctuels sont généralement acceptés par les pays d'accueil aux fins de déterminer si le taux de salaire minimal est respecté.

L'étude montre, en ce qui concerne le taux de salaire minimal, qu'il existe un important contraste entre les principes de la directive et les pratiques. Ceci est notamment dû au défi de coordonner des notions abstraites et peu claires énoncées dans la directive avec des règles nationales de rémunération minimum très complexes. Des mesures

d'application encore plus strictes, par exemple par le biais de contrôles intensifiés menés par les inspections du travail, ne seront pas pleinement efficaces tant que les taux de salaire minimal ne seront pas définis plus précisément, soit directement par la législation européenne soit par l'intermédiaire la CJUE.

ZUSAMMENFASSUNG

Einleitende Bemerkungen

Im Fokus dieser Studie steht das Konzept der „Mindestlohnsätze“ für entsandte Arbeitnehmer und deren Zusammenhang mit den unterschiedlichen Formen der Lohnfestsetzung in den einzelnen Mitgliedstaaten. Die Studie liefert einen Überblick über die Festlegung von Löhnen in Bezug auf die Entsenderichtlinie, untersucht die Auswirkung dieser Mechanismen auf verschiedene Aspekte des Mindestentgelts und gibt Aufschluss über die Auslegung des Konzepts „Mindestlohnsätze“ im Sinne der Entsenderichtlinie. Die Studie befasst sich mit neun Mitgliedstaaten, die aufgrund ihrer Traditionen der Lohnfestlegung und Entsendungspraxis ausgewählt wurden, und zwar Belgien, Dänemark, Frankreich, Italien, die Niederlande, Polen, Rumänien und Schweden. Des Weiteren ist die Studie auf vier Wirtschaftszweige begrenzt, in denen es hohe Fallzahlen und bestimmte Merkmale der Entsendung gibt. Dabei handelt es sich um das Bauwesen, den Straßentransport, den Bereich Gesundheit und Pflege sowie die Arbeitnehmerüberlassung.

Die Studie beruht auf quantitativen und qualitativen Auswertungen und beleuchtet sowohl rechtliche als auch sozioökonomische Aspekte. Zur Auswertung wurden nationale Untersuchungen herangezogen, die in den jeweiligen Ländern von nationalen Experten durchgeführt wurden, als vergleichende Untersuchungen eines interdisziplinären Fachteams. Interviews mit relevanten Akteuren auf Länder- und EU-Ebene bildeten neben Fachliteraturrecherchen die Informationsgrundlage für unsere Studie.

Entsendungsverhalten und Lohnfragen

Im Jahre 2013 machten entsandte Arbeitnehmer zwischen 0,1 Prozent und 3,0 Prozent der Beschäftigten der im Rahmen der Studie untersuchten neun Mitgliedstaaten aus – am größten war der Anteil in Belgien, am niedrigsten in Polen und Rumänien. In absoluten Zahlen bildete Deutschland mit 373.666 entsandten Arbeitnehmern den Spitzenreiter, gefolgt von Frankreich mit 182.219 Arbeitern. Demgegenüber stehen Dänemark mit der Aufnahme von 10.763 entsandten Arbeitnehmern und Rumänien 10.894 entsandten Arbeitnehmern. Aus Sicht der entsendenden Länder lag Polen mit 262.714 Menschen an der Spitze, gefolgt von Deutschland mit 227.008 Arbeitnehmern. Schweden und Dänemark entsandten mit 4.026 bzw. 5.320 die wenigsten Arbeitnehmer.

Da es Daten über entsandte Arbeitnehmer basierend auf der Anzahl vorliegender PD A1 Dokumente erst für 2010 und 2013 gibt, sind Informationen über die Entwicklung der Entsendungen relativ gering. Anzumerken ist auch, dass die Verfahren zur Erstellung von PD A1 Dokumenten von Land zu Land variieren können und oftmals erst rückwirkend vorgelegt werden. Wie statistische Daten aus anderen Quellen (z.B. der bilaterale Fonds der Baubranche in Deutschland, oder LIMOSA in Belgien) sowie die Meinungen von Experten vermuten lassen, sind die Daten laut PD A1 Dokumenten über die Anzahl der entsandten Arbeitnehmer zu niedrig angesetzt. Deshalb sollte der auf Basis der PD A1

Dokumente errechnete Anstieg um mehr als 27 Prozent zwischen 2010 und 2013 lediglich als grober Indikator für einen wachsenden Trend angesehen werden.

Außerdem erlauben die Informationen aus den PD A1 Dokumenten nur einen begrenzten Einblick in branchenbezogene Muster der Entsendungen. Aus den verfügbaren Informationen lassen sich jedoch Unterschiede zwischen den Mitgliedstaaten erkennen. So entsenden Belgien, Deutschland und die Niederlande zumeist Dienstleistungskräfte, Polen und Rumänien vor allem **Bauarbeiter**. Befragungen von Interessenvertretern in den neun Mitgliedstaaten weisen außerdem auf einen beachtlichen Umfang von Entsendungen in der Baubranche hin. Im Bereich des **Straßentransports** ergibt sich eher eine geringe Bedeutung. Anzumerken ist hier jedoch, dass viele Arbeitnehmer, die die Binnengrenzen der EU überschreiten, häufig nach den Kabotagegesetzen auf zeitlich befristeter Basis arbeiten. Für das **Gesundheitswesen und die Pflegebranche** ist das Bild etwas unscharf, da die Entsendungen in diesem Bereich häufig im Rahmen der Arbeitnehmerüberlassung erfolgen. Die Länderberichte weisen in dieser Branche aber auf keinen großen Umfang hin. Schließlich ist zu anzumerken, dass mit Blick auf die Arbeitnehmerentsendung der Bausektor und die Landwirtschaft wichtige Zielbranchen darstellen.

Mit Blick auf Lohnniveaus Elemente des Mindestentgelts für entsandte Arbeitnehmer ist zunächst festzustellen, dass es über das tatsächliche Einkommen entsandter Arbeitnehmer keine offiziellen Statistiken gibt. Hinzu kommt, dass es für die vier im Rahmen der Studie untersuchten Branchen mit Ausnahme der Baubranche keine Eurostat Daten zu den Durchschnittseinkommen gibt. Weiterhin ist zu berücksichtigen, dass die Lohnniveaus in den untersuchten Mitgliedstaaten schon allein aufgrund der unterschiedlichen Lebenshaltungskosten, Produktivitätsniveaus, Arbeitsbedingungen und des (Un)Gleichgewichts zwischen Stellenangebot und Nachfrage erheblich voneinander abweichen. Folglich lassen sich anhand offizieller Quellen allein keine Schlussfolgerungen bezüglich der Löhne der entsandten Arbeitnehmer ziehen, sondern müssen die subjektiveren Ansichten der befragten Schlüsselakteure herangezogen werden.

Folglich stützen sich die Aussagen über die Lohnunterschiede für lokale und entsandte Arbeitnehmer oft auf Einzelberichte und beruhen auf den Ergebnissen und Daten von Arbeitsschutzinspektionen, gewerkschaftlichen Initiativen, Medienberichten, usw. Sozialpartner und Vertreter von öffentlichen Behörden in denjenigen Mitgliedstaaten, welche zu den Hauptaufnahmeländern entsandter Arbeitnehmer gehören (siehe insbesondere Berichte über Belgien, die Niederlande, Dänemark und Schweden), haben hervorgehoben, dass entsandte Arbeitnehmer in der Bau- und Transportbranche gewöhnlich weniger verdienen als lokale Arbeitnehmer. Das mag zum einen daran liegen, dass die Mindestlohnsätze nicht korrekt gezahlt werden, kann aber auch andere Gründe haben (z.B. der Trend, entsandte Arbeitnehmer in der niedrigsten Mindestlohngruppe anzusiedeln, wie z.B. bei Bauarbeitern in Deutschland). Obwohl es nur wenige Zahlen über das Verdienstniveau entsandter Arbeitnehmer gibt und sich auch Unterschiede in der Bewertung zwischen Gewerkschaften oder Arbeitgeberverbänden mit Blick auf Durchschnittsverdienste gibt, zeigt unsere Studie, dass die Lohnunterschiede (in Dänemark nach Aussagen der Arbeitgeberverbände) zwischen 10-15% und 35% (für einige Arbeitergruppen in der Baubranche laut des nationalen Arbeitgeberverbands der Baubranche) und sogar bis zu 50% betragen (in der belgischen Straßentransportbranche nach Informationen der zuständigen Gewerkschaft). Hier gilt es jedoch zu beachten, dass

die Lohnunterschiede nicht nur auf gesetzeswidrigen Lohnpraktiken der Arbeitgeber beruhen, sondern auch auf strukturelle Gründe wie z.B. Unterschiede bei den Sozialversicherungsbeiträgen und dem Steuerniveau in den Aufnahme- und Entsende-Mitgliedstaaten zurückzuführen sind.

Ein Ergebnis unserer Studie ist, dass vor allem die Sozialpartner wie auch Inspektionsbehörden für die Transport- und Baubranche beachtliche Lohnunterschiede zwischen entsandten und lokalen Arbeitnehmern hervorheben, während in anderen Branchen (wie z.B. im Gesundheitswesen in Deutschland oder bei der Leiharbeit in Deutschland, aber auch in den Niederlanden oder Dänemark) die Lohnunterschiede weniger eklatant scheinen. Diese Unterschiede scheinenvor allem auf unterschiedliche Motive für die Beschäftigung entsandter Arbeitnehmer - z.B. Reduzierung von Personalkosten im Unterschied zum Mangel an qualifizierten Arbeitskräften - zurückzuführen zu sein. Des Weiteren haben wir bei Gesprächen mit Fachleuten aus allen untersuchten Mitgliedstaaten festgestellt, dass es auch Unterschiede zwischen den Lohnniveaus entsandter Arbeitnehmer aus verschiedenen Herkunftstaaten gibt (so verdienen beispielsweise LKW-Fahrer aus Polen mehr als ihre Kollegen aus Rumänien). Eine Tatsache, die uns zur Annahme veranlasst, dass sich auch das durchschnittliche Lohnniveau in den Herkunftstaaten auf das Lohnniveau der entsandten Arbeitnehmer auswirkt.

Lohnfestsetzungspolitik und Versendung

Die in dieser Studie untersuchten neun Mitgliedstaaten spiegeln die beachtliche Bandbreite unterschiedlicher Formen der Lohnfestsetzung und der Festlegung von Mindestentgelten in der EU wider. Dabei sind nicht nur länderspezifische, sondern auch branchenspezifische Unterschiede kennzeichnend. In Bezug auf den Mindestlohn haben sich im Wesentlichen zwei Mechanismen der Lohnfestlegung herauskristallisiert: Zum einen, durch die Regierung, bi- oder trilateralen Tarifabkommen oder einer Kombination aus beidem festgesetzte, allgemeingültige Mindestlöhne (wie in Belgien, Deutschland, Frankreich, Niederlande, Polen und Rumänien); zum anderen Mindestlöhne, die allein auf branchenweit geltende Kollektivvereinbarungen basieren, wie in Dänemark, Italien und Schweden. Aus der Sicht der entsandten Arbeitnehmer und Entsenderunternehmen bedeutet dies, dass die Mindestentgeltsätze entweder auf Basis allgemeingültiger Mindestlohnsätze oder auf Mindestlohtarifverträgen auf Branchenebene beruhen, sofern diese existieren. Des Weiteren hat unsere Studie ergeben, dass, sofern in den branchenspezifischen Lohnsystemen (wie z.B. in Bauwesen und Straßentransport) weitere Lohnkomponenten enthalten sind (z.B. Entlohnung für Schwerarbeit, Klassifizierung nach fachlicher Qualifikation und Erfahrung), die jeweilige Lohnfestsetzungspraxis für die Mindestlohnsätze, die ein entsandter Arbeitnehmer erwarten kann, eine große Bedeutung hat. Daraus lässt sich folgern, dass entsandte Arbeitnehmer in Bereichen mit branchenspezifischen Regelungen in einer grundsätzlich vorteilhafteren Situation sind als in anderen.

Außer diesem allgemeinen Muster der Lohnfestsetzung für entsandte Arbeitnehmer hat unsere Studie eine Reihe problematischer Aspekte in Bezug auf die einzelnen Mitgliedstaaten und branchenspezifische Besonderheiten ergeben:

Zum einen wird das Lohnniveau in den Mitgliedstaaten und Branchen, in denen es für die Mindestentgeltsätze weder einen allgemeingültigen Mindestlohn noch branchenspezifische Mindestlohn-Tarifvereinbarungen gibt (wie z.B. im Transportwesen in Deutschland vor 2015) ausschließlich vom Entsenderunternehmen festgelegt, was zu einer großen Kluft zwischen lokalen und entsandten Arbeitnehmern führen kann.

Zum anderen zeigt unsere Studie, dass entsandte Arbeitnehmer in Branchen, in denen die Mindestentgeltsätze durch differenzierten Tarifvereinbarungen geregelt werden, im Vergleich zu lokalen Arbeitnehmern häufig benachteiligt werden, da sie nicht entsprechend ihrer fachlichen Qualifikation eingestuft werden, sondern meist in eine niedrigere Mindestlohngruppe (z.B. in Belgien, Dänemark oder Polen) oder weil die Entsendeunternehmen über die entsprechenden Mindestentgeltregelungen nicht genügend informiert sind und nicht genau wissen, welche Komponenten in die Berechnung einfließen sollten (wie Arbeitgeberverbände in Polen und Rumänien berichten).

Auf der anderen Seite gelten nach Polen und Rumänien entsandte Arbeitnehmer im Vergleich zum durchschnittlichen lokalen Arbeiter als relativ hochqualifiziert und somit liegt ihr Verdienst im Allgemeinen über dem lokalen Durchschnittslohn. Dementsprechend stellt die Erbringung von Mindestentgeltanforderungen in diesen Fällen selten ein Problem dar. Ähnliches wird von Interessenvertretern in den aufnehmenden Mitgliedstaaten und Branchen berichtet, in denen es einen Mangel an qualifizierten Fachkräften gibt, beispielsweise in Dänemark oder Polen. Angesichts des erheblichen Mangels an qualifizierten Fachkräften ist der Lohnunterschied zwischen entsandten und lokalen Arbeitnehmern den Aussagen zufolge relativ gering und vor allem auf unterschiedliche Sozialversicherungsabgaben zurückzuführen.

Betrachtet man die vier, in unserer Studie untersuchten Branchen, ergibt sich in Bezug auf die Arbeitnehmerentsendung und Anwendung der Mindestentgelte ein ziemlich polarisierendes Bild. Bei der Arbeitnehmerentsendung in der Bau- und Straßentransportbranche besteht nach Meinung der Branchenakteure und Vertreter von Behörden aus unterschiedlichen Gründen ein Anlass zur Sorge. Festgestellt werden insbesondere erhebliche Lohnunterschiede und Probleme bei der Umsetzung der Gesetzesvorgaben für Mindestentgeltsätze und die Beschäftigung entsandter Arbeitnehmer. Dies steht im Gegensatz zu den anderen beiden Branchen, in denen die Vergütung entsandter Arbeitnehmer vor dem Hintergrund eines Mangels an qualifizierten Fachkräften wie im Gesundheits- und Pflegebereich oder aufgrund des Equal-Pay Prinzips in der Arbeitnehmerüberlassung weniger problematisch erscheint.

Die Studie untersuchte verschiedene mögliche Situationen in Bezug auf eine Erweiterung der Zweckbestimmung von Artikel 3 (1) bis (8) der Entsenderichtlinie hinsichtlich der Instrumente, die zur Festsetzung der Mindestentgeltsätzen für entsandte Arbeitnehmer zulässig sind. Dabei wurden Interessenvertreter und Experten zu den möglichen Auswirkungen einer Ausweitung auf tarifvertragliche Vereinbarungen befragt, die den oben genannten Vorgaben nicht gerecht werden, d.h. Tarifverträge, die nicht als allgemein anwendbar erklärt wurden, oder die ohne einen derartigen Erweiterungsmechanismus nicht allgemein auf alle weiteren, ähnlichen Unternehmen der jeweiligen Region/Branche angewandt werden können und/oder nicht von

repräsentativen Tarifpartnern abgeschlossen wurden und somit nicht landesweit gültig sind.

Die Studie kommt zu dem Ergebnis, dass bei denjenigen Mitgliedsstaaten, die über ein allgemeines System von Mindestlöhnen ohne branchenspezifische Abstufung verfügen, d.h. Polen und faktische auch Rumänien, die Auswirkungen einer solchen Ausweitung nur wenig relevant wären. Für die Mitgliedstaaten, in denen es branchenspezifische Mindestlohnabkommen gibt, könnten die Auswirkungen nach Meinung der Interessenvertreter jedoch ganz erheblich sein, insbesondere in den Mitgliedstaaten und Branchen, in denen es keine landesweiten oder branchenspezifischen Tarifverträge gibt und wo Mindestlohnsätze und sonstige Beschäftigungsvorgaben zum Großteil auf regionaler Ebene beschlossen werden und/oder wo unternehmensinterne Vereinbarungen das Lohnniveau maßgeblich beeinflussen. Wie die Studie zeigt, gibt es zwischen den einzelnen Mitgliedstaaten und Branchen bezüglich der Rolle der regionalen/lokalen Lohnfestsetzung deutliche Unterschiede. Dies gilt beispielsweise für das Transport- und Gesundheitswesen in Polen oder die öffentliche Baubranche in Frankreich. Interessenvertreter in anderen Mitgliedstaaten fanden diesen Aspekt weniger relevant, da die Mindestentgelte auf Branchenebene durch landesweite Tarifverträge geregelt werden und für alle Beschäftigten verbindlich gelten. Dies wurde vor allem von Interessenvertretern der beiden nordischen Mitgliedstaaten, aber auch in Belgien, Italien und den Niederlanden hervorgehoben.

Ungeachtet des jeweiligen Branchenkontexts ist ein wichtiges Ergebnis der Studie das, dass es deutliche Unterschiede zwischen den nationalen Akteuren hinsichtlich der Bewertung möglicher Szenarien einer Ausweitung von Artikel 3 (8) der Entsenderichtlinie gibt. Anders etwa als in den Niederlanden wird die Abdeckung der entsandten Arbeitnehmer von Interessenvertretern in Dänemark und Schweden als das Ergebnis einer erfolgreichen Praxis und Abdeckung von Tarifvereinbarungen der Tarifpartner angesehen und weniger als Ergebnis gesetzlicher Regulierung. Die meisten Interessenvertreter der anderen Mitgliedstaaten betonten, dass die Auswirkungen einer Erweiterung auf die Abdeckung und Mindestlohnniveau minimal wären, jedoch zu noch komplexeren Abläufen führen würden: Im Falle einer Ausweitung der Instrumente, die zur Bestimmung des "harten Kerns" von Entgeltsätzen und Arbeitsbedingungen herangezogen würden, sei das System für ausländische Unternehmen noch schwieriger zu durchschauen und führe zu deutlich höheren Belastungen der Inspektionsdienste bei der Überwachung und Durchsetzung.. Das Ergebnis wäre letztendlich mehr Outsourcing, Umgehungen der Vorschriften und vorschriftswidrige Praktiken, wie vor allem Vertreter von Regierungsstellen und branchenübergreifende Arbeitgeberorganisationen, Vertreter der Bau- und Straßentransportbranche sowie der Inspektionsdienste betonen.

Dies wird auch von den befragten Vertretern der Gewerkschaften in den wichtigsten Aufnahmeländern anerkannt; sie argumentieren für eine Stärkung des allgemeinen Grundsatzes der Gleichbehandlung, d.h. für „gleiches Geld für die gleiche Arbeit am selben Ort“. Demgegenüber fürchten die Arbeitgeberverbände und staatlichen Behörden in den meisten Aufnahmeländern, dass eine Erweiterung zu noch komplexeren Abläufen und vermehrten Anforderungen führen würde. Sie heben hervor, dass vielmehr auf die korrekte und effiziente Umsetzung der bereits bestehenden Vorschriften geachtet werden sollte. Des Weiteren haben die Arbeitgeberverbände und staatlichen Behörden in Polen

und Rumänien hervorgehoben, dass eine Erweiterung der Instrumente und Vorgaben zur Festsetzung von Mindestentgeltsätzen und sonstigen Beschäftigungsvorgaben zu einer Ungleichbehandlung zwischen Entsenderunternehmen und heimischen Unternehmen führen würde.

Abgesehen von diesen unterschiedlichen Bewertungen herrscht jedoch Einigkeit zwischen den verschiedenen Akteuren der Mitgliedstaaten darin, dass die aktuellen Probleme im Bereich der Arbeitnehmerentsendung nicht auf eine zu enge Definition des Hard-Core zurückzuführen sind, sondern auf die mangelhafte Umsetzung und fehlende Informationen über die bereits bestehenden Vorschriften. Hinzu kommen „kreative“ Praktiken, Vorschriften zur Festsetzung und Bezahlung der Mindestentgelten für entsandte Arbeitnehmer zu umgehen. Hier ergab die Studie auch erhebliche, branchenspezifische Unterschiede bei der Umsetzung, so z.B. massive Probleme im Straßentransport bezüglich der Kontrolle von Mindestlohnvorgaben und Arbeitszeitvorschriften.

Bestandteile der Mindestlohnsätze für entsandte Arbeitnehmer

Es gibt nur wenige nationale Gesetze oder Tarifvereinbarungen, die spezielle Vorschriften zu Bestimmung der Bestandteile der Mindestlohnsätze für entsandte Arbeitnehmer beinhalten. So entsteht eine zunehmende Verwirrung bezüglich der Begriffe „Mindestlohn“ und „Mindestentgeltsatz“, die in den Ländern häufig als gleichbedeutend betrachtet werden. Die Entsenderichtlinie selbst schürt diese Verwirrung, da sie in den meisten Sprachfassungen auf beide Begriffe zurückgreift. So werden auch in der Rechtsprechung des EuGH beide Begriffe verwendet. Mit dem Begriff „Mindestentgelt“ werden lediglich die Lohnbestandteile bezeichnet, die die Beschäftigungsbedingungen regeln, die das Gastland in ihr Staatsgebiet entsandten Arbeitnehmern im Rahmen von Artikel 3 (1) der Entsenderichtlinie zusichert. Bei „Mindestentgelt“ handelt es sich folglich um einen eigenständigen Begriff, der den Mindestbetrag festlegt, der dem entsandten Arbeitnehmer vom Gastland nach Vorgaben der Entsenderichtlinie zugesichert wird. „Mindestlohn“ hingegen ist ein ausschließlich landesbezogener Begriff: Er beschreibt die niedrigste Vergütung, die Arbeitgeber ihren Arbeitnehmern in ihrem Land gesetzesgemäß zahlen müssen. Anhand dieser unterschiedlichen Ansätze sind die „Mindestentgeltsätze“ (EU Konzept) nicht mit dem „Mindestlohn“ (landesinternes Konzept) gleichzusetzen. Mit anderen Worten handelt es sich beim Mindestlohn nicht notwendigerweise um die für entsandte Arbeitnehmer geltenden Mindestentgeltsätze.

Außerdem unterscheiden die Länder häufig nicht zwischen der Bestimmung der Bestandteile der Mindestentgeltsätze des Gastgeberlandes einerseits und der Bezahlung des entsendenden Arbeitgebers, anhand der man die Übereinstimmung mit den Mindestentgeltsätzen des Gastgeberlandes bewerten kann. Auch in der Rechtsprechung des EuGH wird diese Verwirrung deutlich. So ist es meistens schwer festzustellen, ob die Bestandteile der Mindestentgeltsätze aus der Sicht des Gastlandes, des Senderlandes oder aus der Sicht beider angewendet werden müssen. Viele Länder sind sich nicht bewusst, dass das Konzept der „Mindestentgeltsätze“ zu unterschiedlichen Zwecken von beiden Perspektiven aus betrachtet werden muss.

Die zu diesen Grundsätzen herrschende Verwirrung trägt zu einer allgemeinen Ungewissheit und Missverständnissen bei. Eine konkretere Anleitung durch den EuGH könnte die Implementierung der Vorschriften für Mindestentgeltsätze verbessern. Dazu braucht es zwei Voraussetzungen: eine strengere Verwendung der Grundkonzepte sowie eine gewisse Anzahl an Rechtsfällen, um die große Diversität der Vergütungsbestandteile abzudecken. Ein Anspruch, der kurzfristig nur schwerlich erzielt werden kann.

Aus der Sicht des Gastgeberlandes gibt es nur wenige allgemein etablierte Grundsätze: Die Mindestentgeltsätze beziehen sich auf das Bruttogehalt und beinhalten Überstundensätze. Zu vielen weiteren Elementen gibt es keine einheitliche Auslegung: Je nach Land und Branche werden Einteilungen in Lohngruppen, Aufwendungen für Mobilität, Boni, bezahlter Urlaub sowie Sozialabgaben als Bestandteile der Mindestentgeltsätze berücksichtigt oder nicht. Schwierig erweist sich auch die Tatsache, dass einige Vergütungsbestandteile, die vom Gastland gewährt werden, ein langfristiges Beschäftigungsverhältnis voraussetzen, sodass sie bei grenzüberschreitenden Entsendungen nur schwerlich Anwendung finden. Aus instrumenteller Sicht (d.h. bei Betrachtung gesetzlicher Regelungen im Vergleich zu Tarifabkommen) wenden sich eher die Tarifpartner als die Gesetzgeber den Fragen der Mindestentgeltbestandteile zu.

Aus Sicht des Entsenders gilt es sicherzustellen, dass der Lohn der entsandten Arbeitnehmer mindestens den Mindestentgeltsätzen des Gastlandes entspricht. Allerdings sind vergleichende Methoden zwischen der tatsächlichen Vergütung des entsandten Arbeitnehmers und den im Gastland geltenden Mindestentgeltsätzen bislang weitgehend vernachlässigt oder nur auf wenige Grundprinzipien beschränkt. Üblicherweise werden - unter Zustimmung der Aufnahmeländer - Tagesgelder eingebracht, damit der entsendende Arbeitgeber den Mindestlohnsätzen des Gastlandes gerecht wird. Die tatsächlichen Aufwendungen werden bei der Berechnung der Mindestentgelte des Gastlandes gewöhnlich nicht berücksichtigt. Es gibt verschiedene Formen der Bezahlung wie z.B. Tagegeld, Zuschläge und Einmalzahlungen, die von den Gastländern zur Bewertung der Übereinstimmung mit den Mindestentgeltsätzen üblicherweise akzeptiert werden.

Die Studie zeigt, dass es hinsichtlich der Mindestentgeltsätze deutliche Gegensätze zwischen den Grundsätzen der Richtlinie und der tatsächlichen Praxis gibt. Zum Teil liegt dies an der Schwierigkeit, abstrakte, unklare Vorgaben der Richtlinie mit den konkreten und sehr komplexen nationalen Mindestlohnvorschriften in Einklang zu bringen. Wir sind der Meinung, dass noch striktere Umsetzungsmaßnahmen, beispielsweise in Form von regelmäßigen Kontrollen der Arbeitsaufsichtsbehörden, nur bedingt effizient wären, solange die Mindestlohnsätze von der Gesetzgebung der EU oder direkt vom EuGH nicht genauer definiert werden.

1.SETTING THE SCENE: A LEGAL AND PRACTICAL OVERVIEW

1.1 The legal framework

Directive 96/71/EC requires Member States to ensure that undertakings established in another Member State, but which provide services in the host Member State, guarantee workers posted to their territory certain terms and conditions of employment, including the 'minimum rates of pay', as laid down by the national rules of the host state. The application of the Posting Directive poses a number of legal and practical challenges, which can be illustrated in the example given below.

A company lawfully established in one Member State ('the sending state') posts a worker in another Member State ('the host state'). In the host state, a collective agreement provides for a minimum hourly wage. A bonus for hard labour is also provided for by the collective agreement. What remuneration is the posted worker entitled to receive? Are the minimum rates of pay limited to the minimum hourly wage? Should the bonus be included in the minimum rates of pay? Should other wage conditions be taken into account? And how should the sending employer concretely meet the requirement?

In this practical case, and notwithstanding risks of fraud and abuse, several legal problems are raised. Two of them concern the host state: which means (legal, conventional, etc.) apply for the setting of minimum wages in the context of cross-border posting? What are the constituent elements of the minimum rates of pay and, in turn, what amount is the posted worker entitled to receive? A third question, targeting the sending state and sending employers, arises: to what extent does the remuneration paid to the posted worker reach the host country's 'minimum rates of pay' amount? In other words, which elements of pay granted by the employer can be included in order to assess whether the posted worker has received the 'minimum rates of pay'?

The Posting Directive tries to address these questions. It defines the means for the determination of minimum rates of pay for posted workers (i.e. law, collective agreements, etc.) and provides guidelines as to the constituent elements of the minimum rates of pay as well as to the comparative analysis between the amount actually received by the posted worker and the minimum rates of pay he/she is entitled to in the host country. Still, a number of issues remain unanswered. Firstly, the Directive is not exhaustive of the means that are in place in Member States for the setting of minimum wages; do the different wage-setting mechanisms have an impact upon the minimum rates of pay applicable to posted workers? Secondly, since the Directive does not itself provide any substantive definition of minimum rates of pay, what constituent wage elements should be considered to form part of the concept? And what elements actually paid to the posted worker can compare with the minimum rates of pay of the host country?

1.1.1 Wage-setting mechanisms

It is well-known that European countries have recourse to various wage-setting mechanisms, in particular in relation to minimum wages. Most Member States set

minimum wages by law, but this is not the case for all of them². In addition, when the framework of minimum wages originates in a law, it does not prevent other mechanisms from applying in parallel. In particular, the conventional way of wage-setting covers a wide array of agreements, depending on the level of conclusion (cross-industry, multi-sectoral, sectoral, company, establishment...) and on the territorial scope (national, regional, local...). Alternative mechanisms may apply, like arbitration. Minimum wages can also be determined unilaterally by the management of a group or of a company. The wage-setting mechanism may consist of multiple layers and may be further differentiated according to e.g. the workers' job classification, qualification, personal status, etc.

Are host states allowed to impose their minimum wages on workers posted to their territory, and is the answer to this question dependent on the wage-setting mechanism used? On the grounds of free movement of services, and before the Posting Directive was applicable, the CJEU set two key principles. Firstly, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by management and labour relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established (Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral*, paragraph 14; Case C-164/99 *Portugaia Construções*, paragraph 21). Secondly, the application of such rules must, however, be appropriate for securing the attainment of the objective which they pursue, that is, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (Joined Cases C-369/96 and C-376/96 *Arblade and Others*, paragraph 35 and Case C-341/02 *Commission v Germany*, paragraph 24).

Inspired by these rulings of the CJEU and by the diversity of wage-setting mechanisms in European countries, the Posting Directive enumerates the categories of legal instruments which are relevant for the determination of the minimum rates of pay for posted workers. The following principle is applicable: wage-setting mechanisms are those laid down "by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex" (Article 3(1)).

The activities specified in the Annex include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings. In the building sector host states are thus bound to ensure that their minimum wage rules - laid down in universally applicable collective agreements and/or arbitration awards - are applied to workers posted to their territory. The Directive does however not preclude the application by Member States of such rules for activities other than those referred to in the Annex (Article 3(10)). From a binding system (for the sector in Annex) we shift to an optional one for all sectors.

With regard to wage-setting mechanisms, a common denominator between Article 3(1) and 3(10) is the reference to universally applicable collective agreements and arbitration awards. These concepts are defined by the Directive. They mean "collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned". Nevertheless, "in the absence of a

² Eurofound, *Pay in Europe in the 21st century*, Dublin, 2014.

system for declaring collective agreements or arbitration awards to be of universal application (...), 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 organizations at national level and which are applied throughout national territory" (Article 3(8)).

The wish to encompass as many wage-setting mechanisms as possible in the Directive leads to a highly complex system resulting in the combined application of Articles 3(1), 3(8) and 3(10). While in countries where minimum wages are set by law or by universally applicable collective agreements, their submission to posted workers is straightforward, a state of uncertainty for companies and posted workers applies in countries where no such tools exist.

A major difficulty concerns Member States where minimum wages are set by instruments- collective agreements in practice - which do not fulfil the conditions described above. The Posting Directive seems to be more apt at accommodating the systems in which minimum wages are set by law or collective agreements that are comparable to delegated legislation than at accommodating more autonomous mechanisms. The Laval case (Case C-341/05) demonstrates the consequences of this remark. The CJEU held indeed that "a Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, 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". Should the Directive be more flexible by enlarging the scope of instruments for the determination of the minimum rates of pay for posted workers?

In this complex legal environment, a mapping of wage-setting mechanisms was needed and has been carried out in four key sectors in nine Member States. In Member States with several layers of minimum-wage-setting mechanisms, how do these layers interact? How is the monitoring and re-evaluation of minimum wages per wage-setting mechanism implemented? To what extent do wage-setting mechanisms include the categorisation of workers into pay groups? A mapping seems all the more useful given that several European countries recently adapted their wage-setting mechanisms.³ The analysis of the structural evolutions in the recourse to minimum-wage-setting mechanisms brings precious information. The survey carried out should help improve improved knowledge of practices in Member States.

³ See, e.g., Changes in wage-setting mechanisms in the context of the crisis and the EU's new economic governance regime, Eurofound 2014.

1.1.2. Minimum rates of pay

1.1.2.1. Introductory remarks

As outlined above, the Posting Directive does not contain a definition of the term “minimum rates of pay”. With regards the regulation of wages, the Posting Directive employs two distinct terms: 'minimum rates of pay' and 'minimum wage'. Similarly, the jurisprudence of the CJEU features both of the terms. The expression “minimum rates of pay” is usual, but the expression “minimum wage” is also found⁴. Both expressions seem to be equivalent, but it is unclear whether they can be used interchangeably⁵. For the purpose of the present study the term 'minimum rates of pay' is used to denote those components of wages which constitute the terms and conditions of employment the host Member State shall ensure to workers posted to its territory within the meaning of Article 3(1) Posting Directive. In other words the term is used as an autonomous term to denote the minimum sum to be guaranteed to posted workers by the host state as required by the Posting Directive. This sum may comprise of a number of individual elements. “Minimum wage” will be used to refer to the lowest remuneration that employers may legally pay to workers. Minimum wages are exclusively defined at national level and, accordingly, the term is used when discussing the remuneration paid to workers in the Member State.

The notion of minimum rates of pay is closely interconnected with wage-setting mechanisms. As it will be explained in sub-section 2.3.5, the impact of different wage-setting mechanisms upon the minimum rates of pay applicable to posted workers is analysed in this report.

Focusing on the minimum rates of pay per se, problems related to posted workers can be looked at from two angles:

- For the host state, the challenge is to ensure that the workers posted to its territory have received what corresponds to the minimum rates of pay⁶ and in this connection to determine the constituent elements of the minimum rates of pay. In this respect, it is unlikely that all parties involved in Member States – the legislator, the social partners, etc. - in the determination of the constituent elements of minimum rates of pay are fully aware of the difficulties raised by the definition of the notion. The way it is understood and applied by the host state is heterogeneous. A previous legal study identified the following issues as particularly problematic: contribution to funds; exchangeability of special benefits; special payments related to the posting and the distinction between pay and reimbursements of costs; complications caused by taxes and premiums (the gross/net problem); withholding of costs from the wages due to the worker; the possibility to combine benefits from different systems, leading to a level of protection that is higher than that envisaged under either the home state or the host state law⁷.

⁴ E.g. Article 3(7), case C-396/13, §35.

⁵ A. van Hoek and M. Houwerzijl, Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, 2011, p. 61.

⁶ Let us recall that enforcement of the directive is not covered by this report.

⁷ A. van Hoek and M. Houwerzijl, Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, 2011, p. 192.

- For the sending state/employer - besides the specific question of access to information on the minimum rates of pay of the host country, a question which is not part of this report - the challenge is to ensure that posted workers have received wages at least equal to the minimum laid down in the host Member State. In this respect, it is necessary to assess which components of the sum actually paid to the posted worker are taken into account for the calculation of the minimum rates of pay of the host country.

The interpretation of the term "minimum rates of pay" and its constituent elements can have various consequences. When a narrow interpretation is adopted in the host state, the posted workers' protection is not adequate since they do not earn as much as they should. Host state companies will experience unfair competition from companies established in other Member States. Is this consequence combated by host states? Not necessarily since posting may be envisaged as a way to reduce costs, for instance in the context of public procurement. Reversely, if the term "minimum rates of pay" is construed too broadly, the additional protection of posted workers will be counterbalanced by an unjustified advantage of the local companies.⁸

The Posting Directive and subsequent case law of the CJEU provide guidelines for a correct understanding of the concept of minimum rates of pay.

1.1.2.2 The Posting Directive orientations

As mentioned above, the Posting Directive does not provide a substantive definition of the concept of "minimum rates of pay". According to Article 3(1) *in fine* the concept of minimum rates of pay is defined by the national law and/or practice of the Member State to whose territory the worker is posted. The Directive nonetheless provides two orientations which, unfortunately, contribute to the confusion between the concept of "minimum rates of pay" as such (set out in Article 3(1) of the Directive) and the rules which apply to the comparative analysis between the amount received by a posted worker and the amount s/he must receive in conformity with Article 3(1) of the Directive:

- Firstly, the minimum rates of pay include overtime rates⁹ (Article 3(1)(c)).
- Secondly, allowances specific to posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging (Article (3)(7)).

It follows from these orientations that countries are not entirely free to set the minimum rates of pay applicable. This notion is neither fully national, nor fully European¹⁰. As the

⁸ Let us recall that "Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness" (case C-341/05).

⁹ Whereas supplementary occupational retirement pension schemes are not covered.

¹⁰ See J. Porta, "Le salaire minimal, un instrument national pour lutter contre le dumping social ?", Droit Ouvrier, Paris, May 2015.

CJEU stated in *Sähköalojen ammattiliitto ry* (C-396-13) the task of defining what are the constituent elements of the minimum wage, for the application of that directive, is a matter for the law of the Member State of the posting, “*but only in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services between Member States*”. This balanced approach contributes to making the notion of minimum rates of pay flexible but hard to identify in practice.

1.1.2.3 Interpretation of the CJEU

On several occasions the CJEU has been given the opportunity to clarify the meaning of the rules dealing with the “minimum rates of pay” within the context of Article 3(1) and 3(7) of the Posting Directive.

In *Commission v. Germany* (C-341/02) Germany (host state) excluded certain sums granted to the worker for assessing whether the remuneration actually paid by the employers established in other Member States to their workers posted to Germany amounted to the German minimum rates of pay. Concretely, the Commission criticised German law for not recognising, as constituent elements of the minimum rates of pay, certain bonuses, such as bonuses in respect of the 13th and 14th salary months, or the contributions paid by employers established in other Member States to holiday and compensation funds comparable to the host country funds, in so far as those amounts are received directly or indirectly by the worker posted in the other Member State. In its ruling the CJEU declared that “by failing to recognise as constituent elements of the minimum wage allowances and supplements which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return, and which are paid by employers established in other Member States to their employees in the construction industry who are posted to Germany, with the exception of the general bonus granted to workers in the construction industry, the Federal Republic of Germany has failed to fulfil its obligations under Article 3 of Directive 96/71/EC”. However, “if an employer requires a worker to carry out additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage”.

Isbir (C-522/12) illustrates another problem introduced above: the concept of minimum rates of pay may be interpreted and applied too broadly. The question referred to the CJEU was to determine whether the “capital formation” was a constituent element of the minimum wage of the host country. A German law indeed provides for payment by the employer of a monetary contribution to allow the formation of a capital amount on behalf of the worker. For the CJEU, “the capital formation contribution seems, in view of its objective and its characteristics as set out by the national court, to alter the relationship between the service provided by the worker and the consideration which he receives by way of remuneration for that service”. Thus, “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". In other words, the "capital formation" is not a constituent element of the host country minimum rates of pay.

Sähköalojen ammattiliitto ry (C-396/13) took place in a different context. Almost 200 workers posted by their Polish employer to Finland claimed that they did not receive the minimum rates of pay guaranteed by the Finnish collective agreement. Two categories of questions were raised. The first category dealt with the definition of the constituent elements of minimum rates of pay by the Finnish collective agreement:

- For the CJEU, a daily allowance "must be regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned". The allowance is indeed "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".
- The same conclusion applies to a compensation for daily travelling time, provided by the Finnish collective agreement, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration. The Court underlines the fact that "such compensation for travelling time is not paid in reimbursement of expenditure actually incurred by the worker on account of the posting".
- The pay which the posted workers must receive for the minimum paid annual holidays (in accordance with the Finnish collective agreement) is also part of the constituent elements of minimum rates of pay. The Court emphasises the fact that "the pay which the worker receives during the holidays is intrinsically linked to that which he receives in return for his services".

The second category of questions dealt with the following question: should certain sums paid to the posted worker by their employer be excluded in order to assess whether the Finnish minimum rates of pay had been complied with? The coverage of accommodation costs and an allowance taking the form of meal vouchers provided to the posted workers by their employer were discussed. The CJEU ruled that they were not to be regarded as an element of their minimum wage.

With these cases, major trends appear. Whereas reimbursement of costs effectively incurred (food, housing, transportation) and payments compensating for additional or arduous work are excluded from the constituent elements of the minimum rates of pay, all payments which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return are part of it.

Moreover, the Posting Directive 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, provided that that calculation and categorisation are carried out in accordance with rules that are binding and transparent.

Even though these orientations are instructive, they are not sufficient to ensure that all problems are resolved. In many cases, it remains difficult to evaluate whether a given sum is a constituent element of the minimum rates of pay of the host country. Besides components which are undoubtedly included/excluded for the determination of the

minimum rates of pay applicable to a posted worker, there is a “grey area” of components not clearly belonging or excluded from the constituent elements of the minimum pay rates. Conversely, it is difficult for sending employers to know which elements of remuneration actually paid to the posted workers are taken into account for the calculation of the minimum rates of pay of the host country. Table A below recaps the elements of a solution based on the Directive and on the case-law to date.

Table A – Elements of the minimum rates of pay according to the Posting Directive and to CJEU case-law: the host country and the sending perspective

	bonus for extra work	overtime payment	13th month bonus	bonus for particular working conditions	daily allowance /posting allowance	compensation for daily travelling time	minimum paid annual holiday	accommodation costs	meal voucher	supplementary occupational retirement pension schemes	« capital formation » contribution	employees' classification
Host country MRP ¹¹	not ruled yet	yes ¹²	not ruled yet	not ruled yet	yes ¹³	yes ¹⁴	yes ¹⁵	not ruled yet	not ruled yet	no ¹⁶	no ¹⁷	yes ¹⁸
Sending perspective ¹⁹	no ²⁰	no ²¹	yes ²²	no ²³	yes ²⁴	yes ²⁵	not ruled yet	no ²⁶	no ²⁷	no? ²⁸	not ruled yet	not ruled yet

¹¹ Elements of remuneration which are included (or not) for the determination of the MRP amount of the host country

¹² Article 3(1)(c) Posting Directive.

¹³ Case C-396/13.

¹⁴ Case C-396/13.

¹⁵ Case C-396/13.

¹⁶ Article 3(1)(c) Posting Directive

¹⁷ Case C-522/12.

¹⁸ Case C-396/13.

¹⁹ Payments made to posted workers by their employers which can (or cannot) be considered for the purposes of assessing compliance with the host country minimum rates of pay.

²⁰ Case C-341/02.

²¹ Case C-341/02.

²² Case C-341/02.

²³ Case C-341/02.

²⁴ Article 3(7) Posting Directive.

²⁵ Article 3(7) Posting Directive.

²⁶ Case C-396/13.

²⁷ Case C-396/13.

²⁸ Case C-341/02.

Table A highlights a major ambiguity with regard to the elements of the minimum rates of pay: it is not obvious in the Directive or in the CJEU rulings whether the question is dealt with from the perspective of the host country (which elements of remuneration are added for the determination of the minimum rates of pay of the host country) or from a sending perspective (which payments made to posted workers by their employers can be considered for the purpose of assessing compliance with the host country's minimum rates of pay) or from both perspectives.

The ambiguity starts in the wording of the Posting Directive and in particular in the combined reading of Article 3(1) and 3(7). Both perspectives seem indeed to be considered but they are not really marked. Hence, in the definition of the "minimum rates of pay" included in the former provision, by stating that they include overtime rates, the legislator looks at the host country perspective. In Article 3(7) however, focus is on the sending perspective – and therefore on the payments made to posted workers by their employers which can (or cannot) be considered for the purpose of assessing compliance with the host country's minimum rates of pay - when the Directive indicates that the "*allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting*".

The CJEU stimulates the confusion by not duly distinguishing both sides even though the three relevant cases would have made it possible to do so. In particular, the *Sähköalojen ammattiliitto ry* case, where preliminary ruling questions dealt with both sides, confirmed the lack of the accuracy of the solutions.

Does it mean that the solutions applicable from the host country's perspective are also valid for the sending country? Probably so in many cases (see e.g. posting allowances), but not necessarily in all of them. Let us give an example that illustrates the complexity of the matter. It concerns the sensitive question of overtime rates of pay: from the host country's perspective, overtime rates are included in the minimum rates of pay²⁹; from the sending perspective, it seems that overtime payment made by the employer cannot be compared to the host country's minimum rates of pay³⁰.

The uncertainty of the solutions applicable at EU level is likely to have an impact on national rules.

Many components of remuneration deserve to be scrutinised from both the host country and the sending perspectives. Let us mention the main components: basic salary (is the gross or net amount considered?); bonus granted as a one-time flat rate sum; bonus granted on a regular basis (ex. Christmas bonus, holiday bonus); bonus based on individual/collective objectives; extra-payment for overtime; allowances specific to the posting; additional remuneration based on working conditions (e.g. daily bonus for working away from home, hardship/hazardous allowances); social advantages (e.g. food stamps, movie tickets) and other advantages in kind (e.g. free access to a care system, free housing, free means of transportation home-work); social protection related

²⁹ Article 3§(1).

³⁰ Case C-341/02, §29.

advantages; social security contributions and income tax deduction; holiday allowances and holiday funds; costs reimbursements; per diem/ flat rate compensation for working abroad; dismissal compensations.

The objective of this study in this respect is to provide a clearer view on which elements are in practice considered as part of the minimum rates of pay – and in particular which ones are of a social protection nature³¹ - in the Member States.

1.2 Overview of wage levels and patterns of posting

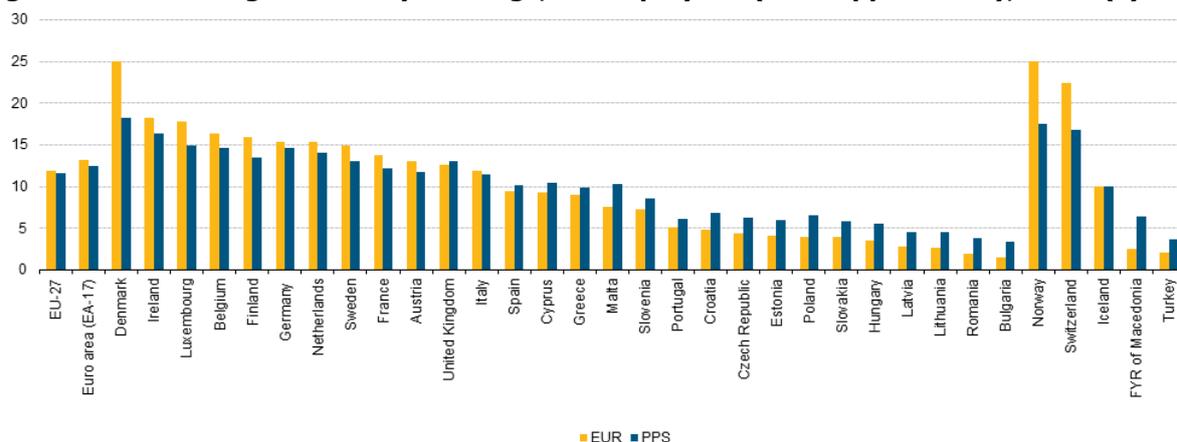
As a first input for understanding the minimum-wage-setting mechanisms and the constituent elements of the minimum rates of pay in the selected EU countries and sectors, this section provides an overview of average wages (1.2.1) and figures on posting patterns in the selected EU countries (1.2.2).

1.2.1 Wage levels

Wages differ between countries due to differences in the costs of living, productivity, the working environment, and in the differences between the supply of and the demand for labour. As the following figure shows, gross hourly earnings within the EU vary significantly. As of October 2010 (most recent data), the highest median gross hourly earnings were recorded in Denmark (EUR 25.00) and the lowest in Bulgaria (EUR 1.50), i.e. the highest value was 16 times as high as the hourly earnings of the Member State with the lowest value when expressed in euros; when expressed in purchasing power standards (PPS) the ratio was 5 to 1.

³¹ Defined as such: Elements of minimum rates of pay which are not linked to the amount of work performed as such, but seek the social protection of posted workers. This includes e.g. those elements seeking to make up for the disadvantages entailed by the posting as a result of the workers being removed from their usual environment (e.g. accommodation allowances or reasonable compensation for the possible increase in living costs in the host state), supplementary retirement insurance, payment of health benefits, unemployment benefits, compensation for accidents at work, and financial assistance for survivors in the event of the death of the worker.

Figure 1-1: Median gross hourly earnings, all employees (excl. apprentices), 2010 ⁽¹⁾



(¹) Enterprises with 10 or more employees. Whole economy excluding agriculture, fishing, public administration, private households and extra-territorial organisations.
Source: Eurostat (online data code: earn_ses_pub2s)

Source: Eurostat 2015

As Table 1-1 shows, there are also sectoral differences in wage levels due to differences in skills and education levels of the workers, as well as sectoral differences between the supply of and the demand for labour. Available Eurostat data does not present average wages precisely for the four sectors covered by the study – apart from construction. Hence, transportation also includes rail and air transport as well as storage, while human health and social work is broader than health and care services. Furthermore, temporary work agencies cover several different sectors: it is not possible to calculate any average wage for this sector.

With this in mind, Table 1-1 shows that the average wages for the selected sectors do not differ that much within a given Member State, and so the wage differences between Member States for a given sector seem mainly to be a reflection of general wage differences.

Furthermore, the table shows that the minimum wages amount to around 50 per cent of average wages in the older Member States. The ratio is particular high in Italy. This is, however, partly a result of the minimum wage rate used (see Table 1-3) in the calculation, which is an estimate based on a sample of sectoral minimum wages, which in general are assessed to be set at higher levels than universal minimum wages³². This being said, the ratio in Denmark – where the calculation is also based on data for sectoral minimum wages – is with 56.5 per cent only slightly higher than the average. A reason for this lower ratio, compared with Italy, is assessed to be the relatively even wage structure in Denmark.

³² See also Kampelmann *et al.*, who write, in relation to national Kaitz indices, that “[a]ll observations from countries without statutory minimum wages lie above 50 per cent, including extremely high values for Italy. In fact, the Kaitz indices for Italy of around 90 per cent indicate that sectoral minima appear to lie close to the corresponding median wages” (S. Kampelmann, A. Garnerio and F. Rycx, Minimum wages in Europe: does the diversity of systems lead to a diversity of outcomes?, 2013, etui report 128, p. 45).

For the newer Member States, Poland and Romania, it is notable that while they have the lowest average wages, they have even relatively lower minimum wages leading to ratios of around 30 per cent of average wages.

Table 1-1 Average wages by sector, EUR per hour, 2010

Member State	Construction⁽¹⁾	Transportation⁽²⁾	Human health and social work⁽³⁾	Total⁽⁴⁾	Minimum wage⁽⁵⁾ / total
Belgium	16.64	18.00	17.61	18.92	44.5 per cent
Denmark	25.18	25.93	23.65	25.37	56.5 per cent
France	14.28	16.05	14.75	16.27	⁽⁶⁾ 54.5 per cent
Germany	14.63	14.25	15.91	16.95	⁽⁷⁾ 50.1 per cent
Italy	12.65	13.64	16.62	14.48	⁽⁶⁾ 73.3 per cent
Netherlands	18.93	16.52	17.49	17.25	50.1 per cent
Poland	4.33	4.63	4.95	5.21	34.9 per cent
Romania	2.29	2.87	2.38	2.63	30.4 per cent
Sweden	18.40	16.92	16.33	17.77	⁽⁸⁾

Source: Eurostat. Structure of earnings survey 2010.

Notes:

⁽¹⁾ NACE Rev. 2 – F: Construction.

⁽²⁾ NACE Rev. 2 – H: Transportation and storage.

⁽³⁾ NACE Rev. 2 – Q: Human health and social work activities.

⁽⁴⁾ NACE Rev. 2 – B-S: Industry, construction and services (except activities of households as employers and extra-territorial organisations and bodies).

⁽⁵⁾ See Tables 1-2 and 1-3.

⁽⁶⁾ Using minimum wage rate for 2009.

⁽⁷⁾ Using minimum wage rate for 2015.

⁽⁸⁾ No estimate for Sweden.

Hence, as shown in Table 1-2, of the six selected EU countries which set universal minimum wages (see Table 2-2 in sub-section 2.3.1) the minimum wages are somewhat lower in Poland and Romania, than in the four older Member States – for which they are fairly similar. Part of the differences in minimum wages can be explained by differences in the costs of living. However, as also shown in Table 1-2 most of the differences remain when the minimum wages are compared in terms of purchasing power standards (PPS). The table also indicates that universal minimum wages are adjusted regularly in most Member States. However, the minimum wage has not changed in Belgium since 1 December 2012. Romania and Poland have seen minimum wages increased relatively most since 2006.

Table 1-2 Universal minimum wages, EUR per hour

Member State	2006	2010	2015	Change 2006-2015	2015 PPS	Latest change
Belgium	7.48	8.41	9.10	22 per cent	8.22	01-12-2012
France	8.03	8.86	9.61	20 per cent	8.71	01-01-2015
Germany			8.50 ⁽¹⁾		7.06	01-01-2015
Netherlands	7.81	8.64	9.21	18 per cent	8.32	01-01-2015
Poland	1.24	1.82	2.42	95 per cent	3.95	01-01-2015
Romania	0.44	0.80	1.30	195 per cent	2.04	01-01-2015

Sources: WSI Minimum Wage Database, Schulten (2014b) and Eurostat.

Note: ⁽¹⁾ Germany has only had a universal minimum wage from 1 January 2015.

For the Member States which set sectoral minimum wages (see Table 2-1), there is no immediately available data for an official (universal) minimum wage. However, a recent study³³ attempted to estimate levels for such sectoral minimum wages for two of the three selected EU countries (see Table 1-3). This was done on the basis of data collected manually from a selected sample of sectoral collective agreements. From each agreement, the wage assigned to the lowest category in collectively negotiated pay scales was used (with the exception of pay scales for apprentices and young workers). Hence, the estimated minimum wages are in practice the pay rates that apply to workers with no seniority in low status occupations.

Although, the sectoral minimum wages are not fully comparable with the universal minimum wages in Table 1-2, it seems that they are slightly higher than these. This also reflects research results that show that minimum wages set by collective bargaining agreements either at sectoral or cross-sectoral level are significantly higher than those minimum wages set by statutory regulation³⁴.

Table 1-3 Sectoral minimum wage, EUR per hour

Member State ⁽¹⁾	2007	2009	Change 2007-2009
Denmark	13.44	14.33	7 per cent
Italy	10.16	10.62	5 per cent

Source: Kampelmann, et al. (2013).

Note: ⁽¹⁾ No estimate for Sweden.

³³ S. Kampelmann, A. Garnero and F. Rycx, Minimum wages in Europe: does the diversity of systems lead to a diversity of outcomes?, 2013, etui report 128.

³⁴ See A. Garnero, S. Kampelmann and F. Rycx, Minimum wage systems and earnings inequalities: Does institutional diversity matter?, IZA Discussion Paper No. 8419, August 2014.

Table 1-4 provides for the selected EU countries that apply universal minimum wages, where available³⁵, some additional Eurostat minimum wage indicators. It shows firstly that the share of workers earning less than 105 per cent of the minimum wage – which can be argued to be the share that must be under observation regarding compliance with minimum rates of pay – ranges from 3.7 per cent in the Netherlands to 9.9 per cent in Poland. Secondly, although overall comparable in size, it shows that the share of minimum wages to mean earnings for the Netherlands and Poland differ somewhat for the similar indicator presented in Table 1-1. Thirdly, the shares of minimum wages to median earnings are higher than those for mean earnings, which is a result of the wage distributions being right-skewed.

Table 1-4 Eurostat minimum wage indicators

Member State	Share of workers earning less than 105 per cent of minimum wage⁽¹⁾, 2010	Share of minimum wage to mean earnings, 2012	Share of minimum wage to median earnings, 2012
Belgium		46.1 per cent	53.1 per cent
France	9.2 per cent	47.1 per cent	59.5 per cent
Netherlands	3.7 per cent ⁽²⁾	43.3 per cent	51.9 per cent
Poland	9.9 per cent	43.5 per cent	
Romania	4.4 per cent	34.1 per cent	

Sources: Eurostat, *Structure of Earnings Survey 2010 and Minimum wages (earn_minw)*;

Notes:

⁽¹⁾ Special calculation made for the publication on *Minimum Wage Statistics* – i.e. data is not available in Eurostat's online database. Estimate for full-time employees, 21 years or older, working in enterprises with 10 employees or more, NACE Rev. 2 Sections B to S excluding Section O.

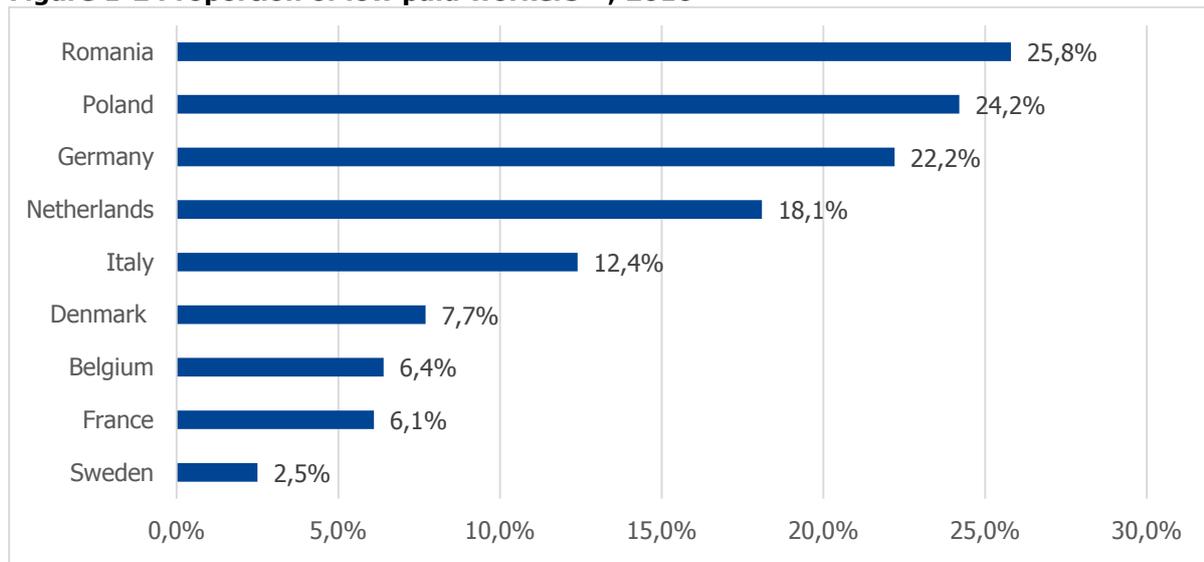
⁽²⁾ The national minimum wage applies to employees 23 years or older, but the scope of the analysis covers employees aged 21 years or older for comparability with other countries.

Finally, Figure 1-2 – using estimates of the Hans Böckler Foundation – shows that while only 2.5 per cent of Swedish workers in 2010 earned below two-thirds of the medium hourly earnings, this was the case for 25.8 per cent of workers in Romania and 24.2 per cent in Poland. Surprisingly Germany and the Netherlands also have relatively high shares of poorly paid workers. However, for Germany it should be remembered that they have chosen a universal minimum wage that is somewhat lower than in Belgium and France.

Denmark, Sweden, and Italy, only make use of sectoral minimum wages agreed via collective negotiation, and have relatively low shares of poor workers.

³⁵ No figures for Germany where a universal minimum wages only is applied since January 2015.

Figure 1-2 Proportion of low paid workers⁽¹⁾, 2010



Source: http://www.boeckler.de/hbs_showpicture.htm?id=43667&chunk=1

Note: ⁽¹⁾ Among those in workplaces with 10 or more employees, earning less than two-thirds of medium hourly earnings.

1.2.1 Patterns of posting

1.2.2.1 Overview of posting patterns in the EU

The most recent comprehensive estimate of the number of posted workers in the EU was made by Pacolet and De Wispelaere (2014)³⁶. Their estimate, presented in Table 1-6, was made on the basis of the number of portable documents A1 (PDs A1) – previously E101 forms, for posting according to Article 12 of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems. They looked into the information both from the side of the sending and the receiving Member State. Furthermore, they used a breakdown by employed/self-employed, economic activity and posting period.

Pacolet and De Wispelaere (2014) underline that there is uncertainty³⁷ as to what extent the number of PDs A1 issued by Member States is a precise measure of the actual number of postings taking place. They mention that uncertainty arises from different national procedures³⁸ related to the granting of PDs A1 or by the fact that PDs A1 may be delivered retroactively. As a way to improve the information about the number of posted workers, they suggest introducing an additional variable in the EU Labour Force Survey (LFS). The uncertainty and lack of reliability of the data were strongly and uniformly confirmed by stakeholders involved in the national analysis of this study (see for example the German country report).

³⁶ J. Pacolet and F. De Wispelaere, HIVA – KU Leuven, Posting of workers Report on A1 portable documents issued in 2012 and 2013, prepared under framework of Contract No VC/2013/0301, 2014.

³⁷ Stakeholders interviewed in the selected EU countries also stress that the PDs A1 data often are insufficient to get a realistic picture of the amount of posted workers. Furthermore, in sectors where alternative figures are available, they are often different from the PDs A1 data.

³⁸ For example, the Belgian declaration tool for posted workers, LIMOSA, had in 2012 about 373,000 registrations, whereas only 125,000 PDs A1 were delivered for persons sent to Belgium.

With this uncertainty in mind, Table 1-6 shows that Poland posts most workers to the other Member States, followed by Germany and France. These latter two Member States are also the largest on the receiving end. Other large receivers are Belgium and the Netherlands. Almost all Member States have seen an increase in the number of postings from 2010 to 2013.

Table 1-6 PDs A1 issued 2010 and 2013, by sending and receiving Member State

Member State	Sending Member State		Receiving Member State	
	2010	2013	2010	2013
Belgium	49,862	58,522	90,540	134,340
Denmark	9,262	5,320	9,608	10,763
France	133,896	123,580	160,532	182,219
Germany	201,436	227,008	250,054	373,666
Italy	35,430	55,509	60,460	47,445
Netherlands	15,190	25,429	91,560	100,423
Poland	221,126	262,714	12,877	14,387
Romania	29,730	51,739	9,445	10,894
Sweden	⁽¹⁾	4,026	19,464	29,446

Source: Pacolet. J. and De Wispelaere. F. (2014).

Note: ⁽¹⁾ No estimate.

Pacolet and De Wispelaere (2014) further provide furthermore, as shown in Table 1-7, for some of the sending case study Member States estimates of posted workers by economic activity (shares in per cent). It shows firstly, that the older Member States (Belgium, Germany, and the Netherlands) mostly send out service workers, while Poland and Romania mainly send out industry and construction workers. Relatively few transportation workers are sent out, and it is notable that the Netherlands sends out many workers from the service sectors: education, health and social work, arts and other services.

Table 1-7 PDs A1 for posted workers issued by sending Member States, share (per cent) by economic activity, 2013

NACE Rev. 2	A	B-F	F	G-T	G	I	H-J	K-N	P-S
Member States ⁽¹⁾	Agriculture, hunting and fishing	Industry total	Construction	Services total	Wholesale and retail trade	Accommodation and food service activities	Transportation and storage; Information and communication	Financial and insurance; etc.	Education, health and social work, arts and other services
Belgium	0.6	40.1	21.2	59.2	4.0	0.9	2.7	37.4	14.2
Germany ⁽²⁾	0.0	24.0	24.0	76.0	0.0	0.0	0.0	36.6	39.4
Netherlands	0.7	28.2	11.5	71.1	4.4	1.9	1.8	9.1	53.6
Poland	2.7	64.8	47.8	32.4	0.6	0.1	1.0	3.6	11.1
Romania	4.4	80.2	27.5	15.4	0.5	0.7	7.0	3.1	4.1

Source: Pacolet, J. and De Wispelaere, F. (2014)

Notes:

⁽¹⁾ No estimates for Denmark, France, Italy, and Sweden.

⁽²⁾ The figures for Germany were available only for one competent institution or 175 PDs A1. The results are therefore not representative for Germany.

1.2.2.2 Posting patterns in the four sectors and nine countries

National reports provide information about sectoral patterns and the trends in the posting of workers. This information is mainly of qualitative nature and is based on the experiences of the interviewed stakeholders. The focus is on the four selected sectors and on the jobs for the posted workers that may be subject to the minimum rates of pay. With this in mind, postings are pointed out as having an important role for the **construction sector**. For Belgium, Denmark, Germany and France, it is by far the most important single sector when it comes to the number of received posted workers. While Poland and Romania are known for posting construction workers to other Member States, they do also receive some. These are, however, often workers with skills lacking on the local market, and so they are rarely remunerated in conflict with minimum wage rules. Although, there are many workers within the **road transport sector** crossing the EU borders, many of these are working on a temporary basis in a host Member State according to cabotage rules governed by Regulation (EC) 1072/2009. In actual fact the road transport sector is a very specific one in this context, due to issues concerning the applicability of the Posting Directive, the existence of an entire set of specific legislation and the corresponding involvement of different authorities at national and EU levels, and the intrinsically mobile character of the players involved. Whether transit and bilateral transport operations fall under the Posting Directive is not a foregone conclusion. And while recital 17 of Regulation (EC) No 1072/2009 stipulates that the Directive applies to

transport undertakings performing a cabotage operation, the message that transpires from several country reports is that the Directive's application in this sector is largely theoretical. This being said, there appears to be an increase of posting in road transport. This is for example the case in Denmark, and there is evidence of French and Belgian road haulers setting up subsidiaries in other Member States, which involve some posting. The picture of posting within the **health and care services sector** is somewhat blurred, partly because many of the postings of such workers may take place by temporary work agencies. However, none of the national reports point to important posting volumes within this sector.

Finally, for **temporary work agencies** there are no official registrations as to who the final users of the posted workers from temporary work agencies are. Hence, the suggestions shown in Table 1-8 are solely those of the stakeholders interviewed. The construction sector is mentioned as a typical final user in several countries: the Netherlands, Belgium, Denmark, and Sweden. Although, in Sweden this is often not the case for the larger construction companies who leave this to construction companies further down the subcontracting chain. Germany is an exception as temporary agency employment in the construction sector is not allowed according to German law. The agricultural sector is also a common employer of workers posted by temporary work agencies, i.e. in the Netherlands, France, and Denmark. Sweden makes good use of doctors and nurses posted by foreign temporary work agencies, while Germany makes use of Nordic agencies to secure sufficient workers for the offshore wind sector.

Table 1-8 Final users of posted workers from temporary work agencies

Member State	Finding
Belgium	Final users are found in various sectors of the industry including cleaning and meat-processing and to a lesser extent road transport. Construction workers are mainly posted via temporary agencies.
Denmark	Final users are companies within road transport, construction and the green sector: mainly forestry companies and gardening.
France	Final users are construction undertakings and public works, industry, agriculture, road transport, food processing plants, restaurants and hotels, and shipbuilding.
Germany	Foreign temporary work agencies do not play a large role in Germany. Most temporary agency workers are of Polish origin and work in various sectors. According to anecdotal evidence, Hungarian agencies mainly post workers to the meat industry, Baltic agencies to the road transport sector, and Nordic agencies to the offshore wind sector. In recent years strong growth in the number of applications and licences of foreign employment agencies from Member States in Eastern Europe in Germany can be observed. Temporary agency employment in the construction sector is not allowed according to the German law.
Italy	Final users are mostly related to the aircraft industry and the health care sector.
Netherlands	Final users of posted workers from foreign temporary work agencies are often from the agricultural, industry, construction and transport sectors. For the construction sector, there are both Dutch and foreign subcontractors active on construction sites in the Netherlands.
Poland	Temporary work agencies are unwilling to provide such information – partly because they are not obliged to do so, and partly because they do not always know the final user due to chains of employment contracts.
Romania	There are only few postings to Romania from foreign temporary work agencies

	(Romanian temporary work agencies mainly post workers to the construction and transport sectors).
Sweden	The Swedish posting register contains too limited information to answer the question. However, there are indications that for example large Swedish construction companies do not tend to use agency work, but leave this up to construction companies further down the subcontracting chain. In turn, the health care sector makes use of doctors and nurses posted by foreign temporary work agencies.

Finally, there is no official data and so no precise characteristics of the firms using the posted workers. Hence, a description of such firms must rely on surveys, case studies (such as the nine within the present study), and anecdotal evidence.

Earlier studies such as IDEA Consult (2011)³⁹ and Ismeri Europa (2012)⁴⁰ provide some valuable insights into the companies using posted workers both from the sending and receiving perspectives, and in the use of posted workers in the construction sector and temporary agency sector. They conclude, for example, both that the posting in the construction sector often occurs through temporary work agencies via sub-contracting, and there is virtually no in-company posting. Furthermore, the construction sector is characterised by a high level of self-employed workers.

Furthermore, Ismeri Europa (2012) indicates on the basis of the data available for France and Denmark that small companies are also involved in the posting of workers. For example, in certain sectors, most notably the construction sector, where the role of large multinational companies is very important, subcontracting is also important and the subcontracting chain is often extended to include numerous SMEs at its downstream end. From the sending perspective, posting represents a means for firms to enter new markets and to extend the transnational provision of services. For SMEs in particular, posting enables them to exploit the learning potential attached to business growth and consolidation in foreign markets, and as such it contributes to the integration of the market of services.

From the receiving perspective, large firms are more present among the users of posted workers. They can, in particular, exploit the advantages in terms of increased allocative efficiency and of filling labour and skill gaps. Furthermore, large firms can often exert high competitive pressure on small firms, particularly in the construction sector, but also in the temporary employment agency sector, by virtue of using posted workers with lower wage levels and lower social security contributions obligations (Ismeri Europa, 2012).

³⁹ IDEA Consult, ECORYS Netherlands, Study on the economic and social effects associated with the phenomenon of posting of workers in the EU, Final report, VT/2009/062, 2011 (+ annexes).

⁴⁰ ISMERI EUROPA, Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, Final Report, 2012.

2. WAGE-SETTING MECHANISMS AND POSTING

There is a great variety of wage-setting mechanisms in the EU. Their interactions with minimum wages are highly complex. Thus, an overview of wage-setting mechanisms (2.1) as well as a presentation of their evolution in time (2.2) and their main features in relation to minimum wages (2.3) need to be provided. Then, the study will be looking at the connections between wage-setting mechanisms and posting (2.4) and will explore the potential impact of an extension of the instruments available to set the minimum rates of pay applicable to posted workers (2.5).

2.1 Overview of wage-setting mechanisms

The practice of wage-setting in advanced market economies is a combination of various regulatory tools and elements that are influenced and shaped by market forces, state intervention and collective bargaining. While the labour market exerts a primary influence on wages, political regulation can be important, in particular in regard to establishing legal minimum wages, setting automatic indexation mechanisms for wage adjustments or by tripartite wage concertation. Even though collective bargaining as a wage setting instrument could be regarded as an alternative tool to pure market forces, collective bargaining in practice is of course influenced strongly by labour market conditions, namely the unemployment level and economic conditions that could either depress or support the bargaining power of trade unions.⁴¹

The ways in which wage-setting and wage bargaining is conducted varies significantly across the EU Member States. As recent comparative research has shown, the following factors seem particularly relevant:⁴²

- whether multiple bargaining levels exist at the same time;
- the extent to which bargaining at various levels is interlinked;
- the extent to which coordination occurs between the actors at different levels and across sectors, branches or companies;
- the extent to which the government intervenes in the wage bargaining (for example, by setting statutory minimum wages or by providing for the legal extension of agreements to non-affiliated parties);
- legal possibilities to opt out or derogate from agreements;
- the existence of 'automatic' mechanisms of pay indexation;

The following table provides an overview of these elements and factors of influence in regard to the nine case study countries based on the ICTWSS database. Apart from most of those elements indicated above, the table also includes the most recent available data on membership density rates of employers and trade union organisations as well as collective bargaining coverage rates.

⁴¹ For further details and a literature review on this topic see European Commission: Industrial Relations Report 2014, p. 41-43.

⁴² Eurofound, Pay in Europe in the 21st century, Dublin, 2014..

Viewing our country sample it becomes quite obvious that the framework conditions in general vary quite significantly and hereby reflect differences between industrial relations and collective bargaining models, for example with a view on collective bargaining coordination or extension practices. However, what also becomes quite evident from the overview is that there is a clear gap between the two major sending countries (Poland and Romania) on the one hand and the receiving countries on the other hand. Key characteristics of the Polish and Romanian wage-setting practices are the dominance of company-based and largely fragmented, un-coordinated wage bargaining practices, a low collective bargaining coverage and a non-existing (Romania) or practically not used (Poland) practice of extending collective agreements.

Table 2-1 Wage-setting and bargaining characteristics, years from 2008 to 2011

	Coordinatio nof wage bargaining (1)	Dominant level of wage bargaining(2)	Bargaining coverage(3)	Extension practice(4)	Trade Union density	Employer organisatio n density
Belgium	5	5	5	3	50.4	82
Denmark	4	3	5	0	68.5	65
France	2	2	5	3	7.9	75
Germany	4	3	3	1	18	60
Italy	3	3	4	3	35.2	58
Netherlands	3	3	5	2	19	85
Poland	1	1	1	1	14.1	20
Romania	2	1	2	0	32.8	60
Sweden	4	3	5	0	69	83

Source: own, based in ICTWSS database, Version 4.0, April 2013

Notes/Explanations:

⁽¹⁾ 1 = fragmented bargaining, mostly at company level; 2 = mixed or alternating bargaining at industry- and firm level, with weak enforceability of industry agreements; 3 = industry bargaining with no or irregular pattern setting, limited involvement of central organisations, and limited freedom for company bargaining; 4 = mixed industry and economy wide bargaining based on central organisations that negotiate non-enforceable central agreements/guidelines (Denmark, Sweden) or key unions and employers associations set patterns for the entire economy (Germany); 5 = economy-wide bargaining based on enforceable agreements between the central organisations of unions and employers affecting the entire economy or entire private sector.

⁽²⁾ 1 = local or company bargaining; 2 = sectoral or industry level bargaining, with additional local or company bargaining; 3 = sectoral or industry level bargaining; 5 = national or central level bargaining.

⁽³⁾ 1 = very low (<20%); 2: low (20-40%); 3 = medium (40-60%); 4 = high (60-80%); 5 = very high (80-100%).

⁽⁴⁾ 0 = there are neither legal provisions for mandatory extension, nor is there a functional equivalent; 1 = extension is rather exceptional, used in some industries only, because of absence of sector agreements, very high thresholds, public policy criteria, etc.), and/or resistance of employers; 2 = extension is used in many industries, but there are thresholds and public authorities can (and sometimes do) decide not to extend (clauses in) collective agreements; 3 = extension is virtually automatic and more or less general (including enlargement)

2.2 Structural changes with regard to wage-setting mechanisms

Industrial relations systems in many Member States have undergone structural evolutions within the last 20 years. These changes have also had an effect on the wage-setting mechanisms applied. The specific changes include:

- the progressive strengthening of the role of local/company-level collective bargaining vis-à-vis sectoral bargaining
- move from national level bargaining to sectoral-level bargaining
- introduction of a statutory minimum wage

On the other hand, a reversed trend has been observed in **France** with respect to the move from department-level collective agreements to regional agreements as regards public work in the construction sector. In Denmark the stakeholders could not confirm a change towards either more or less centralised agreements within the private sector. Yet, some stakeholders indicated that there has been a move towards a minimum wage instead of a normal wage, i.e. a move towards more decentralisation.

With regards detailed changes to the wage-setting mechanisms in the Member States, in **Italy** the fixing of the minimum wage 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"). 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 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 Protocol 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 allows 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.

In **France**, Statute 2004-391 of 4 May 2004 modified the interaction between sector/industry wide collective agreements and company or undertaking collective agreements in favour of the latter. Nevertheless, company/undertaking collective agreements are not allowed to provide lower salaries than those of sector-wide collective agreements.

A characteristic feature of **Swedish** industrial relations is that collective bargaining on wages takes place at local as well as central level. There has been a structural change during the past 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 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 the trade unions. Most collective agreements today explicitly aim at, or in practice lead to, individual wages, albeit within a collective framework.

Still, all sectors wages and other terms and conditions of employment are negotiated at a central level, but the substance of the central agreements has changed, for some categories of workers with the effect that individual wages are now set entirely at a workplace level according to the procedures and criteria laid down in the central agreement. The blue-collar trade unions organising workers in construction and road transport are exceptions from this trend.

In the construction sector the workplace is the primary level for wage setting and *Byggnads* has not adopted the general trend towards individual wages. In road transport the central collective agreement between the Transport Workers Union and the Road Transport Employers Association still includes a complete system of tariffs; i.e. the wages agreed for different categories of workers are not only minima but also maxima. In the health and care sector the decentralisation and industrialisation of wage setting has gone very far. The central collective agreements for doctors and trained nurses do not set any minimum wage. The Municipal Workers Union which organises blue-collar workers in the sector accepted decentralisation. Its central agreements still includes minima that cannot be undercut. Finally, in the temporary agency work sector the employer's association *Bemanningsföretagen* has central collective agreements for all types of work. 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.

In **Romania** the 2003 Labour Code maintained the model in which national minimum wage is established by the government following consultations with the social partners. Additionally, the minimum wage was set in a unique national bargaining agreement which provided minimum wages for all levels of qualification and vocational/professional training based on multiple factors (e.g. skilled/unskilled, education, etc.). The collective bargaining system was fundamentally changed in 2011 when collective bargaining at national level was abolished and replaced by sectoral collective agreements and new representativeness criteria were introduced for social partners. Moreover, the new Social Dialogue Code changed the rules setting out who is entitled to negotiate at company level. At industry level, the situation remains unchanged; Unions must represent at least 7 per cent of the employees in the industry sector in order to negotiate at this level and employers' associations at least 10 per cent. At company level they must represent at least half plus one (previously one third) of the employees at the company.

In **Poland**, the minimum wage has been regulated by an Act in 2002 on the Minimum Wage (Remuneration) for Work. The determination of the minimum wage 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. Pursuant to the Minimum Wage Act, the Council of Ministers makes a suggestion to the Tripartite Commission each year on adjustments of the minimum wage. However, with the crisis of tripartite dialogue on Poland, the Government has, since 2010, unilaterally set the minimum wage.

Denmark has what is typically called centralised decentralisation. 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 bargaining and an increasing internationalisation – mainly coming from the EU. Most of the interviewees found that within the last 20 years there had been no change towards more or less centralised agreements within the private sector. The employers' organisation DA notes that a move towards a minimum wage 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 especially accelerated in the sectors using a normal wage. In order for businesses in these sectors to stay competitive many have introduced the use of agreement.

In **Germany** there is a long tradition of generally binding collective agreements on minimum pay and working conditions and of extension practices of sectoral collective agreements. Since 1996, there is however a new dynamic with a view on minimum wage setting in the context of collective bargaining and – finally – statutory law. Limited to the construction sector originally, the Posted Workers Act was established in 1996 with the clear objective to limit social and wage dumping and establish an environment for fair competition in this sector. The posted workers regulation was then significantly opened for further sectors by legal amendments until 2014 when the final step was taken to 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 sectors where specific collective agreements on minimum pay rates and conditions were in place in 2014. Consequently, the next step was the introduction of a general statutory minimum wage for all employees (2015). The increasing role of minimum wage agreements via the Posted Workers Act has to be seen against changes within the German labour market as well as the collective bargaining system that resulted in increased pressure on wages and a growing low wage sector. The Posted Workers Act 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 provided for a further extension of the scope of minimum wage – now the whole labour market - but is also a reflection of the situation in those sectors that have faced increased internal competition on wages. At the same time, due to low organization rates both in unions as well as with 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.

Against the background of increasing unemployment in Germany, sectoral agreements from the mid-1990s increasingly included such opening or 'hardship clauses' whereby companies – temporarily - 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 new investments. 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.

Finally, in **Belgium**, while no structural changes were reported as such, the interviewees pointed out that social dialogue in the field of minimum wages has become more difficult over the previous decades, notably as a result of globalisation, increased international competition and the so-called Wage Norm introduced in 1996 to safeguard Belgium's competitiveness (i.e. an inter-sectoral framework for containing wage costs, coupling their evolution to the prospective evolution in Belgium's main trading partners).

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. 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 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).

The second central coordination tool that directly relates to minimum wage-setting is intersectoral CLAs concluded within the National Labour Council (*Nationale Arbeidsraad / Conseil national du Travail*) that determine the *guaranteed average minimum monthly income* (GAMMI). The GAMMI is subject to automatic indexation according to developments in the health index. 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.

The representatives of **EU-level social partners** representing workers who have given an opinion about evolutions in industrial relations systems within this context have also

referred to the complication of social dialogue and a downward pressure on wages as a result of the Great Recession and increased international competition. The interviewee from the cross-sectoral European trade union additionally pointed towards a push to decentralised (company-level) collective bargaining in the Member States, which, combined with the greater weight attached in CJEU case law (notably the so-called Laval quartet) on the erga omnes character of collective agreements, eventually results in a decline in collective bargaining quality and coverage. Representatives of the cross-sectoral employers' organisation, on their part, drew attention to the fact that wage-setting is and should continue to be a matter of national competence and not undergo EU regulatory intervention. They also underlined that, whatever the system in place at national level, it should ensure that wage evolutions are consistent with developments in productivity.

2.3 Minimum wage-setting systems

2.3.1 An overview of the minimum wage systems in the EU

Establishing a statutory universal minimum wage is one of the main forms of policy intervention in wage-setting processes. The minimum wage establishes a basic floor for all wages in the economy, although some exceptions are possible for certain occupations or groups of workers. Minimum wages are enforced through legislation, but can be determined by further means, collective agreements or even tripartite central agreements. As shown in Table 2-2, 22 out of 28 Member States have a statutory/universal minimum wage. With the introduction of a statutory minimum wage on 1 January 2015, Germany was the latest to join this group. In those countries that do not have a statutory minimum wage (Austria, Denmark, Italy, Cyprus, Finland and Sweden), this is counterbalanced by a wide coverage of collective bargaining and high union density (Denmark, Finland and Sweden) or mandatory membership of the employers' association as in Austria or jurisprudential practice as in Italy.

The table shows also that universal minimum wages are mostly set by law, while sectoral minimum wages typically are set by collective agreements.

Table 2-2 Universal and sectoral minimum wage systems in the EU⁽¹⁾

Regulatory instrument/ Scope	Law	Collective agreement or tripartite agreement
Universal minimum wage	France, Germany, Netherlands, Romania, Croatia, Czech Republic, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovenia, Spain, United Kingdom	Belgium, Poland⁽²⁾, Bulgaria ⁽²⁾ , Estonia ⁽²⁾ , Slovakia ⁽²⁾
Sectoral minimum wage only	Cyprus	Denmark, Italy, Sweden, Austria, Finland

Sources: Schulten, T., 2014a and 2014b, updated.

Notes: ⁽¹⁾ Member States in **bold** are those selected for case studies within the present study.

⁽²⁾ If a tripartite agreement is not reached the decision is taken by the legislator.

2.3.2 Determining the minimum wage level

In regard to the focus countries of our study, there are different rationales and concepts to define minimum wage levels. The analysis in the previous chapter already pointed to a connection between the levels of the minimum wages and the overall wage levels in the selected EU countries. Furthermore, it was suggested that the levels of living costs influence the wage levels. Other aspects of importance according to various sources include:

- average and median incomes and earnings
- definition of the poverty line, i.e. minimum wage should be at least slightly above
- definition of low wage (sometimes 50 per cent sometimes 60 per cent of the national average (sometimes median) earnings)

Table 2-3 shows that such connections are also suggested by the findings of the national experts in the selected EU countries, and there was consensus among the interviewed stakeholders on this account.

Universal minimum wages are generally set with an eye on the daily living of vulnerable groups of workers, and minimum wage developments are linked to price indices. Sectoral minimum wages are more indirectly linked to economic developments through those developments' influence on the collective bargaining results.

In turn, sectoral minimum wages are the result of overall collective bargaining processes and thus directly connected to the overall wage developments. Universal minimum wages are more indirectly connected to the overall wage developments, i.e. when pursuing to keep minimum wage developments in line with overall wage developments.

Some national stakeholders mention other factors such as the fight against social dumping or other international matters. It is acknowledged that national markets are increasingly linked to international markets and so the overall wage setting reflects the international economic situation.

Particularly from the Germany perspective, it is important to differentiate between statutory/universal minimum wages and collective minimum wage agreements. Regarding sectoral minimum wages the following is very important:

- fight against social/wage dumping (in all four selected sectors) is an important aspect
- average salaries/wage income at sectoral level (taking also into account regional differences, differences along qualification groups, differences between large and small companies)
- economic situation of the companies

Here, it should also be mentioned, that evidence described in the national reports for Denmark and Sweden, and also Belgium and the Netherlands indicated that the issues of social dumping and low wages have been issues of increasing concern with regards wage and income policies in recent years.

Table 2-3 Determining the minimum wage level

Member State	Finding
Belgium	Universal minimum wage is set through negotiations between social partners at both national and sectoral levels. The minimum wage scales are automatically adjusted according to developments in consumer prices. At the same time, an upper bound for wage negotiations at all levels is set through the so-called wage norm, based on the projected development in hourly labour costs in three neighbouring countries.
Denmark	Sectoral minimum wages are defined in collective agreements that have been negotiated between the different employers' and workers' organisations. Such agreements are renegotiated every second or third year. The minimum wage levels are connected to the – at the time – economic situation in Denmark. Danish companies increasingly depend on international markets and so the wage-setting also reflects the international economic situation – hereunder via a development towards a more flexible, decentralised wage-setting structure.
France	Universal minimum wage is set to guarantee vulnerable workers their purchasing power and their participation in the economic growth of the nation. The purchasing power is guaranteed by indexation to the national consumer price index.
Germany	Universal minimum wage has only existed since January 2015. The amount set is the result of a political negotiation process that took into account average incomes and wages as well as minimum wage levels in other EU countries. It also took into account the existing significant wage and income differences between Western Germany and the Eastern Federal States, and so the EUR 8.50 is a compromise. Collectively agreed minimum wages that exist in more than a dozen sectors also take into account the economic/business framework conditions, regional varieties in pay/earnings and are linked to the objective to define certain minimum standards of pay and working conditions that protect against social dumping and unfair competition.
Italy	Sectoral minimum wages are set via collective agreements between employers and workers. In the absence of an agreement, the National Collective Bargaining Agreement (NCBA) will set the minimum standards. A harmonised index for consumer prices is used as reference indicator for the setting of wages. Furthermore, Article 36 of the Italian Constitution states that workers must be guaranteed a wage consistent with their work and sufficient to ensure both them and their families a free and decent life.
Netherlands	Universal minimum wage is set to enable a daily living for the most vulnerable groups of workers. It is regulated via a link to the average contractual wage development. Sectoral collective agreements contain wages that are generally higher than the universal minimum wage. They are generally binding to prevent competition on employment conditions.
Poland	Universal minimum wage level is set on the basis of information regarding average household spending and also the standard of living of various social groups. It is on an annual basis kept in line with the annual development in the prices of goods and services. If the annual price inflation is above 5 per cent, the minimum wage is updated twice a year.
Romania	Universal minimum wage is set via negotiations between the Government and the social partners, taking into account the needs of workers and their families, the cost of living, social security benefits, and other economic factors.
Sweden	Sectoral minimum wages are regulated exclusively by collective agreements and so can vary between sectors/professions.

For more detailed country-specific information, please refer to the country reports in Annex 1.

2.3.3 Instruments setting minimum wages

As introduced in Table 2-2 above, there are differences in the minimum wage-setting mechanisms in the studied Member States. Hence there are differences in terms of the instruments used to set minimum wages. In the majority of the selected countries with a universal minimum wage system the main regulatory instrument is statutory. However, there are a number of countries that have a distinctive model of minimum wage setting. Three wage-setting mechanisms can be distinguished in the Member States subject to the detailed analysis:

- Member States in which the minimum wage is set unilaterally – though typically after consulting social partners - by the government (France, Netherlands, Romania) or following the recommendation of an independent expert commission (Germany⁴³).
- Member States in which the minimum wage is negotiated at tripartite level and assumes statutory character (Poland).
- Member States in which the minimum wage is negotiated between the social partners and set in collective agreements (Belgium, Denmark, Italy, Sweden).

Table 2-4 summarises the main characterising features of the wage-setting mechanisms in the studied Member States.

Table 2-4 Overview of instruments setting minimum wages

Minimum wage set by the government	
France	National minimum wage is set by a statutory instrument on the basis of Article L2232-2 of the Labour Code and it is applicable to all adult workers (manual and non-manual, working for private or public undertakings under private law conditions). Cross-industry collective agreements are recognised by the law but do not in principle establish cross-industry minimum wages different from the statutory minimum wage. In contrast, sectoral collective agreements play a significant role in the determination of minimum wages. Company-wide and group collective agreements may increase the minimum wages as provided by a national- or industry-wide collective agreement.
Netherlands	There are two relevant wage-setting mechanisms in the Netherlands: the statutory minimum wage (as laid down in the Minimum Wage Act, <i>Wet Minimumloon</i>) and generally binding (sectoral) collective agreements (as laid down in the <i>Wet op de collectieve arbeidsovereenkomsten</i>).
Romania	The minimum wage is determined annually by Government decision at a national level, after consulting social partners. The minimum wage can also be negotiated per industry sector and per company/group of companies. The national minimum wage set by the government is the basis for sector and company collective bargaining.
Minimum wage negotiated between social partners and assumes statutory character	
Germany	Universal minimum wage (as of 2015) has initially been set by the Minimum Wage Act. In the future the minimum wage will be set by a Minimum Wage Commission consisting of trade union and employers' organisation representatives as well as independent experts (two members each). The government will maintain the statutory character by decree. While the statutory minimum wage is binding for all employees, an additional and alternative way to set minimum wage levels has traditionally been sectoral collective agreements that have been declared universally binding by an ordinance of the Ministry of Labour. Further instruments to set minimum wage floors and define minimum standards of working conditions include social clauses in public procurement and minimum wage regulations at federal state level.

⁴³ Universal minimum wage (as of 2015) was initially set by law.

Poland	The Minimum Wage Act of 10 October 2002 provides for the mechanism according to which the minimum wage is set. In the 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. If a tripartite agreement is reached the minimum wage assumes statutory character. If negotiations fail, the minimum wage is set unilaterally by the government.
Minimum wage negotiated between social partners and set in collective agreements	
Belgium	Wage-setting in Belgium is done through collective bargaining at several levels, the most important being sectoral level. CLAs concluded at sectoral level within the joint (sub) committees lay down minimum wages for different professional sectors, including minimum wage scales (rules categorising workers into different pay groups) according to various criteria. The minimum wage scales as provided in the CLAs may be exceeded in individual agreements. Company CLAs typically exist in some large companies but do not as a rule deal with minimum wages/quantitative wage conditions. In the absence of a specific scale within the sector or the company, the wage should correspond at least to the guaranteed average minimum monthly income fixed within the National Labour Council (NAR/CNT).
Denmark	Minimum wages are defined in collective agreements negotiated by the trade unions and employers' organisations. There is not just one but several minimum wages defined in collective agreements for each relevant sector and in many cases also negotiated at company level. While in some sectors the negotiations take place solely at a centralised sector-specific level, most of the agreements contain a top-down regulation combined with a decentralised wage bargaining. The road transport sector is one of the few areas in Denmark where collective agreements are supplemented by statutory law. The Law on Haulage nonetheless does not fix the minimum wage as such but refers to the applicable collective agreements.
Italy	Minimum wages are fixed by the NCBA (National Collective Bargaining Agreements). The NCBA set out minimum standards for the whole category of workers covered by the relevant NCBA (i.e. per sector). Local company-level agreements may improve these standards. The 2009 Framework Agreement signed by the government, Confindustria, the Italian Confederation of Workers' Trade Unions and the Italian Labour Union strengthened the role of second level bargaining, giving it the possibility to derogate in a pejorative way from provisions settled by the NCBA.
Sweden	Wages are regulated exclusively by collective agreements at 'central' and 'local' level. A 'central' collective agreement regulates terms and conditions for workers in a certain sector or a specific occupation, and around 90 per cent of all workers are covered by such agreements. Local collective agreements on wages are complementary to the central agreements and negotiated within the framework of these. Most central agreements for the private sector lay down some kind of pay minima, but they seldom use the term 'minimum wage'. They speak of 'starting wage', 'basic wage', 'commencing wage' and the like, indicating that this is a wage for very young workers or those with their first job in the occupation in question, and they all imply that wages are to increase alongside with the workers' experience. Only, the 'minimum wage' for more experienced workers is set through collective bargaining at local level and may not emerge from the central agreement. However, to an ever increasing extent, central collective agreements do not include any set minimum wage, but refer wage formation to collective bargaining between the local trade union and the individual employer, within a procedural framework laid down in the central agreement. This is particularly true for collective agreements for white-collar workers in the public sector.

For more detailed country-specific information, please refer to the country reports in Annex 1.

2.3.3.1 Universally applicable collective agreements

According to Article 3(1) of the Posting Directive, Member States shall guarantee workers posted to their territory the terms and conditions of employment laid down by collective agreements and arbitration awards which have been declared *universally applicable* insofar as they concern activities referred to in the Annex to the Directive.

In three of the studied Member States (Italy, Poland, Romania) there are no 'universally applicable' collective agreements within the meaning of the Posting Directive. Under **Italian** law collective agreements have however a general effect de facto on the basis of numerous court rulings. In **Romania** there is the possibility for industry-specific agreements to become 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. However, as mentioned above, there are currently no universally applicable collective agreements within the meaning of the Posting Directive. Also in **Poland**, there are no universally applicable collective agreements.

In **Belgium, France** and the **Netherlands**, sector-wide collective agreements within the studied sectors are generally applicable within the meaning of the Posting Directive. In France sectoral collective agreements are universally applicable provided that they have been extended by a ministerial order following the opinion of the national commission for collective bargaining. In the four studied sectors there are several relevant collective agreements, most of which have been extended and, accordingly, are universally applicable. In Belgium it is a standard practice to declare CLAs concluded at sectoral level universally applicable. Similarly, in the Netherlands, all collective agreements applicable in the four sectors are generally binding and have a statutory value.

The **Swedish** Posting of Workers Act (Sections 5a and 5b) indirectly defines universally applicable agreements as a 'central collective agreement that is applied through Sweden to corresponding workers within the sector in question'. The description is meant to identify collective agreements with sufficient coverage to be 'generally applicable to all similar undertakings'. Central collective agreements exist within the sectors subject to the analysis and, accordingly, most activities where posting is frequent are covered by central agreements and their provisions on the minimum wage.

As regards applicability of collective agreements in **Denmark**, an employer covered by a collective agreement must offer the terms of agreement to all employees working within the area of the collective agreement regardless of whether the employee is a member of the trade union. If an employer is not a member of a trade association, the trade union may try to enter into a collective agreement with the individual employer by means of a so called adoption agreement. Such adoption agreements are also relevant in relation to foreign employers. It is the impression of the cross-sectoral employers' organisation that posted workers are covered by collective agreements to the same extent as Danish workers.

In **Germany** there is a special practice of declaring collective agreements reached at sectoral level on minimum wages generally binding by means of an ordinance/statutory

regulation by the Ministry of Labour in accordance with the Posted Workers Act and the Act on Temporary Employment Business. This practice has been established since the 1990s and plays an important role in establishing certain minimum standards of working conditions and avoiding unfair competition between enterprises in a growing number of sectors. In July 2015 there were approximately 70,000 valid collective agreements, out of which 502 have been declared generally binding (though only very few on the minimum rates of pay). Currently, the major criterion for extension is that the collective agreement is in the public interest. Additionally, a statutory general minimum wage binding for all companies came into force from January 2015.

2.3.3.2 Interaction between different layers of the minimum-wage-setting mechanisms

As shown above, while in some Member States (Poland) only one minimum-wage-setting mechanism exists, in others such systems contain multiple layers.

In countries where minimum wages are set exclusively through collective agreements, there is only one layer applicable for each occupation/sector (Sweden, Denmark). In Sweden central collective agreements regulate terms and conditions for workers in a specific sector or a specific occupation. Local collective agreements on wages are complementary to the central agreements and negotiated within the framework of these. Thus they are not alternatives to the central agreement.

In countries where a combination of statutory and collective agreed minimum wages is applied, collective agreements prevail over a statutory minimum wage (France, Germany, Netherlands, Romania). Derogation from a statutory minimum wage is however only allowed if it is more beneficial to the employee. Moreover, lower-level collective agreements (company collective agreements) may not reduce minimum wages established by sectoral agreements. In case of more than one simultaneously applicable collective agreement (national, regional, sectoral or company) it is the most favourable that will apply determined on the basis of a separate analytical comparison of the relevant provisions for each advantage (France).

Similarly, 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 collective bargaining is only possible if it either favours the employee or the collective agreement contains a deviation clause. To the same effect the Minimum Wage act provides that collective agreements according to the Collective Bargaining Act, Posted Workers Act and Act on Temporary Employment Business are a superior source of norm setting if they benefit the individual employee more than the Minimum Wage Act. In contrast, the minimum wage takes priority over collective agreement provisions that conflict with the minimum wage and are less favourable for workers.⁴⁴

2.3.3.3 Differentiation of rules on minimum wages

⁴⁴ There are exceptions regarding a transitional period until the end of 2016.

The existing wage-setting mechanisms – both those providing for universal and sectoral minimum wages - do not as a rule provide for a single minimum wage, applicable to all employees, but differentiate the rules on minimum wages, taking into account a number of factors. These factors typically include job classification, age, education and skills, and working conditions. The table below provides a detailed overview of the different practices applicable in the studied Member States.

Table 2-5 Overview of criteria for differentiating rules on minimum wages

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Statutory provisions									
Statutory provisions	N/A	No differentiation, but a number of exceptions ⁴⁵ and special arrangements ⁴⁶	N/A	Age (lower wage for minors under 18) Employment status (lower wage for apprentices, young people under professionalisation contracts and trainees/interns) ⁴⁷	N/A	Age (lower wage for youths under 23)	Entry into labour market (lower wage for employees during their first year of employment)	No relevant criteria	N/A
Collective agreements (per sector)									
Construction	Employees' conventional classification partly based on the employees' personal situation: six different categories (I, IA, II, IIA, III, IV) according to professional skills, training or experience.	Regional differentiation (Western/Eastern Germany), qualification (basic, professional)	Very few seniority provisions in the collective agreements. Agreements allow workers to negotiate higher wages if they have skills that are in demand.	Job classification grid dividing jobs into seven categories for manual workers and eight categories for employees, foremen and engineers taking into account tasks and duties, autonomy or initiative in the performance of the tasks, degree of	Employees' conventional classification	Classification to job groups (A-E) on the basis of job requirements with regard to education/training, experience, safety and health, aggravating physical conditions, leadership and the		For labourers (unskilled/skilled), for administrative personnel (high school education, post-secondary non-tertiary education), for specialised personnel (foremen, long-term higher education)	Employees' conventional classification taking into account age, seniority and skills/training

⁴⁵ Youths under the age of 18, long-term unemployed persons during the first six months of their employment, specific groups of interns, training or university studies, internships in connection with introductory training for young people.

⁴⁶ E.g. for newspaper deliveries and also many seasonal workers.

⁴⁷ Specific working conditions also play a significant role – e.g. childcare and family assistants only receive a fraction of the National Minimum Wage because they exercise their duties from home and their activity includes periods of time relatively inactive.

				required technicality and level of training, adaptability and experience		extent to which decisions must be taken independently and age (in categories 16-21, 22 and above)		Additionally a system of bonuses is provided taking into account workers' working conditions	
Temporary work agencies	Application of the user-pay principle, according to Article 10 of the Act of 24 July 1984. In practice, the sectoral CLAs in the sector of the user are decisive.	Regional differentiation (Western/Eastern Germany), qualification	In the green sector: seniority (one, three and five years of employment), part-time/full-time, skills, age (17 or under, 18 and above)	Six divisions divided into several descriptions further divided into 13 levels (classification grid) taking into account experience and training, autonomy, complexity, decision impact and responsibility, communication and coordination qualities (applies only for permanent workers working for a TWA)	Employees' conventional classification	Grading system based on the user undertaking's job grade		No collective agreements, possible application of the classification of the user establishment	
Road transport	Employees' conventional classification: minimum wage scales for five different categories of road transport workers. Apart from	Before the establishment of a statutory minimum wage no experience with collective minimum wage agreements or sector	Classification based on the size of the truck and whether it has a trailer, seniority (supplement after nine months of employment),	Classification grid taking into account working time and seniority resulting in three separate classification grids for manual workers including 4	Employees' conventional classification	Job classification based on experience and age (categories 15-21 and 22 and above)		For labourers (unskilled/skilled), for administrative personnel (high school education, post-secondary non-tertiary education),	Employees' conventional classification taking into account age, seniority and skills/training

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

	categories 1 (assistant-attendant) and 2 (worker in training), these vary according to the payload of the vehicle and/or its specific type (e.g. ADR, refrigerator).	collective bargaining agreements	skills, age (17 and under, 18 and above)	different job descriptions, one classification grid for employees including 5 different job descriptions and one for foremen including 8 different job descriptions and one for engineers and executives including 6 different job descriptions				for specialised personnel (post-secondary non-tertiary education, short-term higher education, junior long-term higher education and senior) Additionally a system of bonuses is provided taking into account workers' working conditions and age	
Health and care services		Regional differentiation (Western/Eastern Germany)			Employees' conventional classification	Job classification based on the level of education/training (qualification level), experience and job groups requiring different kinds of qualifications and tasks		Differentiation by function according to the importance, responsibility, the complexity of the activity and the necessary study level for performing the activity	Employees' conventional classification taking into account age, seniority and skills/training

For more detailed country-specific information, please refer to the country reports in Annex 1.

2.3.3.4 *Adjustment of minimum wages*

As the following table shows, there is a significant variety of systems and practices for adjusting minimum wages. Within our sample of countries, Belgium is the only country where wage adjustments are still made on the basis of an indexation mechanism. However, as other comparative studies have shown⁴⁸ there are only a few countries left, where indexation of wages is still in place (apart from Belgium, in Luxembourg, Cyprus and Malta) and a number of countries (such as France, Italy and the Netherlands) have changed from indexation mechanisms to more flexible practices that take into account not only CPI aspects but also economic and labour market conditions and policy objectives. When it comes to wage setting and adjustment practices in the other countries, practices vary between statutory minimum wage regimes and sectoral collective agreements regulation.

In Denmark, Italy and Sweden no statutory, universal minimum wages are in place, and the setting and adjustment of minimum wages at sectoral or cross-sectoral level in all other EU countries, France, the Netherlands, Poland, Romania and Germany entirely rests on the outcomes of negotiations between the sectoral social partners (and thus also results from their bargaining power). Belgium is a special case in this context because sector-level collective bargaining forms the core of Belgium's minimum wage system while at the same time the country differs from the Nordic practice in that a national universal minimum wage plays an important role as well. While the national minimum wage ('guaranteed average minimum monthly income') is negotiated between the social partners in the National Labour Council, sector-level agreements are negotiated and set in sectoral bipartite 'Joint Committees' of which more than 100 exist. Given that these commissions are segregated by occupational status (in most sectors blue- and white-collar workers belong to separate commissions), workers at the same firm typically belong to several bargaining commissions and different minima may apply within the same firm⁴⁹.

There are a number of different patterns to set and adjust minimum wages in these countries involving cross-sector agreements, as in Belgium; tripartite bodies, as in Poland, independent bodies or commissions which consult the social partners or to which the social partners can make representations (as in the UK or Germany); or government decision, with or without consulting the social partners, as in France (with consultation), Poland and Romania (without consultation).

⁴⁸ See for example Eurofound 2014: Changes to wage-setting mechanisms in the context of the crisis and the EU's new economic governance regime, Luxembourg; EU Commission 2014: Wage setting systems and wage developments. European Semester Thematic Fiche, Brussels.

⁴⁹ S. Kampelmann, A. Garnero and F. Rycx, Minimum wages in Europe: does the diversity of systems lead to a diversity of outcomes?, 2013, etui report 128, 31.

Table 2-6 *Systems and practices of adjusting minimum wages*

Member State	System and practices
Belgium	<p>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 inflation, in particular to developments in the so-called health index (using a four-month moving average of this index). This (virtually) complete coverage by an automatic wage adjustment mechanism is rather unique in Europe. The system is not centrally organised, but is rather a patchwork of sector-level mechanisms.</p> <p>For the road transport and construction sectors, automatic indexation is provided for in the sectoral CLAs laying down the minimum wage scales. 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.</p>
Denmark	<p>Minimum wages established through the collective agreements are usually negotiated every second or third year. The last negotiations were in 2014 the next will be in 2017.</p> <p>The levels of minimum wages 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, which was also one of the crucial factors in the development towards a more flexible decentralised wage setting structure. Thus, the wage-setting mechanism to some extent also reflects the international economic situation.</p>
France	<p>National minimum wage: Annual reevaluation of the National Minimum Wage on the basis of the national consumer price index</p> <p>Sectoral minimum wage agreements: 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 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.</p>
Germany	<p>There is no automatic indexation mechanism in either the statutory nor in the sectoral minimum wage setting practice. Minimum wage setting is always a political negotiation process that depends very much on the capacity and negotiation power of the bargaining parties.</p> <p>Sectoral minimum wage agreements: Wage adjustments 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.</p> <p>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).</p> <p>Statutory minimum wage: For the statutory minimum wage a commission with six members (composed of two scientific experts, two employer reps and two union reps) has been established at the Ministry of Labour.</p> <p>The Commission will decide every two years – for the first time in June 2016 – whether to adjust the minimum wage. In the course of an overall assessment, the Minimum Wage Commission will examine which level would help to ensure adequate minimum protection for workers, enable fair conditions for competition and, at the same time, not jeopardise jobs. The Minimum Wage Commission will use the development of collectively bargained pay scales in recent years as the basis for its</p>

	decisions.
Italy	In condition of a normal evolution of the business involved in the relevant sector, the NCBA's intervene, after the expiration of the economic part of the NCBA's (that usually last two years) in order to compare the amount of the minimum wage to the living costs indexation rules.
Netherlands	Statutory minimum wage: The statutory minimum wage level is adjusted twice a year - in January and July. The level of the statutory minimum wage is linked to the average contractual wage development, i.e. 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 on the basis of a comprehensive and sophisticated formula. Sectoral minimum wage agreements: 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.
Poland	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. It also changes with the increase in inflation on a quarterly basis. Annual adjustments are made on an annual basis after consultation within the Tripartite Commission (however, due to the failure to reach a consensus, the Polish government in recent years and in 2015 set the minimum wage rate by unilateral decision).
Romania	The minimum wage level is established by government decision after consulting the social partners and it is updated twice a year, usually in January and July, respectively. To establish the national minimum wage, the Government and the social partners negotiate according to article 3 of the ILO Convention no. 131/1970 (<i>Minimum Wage Fixing Convention</i>) taking into consideration the minimum income needs of workers and their families, the cost of living, social security benefits and other economic factors.
Sweden	Automatic indexation rules have been weeded out from Swedish collective agreements. 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 <i>Byggnads</i> and BI is raised every year, but the size of the rise is a matter of each parties bargaining strength.

For more detailed country-specific information, please refer to the county reports in Annex 1.

2.3.4 Groups of workers who do not receive the minimum wage

With a view as to the share of workers that do not receive the minimum wage, and the respective reasons, no comparative quantitative data exists for our focus countries. Figures on workers not covered by a minimum wage because their employers are not bound by the respective collective agreements only exist for Sweden (around 10 per cent) and on those workers that received less than the national statutory minimum wage are reported for France (17 per cent in 2010). Both figures of course refer to different aspects and are not comparable.

The difficulty in gathering, and especially the difficulty in comparing any figures on the coverage of workers by minimum wage regulations results from the marked differences in the national regulation. As shown in the table below, there are significant variations

between countries with a view as to the inclusion and exclusion of groups of workers, depending on age, employment status and other characteristics. The situation becomes even more complex when minimum wage regulation in specific sectors is concerned. As the example of the care sector in Germany shows, the minimum wage does not cover all employees in the sector but only the core group of those that predominantly carry out caring tasks. There are other national specificities: While in some countries school students and interns are excluded from minimum wage regulation because they are not regarded as workers, the regulators in France and the Netherlands have established reduced minimum wage rates for younger people, depending on age (and other aspects).

This lack of reliable data also results from the fact that it is impossible to estimate the number or share of those workers that are entitled to receive the minimum wage but in practice do not because the employer is not complying with the obligations arising from legal regulation or the respective collective agreement. Though no data exists, it could be stated however on the basis of our stakeholder interviews that there seems to be no direct correlation between a certain wage-setting mechanism (i.e. statutory minimum wage or minimum wage by general binding collective agreements) and the efficiency to ensure that all workers that are eligible also receive the minimum wage. Much more important seems to be whether or not effective control, inspection and monitoring instruments are in place or whether there is a broad social acceptance regarding the minimum wage and the payment of decent wages.

Table 2-7 Employees and groups who do not receive the minimum wage

Member State	General pattern and groups of workers excluded
Belgium	<p>The inter-sectoral agreement concluded at the National Labour Council on the guaranteed average minimum monthly income, 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.</p> <p>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.</p> <p>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.</p>
Denmark	<p>Neither the trade unions nor the employers' organisations are aware of how many posted workers there are, who are not covered by a collective agreement or adoption agreement and hence do not receive minimum wages according to the agreements.</p> <p>A study from 2011 shows that amongst Polish workers 38 per cent answered that they were covered by a collective agreement, 13 per cent said they were not, 28 per cent told 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 the 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.</p>
France	<p>Although in principle every single worker is entitled to the National Minimum Wage (SMIC), there are some notable exceptions depending on age and working status:</p> <ul style="list-style-type: none"> • youths under 17 may receive a minimum salary 20 per cent lower than the

	<p>SMIC</p> <ul style="list-style-type: none"> • minors over 17 receive a minimum wage that may be 10 per cent lower than the SMIC • apprentices also receive a wage lower than the SMIC according to their age and experience • since July 2015 small undertakings, with less than 11 employees, do not have to pay apprentices minimum wages 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 '<i>contract of professionalisation</i>' also receive a reduced minimum wage (reduction linked to age and qualification degree) • a reduced minimum wage also applies to Interns • disabled people may also receive a minimum wage inferior to SMIC when they are working in special support programmes • 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 travelling salesmen (VRP) given that it is practically impossible to control their working hours ⁵⁰ • it does also not apply either to childcare or family assistants (<i>assistants maternels et familiaux</i>) who are entitled to a minimum salary of 2,70€ gross per hour and 24,30€ per day. The reason is that they exercise their duties from home and their activity includes inactive periods of time. <p>In 2010, according to DARES figures 17 per cent of the working population received less than the National Minimum Wage.</p>
Germany	<p>Statutory minimum wage:</p> <ul style="list-style-type: none"> • Youths who are under the age of 18 • Long-term unemployed 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, • Training or university studies, • Internships in connection with introductory training for young people. • Temporary deviations possible (until end of 2016): newspaper deliverers • <i>Unclear</i>: Foreign drivers in pure transit through Germany <p>Sectoral minimum wage agreement Construction</p> <ul style="list-style-type: none"> • School students at general schools (excluding evening schools) • School students during the first 12 months after leaving school, up to a period of 50 days • Workers that carry out transport services beyond their working time • Cleaning staff in administration offices <p>Sectoral minimum wage agreement Care Services</p> <ul style="list-style-type: none"> • Undertakings that are not regarded as care facilities according to the ordinance • School students and apprentices as well as specific groups of interns as they are not regarded as employees according to the ordinance • Workers that don't have a caring profession (i.e. technical staff, cleaning, kitchen staff, technical workers, laundry, logistics, etc.)
Italy	<p>There is a de facto extension of the collective bargaining agreements to all workers arising from Article 36 of the Italian Constitution. This entitles every worker to receive a wage 'proportionate to the quality and quantity of their work and in any case sufficient to guarantee a free and decent life for themselves and to their family'. Based on this an 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.</p>
Netherlands	<p>Whether someone performing a service or job 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 covered are all those who have an employment relationship or contract</p>

⁵⁰ There are around 500.000 travelling salesmen in France.

	<p>under civil law. Collective agreements may explicitly include or exclude individuals from the personal scope.</p> <p>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 in respect to 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.</p> <p>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 (between 452,35 EUR for 15 years old and 1281,65 EUR for 22 years old as of 1st July 2015).</p>
Poland	<p>Each worker (employee) has the right to minimum wage of the same conditions and based on the same provisions.</p> <p>Outside the scope of the protection 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 specific-task. Provisions on the minimum wage also do not cover people who are self-employed.</p>
Romania	<p>In Romania no worker can receive a salary lower than minimum wage. 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.</p>
Sweden	<p>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. However, even employers that are not bound by collective agreements may agree with their employees to apply the provisions of the relevant collective agreement.</p>

For more detailed country-specific information, please refer to the county reports in Annex 1.

2.3.5 Impact of wage-setting mechanisms on minimum wages

The question regarding the extent to which the wage-setting mechanisms influence the actual level of the minimum wages is not easy to answer. It is, for example, not feasible to establish significant statistical relationships on the basis of information from the nine selected EU countries – not least because the levels of the minimum wages are determined by many other factors, such as the costs of living, than solely the wage-setting mechanisms applied. This being said, the results of the nine selected EU countries contribute to answering the question.

More generally, the relationship between wage-setting mechanisms and minimum wages has also, although to a limited degree, been addressed in the research literature. Boeri (2012) shows that a minimum wage set by the government in the absence of consultation with social partners is mostly lower than the wage floor set after formal consultation⁵¹. This finding is also supported by e.g. the EC⁵² and Eurofound⁵³. Our study also strongly confirms this, at least with a view to those countries of our study, where both universal as well as sector-related minimum rates of pay exist (Belgium, the

⁵¹ T. Boeri, "Setting the minimum wage", Labour Economics 2012, 19(3).

⁵² European Commission, Wage setting systems and wage developments, European Semester Thematic Fiche, Brussels, 2014, http://ec.europa.eu/europe2020/pdf/themes/26_wage_settings.pdf

⁵³ Eurofound, Changes to wage-setting mechanisms in the context of the crisis and the EU's new economic governance regime, Dublin, 2014.

Netherlands, France, and Germany). Kampelmann et al. (2013) found that not only do collectively negotiated minimum wages lead to higher wage levels compared to statutory minimum wages, but also that there is a positive correlation between wage rates and collective bargaining coverage⁵⁴.

Furthermore, Kampelmann et al. (2013) find not surprisingly that the higher the level of the minimum wage relative to the median wage, the larger the share of workers that earn wages that are actually below the prevailing minimum wage. Finally, they find that minimum wage systems differ with respect to the share of workers who are either not covered or whose wages violate the existing rules, that systems with universal minima are better than systems with sectoral minima, and that higher levels of collective bargaining coverage to some extent can offset the difference.

2.4 Wage-setting and posting of workers

While the above wage-setting findings concern the labour market as a whole and the selected sectors in the case study Member States, the following analysis focuses on the wages obtained by posted workers – hereunder in comparison with local workers.

2.4.1 Actual earnings of posted workers

Firstly, it must be acknowledged that there are no official statistics on actual earnings of posted workers. Furthermore, Table 2-8 reveals that none of the stakeholders interviewed could point to good sources to inform on this issue. This being said, there are indications of posted workers earning low wages or at least lower wages than the comparable local workers in the older Member States. While foreign companies which sign Danish collective agreements pay their posted workers accordingly, many companies do not sign such agreements and surveys reveal that they do offer their workers lower pay on average. In the Netherlands, posted workers subject to a expiring generally binding collective agreement may only be entitled to the universal minimum wage. Hence, for these Member States, it can be assumed the average earnings of posted workers lie somewhere in between the minimum wages and the respective average sectoral wages.

Furthermore, Table 2-8 shows that – from the receiving country perspective – posted construction and transport workers are pointed out as particularly being subject to lower wages than their local counterparts. In contrast, the situation with regards to temporary agency work as well as health care seems to be more differentiated as here not only (low) cost-related motivations but also other factors (e.g. shortage of qualified labour) are important driving factors in some cases.

In contrast, workers posted to the newer Member States, Poland and Romania, are assessed to be relatively highly qualified compared to the average local workers, and so they do in general earn above the average local wages. This appears to be case for all

⁵⁴ S. Kampelmann, A. Garnero and F. Rycx, Minimum wages in Europe: does the diversity of systems lead to a diversity of outcomes?, 2013, etui report 128.

four sectors analysed. Hence, compliance with minimum wage requirements will almost never be an issue.

Table 2-8 Information on the earnings of posted workers

Member State	Finding
Belgium	No official or systematic data about income levels of posted workers exists at this stage. This will change in the near future, in connection with a planned extension of the LIMOSA reporting duty.
Denmark	Foreign companies which sign Danish collective agreements pay according to the Central Danish Employers' Association their posted workers accordingly. Foreign (and Danish) companies are, however, not obliged to sign collective agreements – but may then be subject to industrial actions.
France	Neither official statistics nor any other concrete evidence regarding actual earnings of posted workers exists. However, views of the employers' organisations and labour inspectorates interviewed indicate that posted construction and transport workers often earn less than their local counterparts. This seems to be less of a problem regarding postings by temporary work agencies.
Germany	No data is available on salary and wage levels, wage differences, and real wages of posted workers. However, reports and documentations of evidence of individual cases ⁵⁵ suggest that posted workers structurally earn significantly less than German workers, in particular in construction, health care and road transport (and less so in temporary agency work because of the equal treatment regulation).
Italy	Although the sectoral minimum wages are applicable to posted workers, the interviewed stakeholders emphasise that there are indications that they usually are remunerated at a rate lower than the minimum standards set by the NCBA. This is also the case regarding the minimum labour protection levels. This is particularly a problem for those from temporary work agencies and for health care workers, but less of a problem for construction and transport workers.
Netherlands	No proper monitoring of earnings by posted workers is carried out. However, there are some indications/examples provided by the trade unions that, for example, posted construction and transport workers earn less than the comparable Dutch workers – some even earning less than the universal minimum wage. Furthermore, posted workers subject to expiring generally binding collective agreements may only be entitled to the universal minimum wage.
Poland	No information about remuneration of posted workers exists, as only a few inspections have been carried out of companies posting workers to Poland. However, there are indications from the interviewed stakeholders that the posted workers are often highly qualified compared to the local workers, and so it is expected that many of these are remunerated above the Polish average wage. This appears to be the case for all four sectors analysed.
Romania	No information exists on what posted workers earn in practice. However, having one of the lowest minimum wages in the EU, the workers posted to Romania are certainly assessed to receive higher wages than these. Furthermore, the workers posted to Romania are often highly qualified and earn above-average wages.

⁵⁵ See in particular the report of the Germany Federal Government on irregular forms of employment (Bundesregierung: Zwölfter Bericht der Bundesregierung über die Auswirkungen des Gesetzes zur Bekämpfung illegaler Beschäftigung, 27.9.2013, Drucksache 17/14800, in particular p. 9-11 on posting. Furthermore, evidence from the Project "Faire Mobilität" that was launched by the DGB trade union federation in 2011 (co-funded by the Federal Ministry of Labour, BMAS) has been documented recently: See: Molitor, Carmen 2015: Geschäftsmodel Ausbeutung. Wenn europäische Arbeitnehmer_innen in Deutschland um ihre Rechte betrogen werden, Friedrich-Ebert-Stiftung, Berlin; Wagner, Bettina; Hassel, Anke (2015): Europäische Arbeitskräftemobilität nach Deutschland – Ein Überblick über Entsendung, Arbeitnehmerfreizügigkeit und Niederlassungsfreiheit von EU-Bürgern in Deutschland, Berlin, 9. Juni 2015.

Sweden	No statistics on earnings by posted workers exist, and since only a minority of posted workers join Swedish workers' organisations they also do not have a good estimate.
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For more detailed country-specific information, please refer to the country reports in Annex 1.

2.4.2 Wage differences between posted workers and local workers

2.4.2.1 Debates surrounding the minimum wage for posted workers

The subject of the minimum wage for posted workers has been an issue of concern in all the selected EU countries, apart from Romania where the influx of posted workers is only of limited relevance. From the sending country perspective, Polish companies are concerned about the likely effects resulting from the new universal minimum wage in Germany and particularly uncertainties with regards to its application in the transport sector.

As highlighted already above, in the main receiving countries of our study sample, posting mainly has been an – increasing – issue of concern amongst stakeholders in particular with regard to social and wage dumping, unacceptable labour and working conditions and other related labour market trends. Here posted work has been one form of employment that has gained increasing interest of public debates.

Table 2-10 shows furthermore that the social partners in the older Member States, who are recipients of posted workers, are mostly concerned about social dumping. In addition, alleged abuse of the rules gives rise to concerns about future developments vis-à-vis future labour mobility and the freedom of services.

Table 2-10 Extent to which the subject of minimum wage for posted workers is an issue of particular concern for social partners, policy makers and companies

Member State	Finding
Poland	The new German legislation regulating the minimum rates of pay has been the subject of a critical assessment in several Polish legal journals.
Netherlands	Social partners, policy makers and companies pay particular attention to this form of work – however less so for those having other options to hire (cheap) labour.
Italy	Possible social dumping through postings is of concern by social partners and Italy-based employers – in particular failure to comply with the minimum wage and the minimum labour protection requirements.
France	Posting of workers towards France is an issue of concern – although not limited to minimum wages, but to the risk of social dumping in general.
Sweden	Ever since the Laval judgement, the subject of wages for posted workers has been of great concern for social partners, policymakers and domestic companies. The debate has centred around the issue of whether the EU law on freedom of services allows different treatment of foreign and local workers, and around foreign service providers' alleged abuse of the rules. Less debate has been around the meaning of the concept of minimum rates of pay.

Romania	The issue of posted workers attracts limited attention in the public debate, even among social partners. This is due to the limited relevance of receiving posted workers. This being said, the issue of posted workers has recently made the headlines via a dispute regarding the treatment of relocation allowances paid by temporary work agencies.
Belgium	It is definitely a topic of huge concern for social partners and public authorities. In the construction sector, a joint action plan to fight social dumping was recently agreed upon (July 2015). In the road transport sector, a similar plan is under preparation, in the framework of a 'round table'.
Denmark	The issue of minimum wages for posted workers has received much attention since the accession of the Eastern European countries to the EU, and is part of an ongoing debate on social dumping and its consequences for the Danish Model and the welfare state.
France	Posting of workers towards France is an issue of concern – although not limited to minimum wages, but to the risk of social dumping in general.
Germany	The issue of posting has received much attention since the 1990s mainly in the context of the strong increase in low wage segments in the labour market, illegal employment practices, social dumping and unfair competition practices. This however is not only linked to posted workers but various forms of employment (e.g. bogus self-employment, marginal part-time employment, etc.), The public debate during the last few years has further intensified because of notorious cases of bad practices in particular in sectors such as meat processing, agriculture and transport. This has not only resulted in the successive extension of those sectors covered by the Posting Directive but also in the introduction of the statutory minimum wage in 2015.
Italy	Possible social dumping through postings is of concern by social partners and Italy-based employers – in particular failure to comply with the minimum wage and the minimum labour protection requirements.
Netherlands	Social partners, policy makers and companies pay particular attention to this form of work – however less so for those having other options to hire (cheap) labour.
Poland	The new German legislation regulating the minimum rates of pay has been the subject of a critical assessment in several Polish legal journals.
Romania	The issue of posted workers attracts limited attention in the public debate, even among social partners. This is due to the limited relevance of receiving posted workers. This said, the issue of posted workers has recently made the headlines via a dispute regarding the treatment of relocation allowances paid by temporary work agencies.
Sweden	Ever since the Laval judgement, the subject of wages for posted workers has been of great concern for social partners, policymakers and domestic companies. The debate has centred on the issue as to whether the EU law on freedom of services allows different treatment of foreign and local workers, and on foreign service providers' alleged abuse of the rules. Less debate has been on the meaning of the concept of minimum rates of pay.

For more detailed country-specific information, please refer to the county reports in Annex 1.

2.4.2.2 Wage differences between posted workers and local workers: some trends

In continuation of the previous sub-section that has already touched upon wage differences between posted workers and local workers, scarce information makes it difficult to assess the extent of wage differences. However, with this in mind, Table 2-11 points to a number of situations where posted workers earn less than their local counterparts.

Italian stakeholders suggest that the mere fact that service providers using posted workers are able to offer lower prices is evidence of lower labour costs. The Danish employers' organisations also provide evidence via surveys, mainly covering the construction sector that posted workers on average earn 10-15 per cent less than local workers. Similar indications have been provided by Dutch, French, Swedish, and Danish stakeholders.

In Germany, the relatively lower pay to posted workers is actually formalised by classifying all posted workers, irrespective of their professional qualification, as belonging to the lowest minimum wage group. In other words, German workers with comparable qualifications to the posted workers receive higher wages than these (if they do not belong to the lowest wage group). In turn and as already described above, workers posted to Poland and Romania are assessed to be relatively highly qualified compared to the average local workers, and so they do in general earn above the average local wages.

From the sectoral perspective, the stakeholders suggest that construction workers posted to the older Member States most often seem to be subject to lower wages than the local workers. In turn, workers posted to the newer Member States are often relatively highly qualified and are posted into sectors/positions with good pay and so in general obtain wages above the national averages.

Table 2-11 Wage differences between posted workers and local workers

Member State	Finding
Belgium	All interviewed stakeholders pointed to the existence of wage differences between posted workers and local workers, whereby the former generally earn less than the latter.
Denmark	Employers' organisations estimate that posted workers on average earn 10-15 per cent less than local workers. For the construction sector, it is assessed by a construction trade union that posted workers belong to the 10 per cent of the workers who receive the lowest wages. For the road transport sector, it is the social partners' assessment that there only are few 'officially' posted workers and hardly any registrations of their earnings. Similarly, the posting from temporary work agencies to Denmark is no longer common. Instead, they register in Denmark and provide workers according to Danish rules.
France	Neither official statistics nor any other concrete evidence regarding actual earnings of posted workers exists. However, views of the French stakeholders indicate that posted construction and transport workers often earn less than their local counterparts – although for the latter most foreign workers are not posted workers, but work according to cabotage rules. Wage differences seem to be less of a problem regarding postings by temporary work agencies.
Germany	Posted workers in practice and irrespective of their professional qualification are classified in the lowest minimum wage group (e.g. in the construction sector) while German workers with comparable professional experience receive higher wages due to higher wage groups. For road transport, posted workers used to earn less than German workers – but with the introduction of the universal minimum wage this gap is likely to decrease. There are also many creative wage-setting practices that result in wage gaps between posted workers and German workers. Particularly widespread is longer working time without receiving overtime payment and piecework wage that is difficult to control.
Italy	Service providers using posted workers are able to offer lower prices due to lower labour costs. This is in particular a problem for those from temporary work

	agencies and for health care workers, but less of a problem for construction and transport workers.
Netherlands	Lack of information makes it impossible to say that posted workers generally earn less than local workers. However, there are some indications/examples provided by the trade unions that e.g. posted construction and transport workers earn less than the comparable Dutch workers. Temporary agency workers are mostly classified at the lowest job level – in particular for posted workers and somewhat less for local workers.
Poland	No information about remuneration of posted workers exists, and so it is not feasible to make a comparison with local workers. However, there are indications – e.g. by the Gdansk Construction Cluster organisation – that the posted workers often have high qualifications, and so it is expected that many of these are remunerated above the Polish average wage.
Romania	Posted workers are on average assessed by both government and trade union representatives to be relatively highly qualified – which results in average wages that are above the average wages for the four considered sectors.
Sweden	For the construction sector, most posting companies apply Swedish collective agreements to their posted workers. However, there are various/conflicting views about wage differences, with employers' organisations in general not assessing them to be important apart from for smaller construction companies. In turn, workers' organisations assess that in particular Romanian and Bulgarian workers are paid less than the Swedes. For road transport, both the Transport Workers Union and the Road Transport Employers' Association are aware that foreign drivers are paid far less than domestic drivers. However, most of these drivers are not considered as posted workers, but are working according to cabotage rules. For temporary agency work, posted workers are by the employers' association Swedish Staffing Agencies assessed to earn around a third of the workers employed by Swedish agencies. For health and care services, posted workers are until now not very frequent. Most posted workers come from Denmark and they get a wage at least on par with the Swedes. However, nurses from the Baltic Sea area are by the Association of Health Professionals assessed to be paid far below the local nurses.

For more detailed country-specific information, please refer to the county reports in Annex 1.

2.5 The potential impact of an extension of the instruments available for determining the terms of employment of posted workers

2.5.1 Overview of national practices

One of the key study questions relates to the hard-core of employment conditions and terms in the host country that should be applied to posted workers as defined in Article 3(1) of the Posting Directive and as stipulated by law, regulation or administrative provision and/or collective agreements or arbitration awards. More precisely, an investigation has been made amongst stakeholders on the question about the impact of an extension of the scope of Article 3(1) Posting Directive with regard to the *instruments* allowed to set rules in terms of minimum rates of pay applicable to posted workers, i.e. by an extension to collective agreements that do not meet the criteria as laid down in the Article 3(8) second subparagraph first and second indent of the Directive.

It should be noted here that according to Article 3(10) of the Posting Directive host countries are allowed to extend the 'hard-core' of employment conditions and terms by further provisions in the "case of public policy provisions". Furthermore, while Article 3(1)

restricts the application of the terms and conditions resulting from collective agreements on the matters expressly listed solely to posted workers in the building industry, Article 3(10) again broadens the application of collective agreement rules. Hence, Member States are allowed to extend the application of employment terms and conditions set out in national collective agreements to posted workers in other sectors.

With the view on instruments, Article 3(8) specifies that these collective agreements must be declared 'universally applicable', meaning that they "must be observed by all undertakings in the geographical area and in the profession or industry concerned". In the absence of a formal system for declaring collective agreements to be universally applicable, Member States may regard, as the equivalent to collective agreements of universal application, those that are simply "generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned" and/or 'which have been concluded by the most representative employers' and workers' organisations at the national level and which are applied throughout national territory. However, in all cases, Member States are obliged to ensure equality of treatment for national and foreign undertakings.

Against this and leaving aside questions of definition and technical implementation issues related to the national implementation framework, the Member States have basically two choices in regard to the scope of the 'hard-core' and the instruments that could be applied in this context:

- Defining either a minimum or broader protection
- Implementing this either by legal instruments or through autonomous collective agreements, or by a combination of both.

As highlighted in previous comparative studies⁵⁶, the Member States thus have the choice to identify either a limited set of basic protections that must be guaranteed for posted workers or they may apply the entire system of labour and work protections granted to domestic workers by using Article 3(10). Such a choice applies to legal provisions as well as to collective bargaining. However, while legal provisions essentially provide a minimum protection, collective agreements add further regulation and provisions. Thus, with a view on making use of collective agreements, the legislation implementing the Posting Directive could either stipulate that collectively bargained minimum protections simply replace the legal ones listed in Article 3(1) or it could provide for the complete application of collective agreements to posted workers. This distinction is crucial as it can be used to cluster the approaches of different Member States and it has been addressed by CJEU rulings (e.g. the Luxembourg case) that suggest that the narrower application of minimum protection reflects the actual intention of the European regulator.

As shown in table 2-12, in practice, most national laws implementing the Posting Directive mention both law and collective agreements as instruments for setting the protection level of posted workers. Only Poland has assigned exclusively to the law the definition of employment and working conditions to posted workers. However it needs to be mentioned here that in the case of Romania, the possibility of setting protection levels by collective agreements is a purely theoretical option because in practice no such agreements exist.

⁵⁶ Eurofound. *Posted Workers in the European Union*, Dublin, 2010, p. 14/15.

All other case study countries use a combination of legal and collective agreements as main instruments. With view on the broader or narrower application of the scope of protection, Poland and Romania have implemented the Posting Directive by imposing on posted workers only the minimum requirements as stated in Article 3(1). This has also been indicated for the Netherlands⁵⁷ but in practice the implementation seems to be more varied with differences between sectors.

For France and Germany it is not easy to indicate a minimum or broader approach to protection levels. While for France a shift from a narrower application of the PWD has been reported (also reflecting more recent CJEU cases), the opposite has happened in Germany after the Ruffert case.

Finally, Belgium, Denmark, Italy and Sweden are countries which have implemented a broader set of rules on all matters of employment terms and conditions for posted workers. This for example is illustrated in Italy by 'social clauses' in public procurement that require the application of whole collective agreements and the 'activation' of Article 3(10) possibilities for posted workers.

⁵⁷ Ibid., p. 17.

Table 2-12 Implementation of Posting Directive: Type of regulation and protection levels

Member State	Type of regulation	Protection level	Comment
Belgium	Legislation and CA (universally binding by law)	Broad	The Belgian legislature has opted for a broad transposition of the Posting Directive. 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". Both extensions of Article 3(10) of the Posting Directive are 'activated'.
Denmark	Legislation and CA (most representative)	Broad	The Danish Law on Posted Workers encourages the application of collective agreements to posted workers and so the provision of a broader protection than the minimum protection.
France	Legislation and CA (universally binding by law)	Minimum to broad	French law comprised in the first place only the minimum protection provisions of the Posting Directive, but updates the law by taking into account the possible broader protection interpretations made by the CJEU.
Germany	Legislation and CA (universally binding by public order)	Minimum to broad	According to government as well as social partners, the German government has opted for minimum protection after the Rüffert judgement of the CJEU. However, there exist differences amongst sectors (e.g. a broader protection level in construction and a minimum protection care or transport) and still the possibility of public procurement clauses exist.
Italy	Legislation and CA (most representative)	Minimum to broad	The Italian law provides for minimum protection according to Article 3(1) only. However, 'social clauses' in public procurement that refers to collective agreements are also mandatory for posted workers.
Netherlands	Legislation and CA (universally binding by law)	Minimum to broad	There are no formal provisions in the Dutch law that encourage broader protection than the minimum protection. However, it appears that implementation differs between sectors and so there is broader protection in some sectors than in others.
Poland	Legislation only	Minimum	Poland has almost literally transposed Article 3(1) into the Labour Code and so from this perspective there are not broader protection provisions.
Romania	Legislation and CA (universally binding by law – not applied in practice)	Minimum	Romania has transposed the minimum protection of Article 3(1) by specific law.
Sweden	Legislation and CA (most representative)	Broad	Sweden has made use of the possibility in Article 3(10) to extend the minimum protection of posted workers to be covered by the Swedish rules on for example freedom of association and the right to collective bargaining.

2.5.1 Stakeholders' views on extending the set of instruments

The responses by interviewed stakeholders with regard to a possible extension of Article 3(1) PWD in regard to instruments applicable to set rules in terms of minimum rates of pay for posted workers and their likely impact have been quite varied.

While for example, some respondents referred to a possible inclusion of collective agreements concluded at company level (e.g. France and Belgium), stakeholders in other countries (e.g. Germany) referred more to qualitative issues, namely whether or not the scope of the Posting Directive should be viewed only from the minimum rates of pay perspective or whether the existing regulation (and the instruments foreseen in this context) would allow for a broader perspective that would cover also other relevant working conditions aspects.

In this context, stakeholders in particular from the trade union movement in countries such as Sweden or Germany tend to focus on a perspective that applies a broader and more comprehensive floor of protection as defined in collective agreements in order to increase the equality of wage conditions between domestic and posted workers.

Furthermore, in some countries stakeholders have simply regarded the questions as irrelevant against the national instruments of implementation (e.g. Netherlands, Denmark, Poland) while stakeholders in many countries (in particular employer representatives) have stressed that rather than focussing on extending the set of instruments applicable under the Posting Directive the focus of attention should be on improving the implementation of the already existing rules. This has been highlighted by stakeholders in all countries that mainly receive posted workers in the lower wage groups but also by stakeholders in Romania.

Responses from EU-level social partners varied according to whether they emanated from employees' or industry side. The representative of the construction employees' federation indicated that an extension to collective agreements beyond Article 3(8) would be possible and desirable for some countries (mentioning Germany and Italy as examples), but might conflict with the national systems in place in some other countries. The risk that posting undertakings would be subject to more obligations than domestic undertakings is indeed one of the reasons why the representatives of the cross-sectoral industry federation oppose such an extension, next to other factors of a practical and administrative nature. The interviewee from the cross-sectoral employees' organisation, on the other hand, would welcome an amendment of Article 3(8) provided it meets certain parameters, i.e. not putting any pressure to a proliferation of company-level agreements and, more fundamentally, be sufficiently flexible and general so as to be able to cater for the huge diversity of wage-setting instruments in the EU. The effect of such an extension, according to the latter interviewee, should be an increase in the number of posted workers covered by (sufficiently representative) agreements. The respondent from the construction workers' federation mentioned that while such an extension would not solve the widespread problems relating to enforcement on the ground of the labour and wage conditions, it would at least contribute to filling the legal gaps that exist in this framework.

2.5.2.1 Company-wide agreements

Stakeholders in France and Belgium referred in their replies to possible extensions of the instruments according to Article 3(1) of the Posting Directive referred to the scenario of extending the scope to company-wide agreements and reflected on likely effects:

In France, given that posted workers are already entitled to the National Minimum Wage as well as to the national and/or regional industry/sector wide minimum sectoral wage which has been extended and is therefore universally applicable, it follows that the extension of the scope of Article 3(1) Posting Directive to company/undertaking collective agreements would not alter substantially posted workers' income.

Public works where leading entrepreneurs dispose of company-wide collective agreements, is an exception as they provide for actual wages up to 20 per cent higher than regional industry wide collective agreements. In all other sectors (transport, construction, temporary work), sector wide national or regional collective agreements remain the main reference as company-wide collective agreements and do not provide for substantially higher wages.

In addition to that, the extension of the scope of Article 3(1) of the PWD to company-wide collective agreements would neither increase nor decrease the number of posted workers covered by the minimum rates of pay. The reason is that the national minimum wage already covers all the workers working in the French territory, posted workers included. In addition to that, industry wide collective agreements are, at least most of them, universally applicable and therefore applicable to all workers engaged in the sector, posted workers included. By contrast, company-wide collective agreements are necessarily limited in scope and apply only to the workers/employees of a specific employer.

As said before, for most of the relevant sectors (with the exception of public works), company-wide collective agreements neither will 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) of the PWD to company-wide collective agreements would not substantially augment labour costs for the sending companies, nor would it affect their competitiveness.

In Belgium, the dominant instrument of wage-setting is clearly the CLA concluded within the joint (sub-) committees. Such CLAs are 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 relatively rare, i.e. mainly occurring in larger companies and often dealing with other elements besides wages. From a sectoral perspective, 14 per cent of blue-collar workers in the transport sector (JC 140) are covered by a company-CLA. 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 per

cent of the blue-collar workers are covered by a CLA concluded at the level of the company. In the majority of cases, these deal with working time, although some also award 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.

It is therefore not surprising that according to the interviewees, extending Article 3(8) of the Posting Directive to company-level 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, that have been identified for example in the construction or transport sector (see section I of the report on Belgium). These problems, insofar as they could be avoided by a correct application of the Posting 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', rather than to the fact that some wage conditions would, under the current terms of the Posting Directive, not be covered.

2.5.2.2 Applying a broader protection level by collective agreements and public policy provisions

In some countries, stakeholders would favour a broader protection level for posted workers that also include additional instruments. In Sweden for example, 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 a double burden 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.

In Germany, trade unions have expressed the need to increase the coverage of posted workers since a significant share of posted workers are still not covered by sectoral minimum wage agreements under the Posted Workers Act. They suggest that not only collective minimum wage agreements that are declared generally binding in the context of the Posted Workers Act but also those declared generally binding in the context of the Collective Agreements Acts would be included in the scope of the Posting 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, i.e. minimum pay provisions regarding different wage groups or allowances. This position should also be understood against the background of quite significant regulatory gaps between different sectors, ranging from quite different sectoral agreements in construction and care and further differences in minimum wage provisions in the transport sector (only the statutory minimum wage applies) and temporary agency work (equal treatment with different sector-specific implementation rules).

This would also match a further demand of the trade unions: the demand that the regional/federal state level public procurement clauses with 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 introducing a legal instrument and requirement that exists in German labour law jurisdiction – the ban of social wage dumping

(*'sittenwidrige Löhne'*, i.e. wages that are less than 2/3 of the collectively agreed or 'usually' paid at local level).

In this context, it should also be highlighted that the issue of misuse and social dumping not only in Germany but also in the Nordic countries as well as Belgium and the Netherlands has been an important issue related to posting (amongst other forms of employment, see national reports for more details). Therefore, instruments that increase equal treatment for equal work at the same place such as legislative measures to counteract social dumping and unfair competition are high on the agenda in particular of trade union organisations.⁵⁸

2.5.2.3 The specificity of the temporary agency work sector

Stakeholders have stressed that with regard to the posting of temporary agency workers, the situation is quite specific and peculiar because of the need to apply the equal treatment principle in accordance with the Directive 2008/104/EC on Temporary Agency Work.

This has been highlighted for example by stakeholders in France, Germany or Sweden. As sector representatives in France or Germany stressed, company-wide collective agreements already apply for posted agency workers, at least theoretically, because of the equality of treatment principle. Against this an extension of the scope of Article 3(1) of the Posting Directive to company-wide collective agreements would have a positive effect only in the case of intra-group posting.

Similarly, a stakeholder in Sweden stated that one could 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. This however, does not precondition any extension of the scope of Article 3(1) of the Posting Directive, as this is possible already under Article 3(9) in the present Directive compared to Article 5(1) of the Directive on Temporary Agency Work.

2.5.2.3 Positions of stakeholders in major sending countries

The perspective of stakeholders from major sending countries such as Poland and Romania regarding an extension of the instruments applicable to Article 3(1) of the Posting Directive are different:

From the perspective of both countries an extension of instruments and for example the inclusion of sectoral collective agreements would have hardly any effect as there are only very few of such agreements. However, stakeholders have raised concerns regarding the application of further instruments and legal as well as collective bargained means of protection in countries that receive posted workers from Poland or Romania. As

⁵⁸ But not only. The notion of 'equal pay for equal work at the same place' has also been stressed by the joint letter to the EU Commission by the National Ministries responsible for Labour and Social Affairs of Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden in June 2015 summarising key suggestions on the of the PWD review process.

stakeholders in Romania stressed, the differences existing between the wage rates of the Member States do not constitute an unfair competition in the case of the freedom to provide services. The aim of posting is not the integration of posted workers on 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. Therefore, rules applicable to foreign providers of services should be imposed in total respect of equality of treatment, without any disadvantages compared to local providers.

Against this an extension of the scope of instruments applicable under Article 3(1) of the Posting Directive from the point of view of stakeholders in both countries would be likely to affect the equality of treatment that should be applicable to foreign providers of services in the host Member State. According to stakeholders' opinions in Romania, this could even result in a situation, where posting companies have to pay wages to posted workers that are higher than those paid by a national companies in a similar situation (see report on Romania).

2.5.3 Socio-economic impact assessment

Finally, the extension of instruments applicable to posted workers may have some wider socio-economic impacts. This sub-section contains an assessment of the likely impacts on the number of posted workers covered, on the minimum rates of pay, on the administrative burden of implementing and controlling the extension, and on the level playing field in the local labour markets.

2.3.5.1 Impact of an extension on the number of posted workers covered and the minimum rates of pay of posted workers

The assessments of stakeholders on the effects of an extension of the set of instruments available on the minimum rates of pay of posted workers vary significantly, depending on the country specific background. In all those countries and sectors, where governments make use not only of universal statutory minimum wages but also provide a higher or broader protection as stipulated by generally binding collective agreements, stakeholders found that the effects on minimum rates of pay would be very limited. This has been highlighted for example for Denmark where 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 cost, challenges in relation to implementation and control, effects on companies competitiveness and impact on displacement effect is not expected.

Given that posted workers are already entitled to the National Minimum Wage as well as to the national and/or regional industry/sector wide minimum sectoral wage which has

been extended and is therefore universally applicable, it follows that the extension of the scope of Article 3(1) Posting Directive to company/undertaking collective agreements would not alter substantially posted workers' income.

Similarly, stakeholders in Sweden, Belgium and the Netherlands stressed that most activities where posting from low wage countries is frequent are already covered by central agreements with provisions on minimum rates of pay. An extension of the scope of Article 3(1) of the Posting Directive would therefore have little effect, if any, on the number of posted workers covered by the minimum rates of pay. As a consequence, it would not have any effect on the actual incomes of posted workers.

A slightly different position was expressed by stakeholders in France and Germany. In both countries, there are sector wide collective agreements that do not fall within the scope of the Posting Directive. Accordingly posted workers (e.g. in the transport sector in Germany) are only covered by the statutory minimum wage regulation that in most sectors is significantly lower than sector-level agreements (which often also include further minimum provisions, e.g. on allowances).

Thus, an extension of the scope of Article 3(1) of the Posting Directive would not have an effect on the number of workers covered but on the income of posted workers: While in Germany this would significantly affect the transport sector, in France only the national collective agreement for executives (cadres) in the public works sector is not extended by ministerial order. If the relevant collective agreement were to be extended then posted engineers would be entitled to a much higher basic salary than the National Minimum Wage to which they are otherwise entitled to.

2.3.5.2 Administrative impact (implementation and control)

From the point of view of many stakeholders an extension of the scope of the Directive is simply not feasible and would result in administrative burden that also would vary significantly from sector to sector. This has been stressed very strongly by stakeholders for example in Germany who also underlined that the key issue is rather the proper implementation and the reduction of misuse and circumventing the regulation.

German employers' organisations have always been reluctant and rather critical to use the AEntG as a means of minimum wage regulation. Against this, any extension of the scope would of course result in higher costs and administration as well as supportive activities. The employers' organisation for temporary agency work points to a strong negative impact on the supply of posted temporary agency workers and a negative effect on the German economy as a whole if extensions were to be implemented. The employers' organisation 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.

One employers' organisation in the German construction industry commented that an inclusion of further types of collective agreements within the scope of the Posted Workers Act 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 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 by foreign firms about collective agreements in the hosting country. This could be regarded as discrimination."

As stressed by representatives from employers' organisations in the transport sector, any extension of the scope of the Posted Workers Act, for example on regional collective agreements would have even more severe effects on road transport and would be in practice totally infeasible for example in cabotage transport as collective agreements may differ from region to region.

Furthermore, 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 is by far 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).

Also stakeholders in Italy, France, Denmark, Sweden and the Netherlands strongly stressed the experience that the key problem from the national perspective is not the lack of instruments and the scope of the application of the Posting Directive but the lack of instruments and resources to guarantee a sufficient application of existing rules and the avoidance of misuse and social dumping.

As stakeholders in France stated, an extension would definitely make it harder to monitor and control the implementation and enforcement of the company wide 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 industry wide collective agreements as well as company collective agreements. Most of the labour inspectors we have questioned told us that the majority of the Posting Directive violations they encounter are much more basic than 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 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.

Also in Sweden, stakeholders highlighted that 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 how little 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. 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 Belgium, 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 criminally enforced).

An increased administrative burden and also a growing uncertainty that would result from any extension of the 'hard-core' of the Posting Directive have been highlighted by stakeholders in Poland and Romania. For example, social partners as well as government representatives have raised concerns about uncertainties with a view on the application of the statutory minimum wage regulation in Germany (see report on Poland). Furthermore, any extension of the scope of application could generate more uncertainty in the interpretation of the directive, in particular with regard to minimum wage rules. According to interview partners from public administration, already today Romanians posting providers are complaining 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 an 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.

2.3.5.3 Impact on the competitiveness of the sending countries and on local undertakings and labour forces

According to employer representatives in France, the extension of the scope of Article 3(1) of the Posting Directive 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 employers' contributions partly based on the fact that social security contributions in France are 30 per cent higher than those of some other member States (e.g. Luxembourg). As a result, even if the equality of treatment was applied with regard to the minimum 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. The employer representative from the construction sector stressed that, if the existing rules with regard to minimum rates were being complied by, there would be no unfair competition with regard to the minimum rates of pay. As a result, it is not the posted worker's actual pay but social contributions that create distortions of the labour market.

This assessment has been confirmed by both social partners' organisations in other countries across all sectors. As indicated for example in the national reports on Belgium, the Netherlands, Denmark or Germany, according to the sectoral social partners, the key problems are arising from posting companies not applying existing rules in a correct way, either purposefully or resulting from a lack of information (this reason has been highlighted by stakeholders in the two sending countries Poland and Romania).

Against this, any extension of the instruments available would not have an effect on the competitiveness of posted workers and posting companies. However if rules were enforced more effectively, various forms of social dumping would be affected quite strongly as a representative of the trade unions in Germany has highlighted. As a consequence of better enforcement, registration wage levels would rise and a shift from lower to higher-value services and activities would set in, reducing competitive advantage based on low wage policies only.

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

A previous report dealing inter alia with the constituent elements of minimum rates of pay made the following statement: "A thornier issue is which elements of workers' protection can constitute an element of the minimum 'rates of pay'"⁵⁹. A complementary study reinforced the impression that "the concept of 'rates of pay' is far from clear. Which labour condition should or should not be taken into consideration when determining the minimum rates of pay?" The same study concluded that "there is much confusion about the standards to be used for comparing the wages actually paid to the minimum prescribed by the host state"⁶⁰. Problems identified by both reports target many sources of income⁶¹.

A closer look at nine selected countries and four sectors shows that the matter of constituent elements of the minimum rates of pay is tackled in different ways by the parties involved (public authorities, social partners). As shown in Table 3-1, a minority of countries have implemented rules - via statutory instruments or collective agreement - whose sole purpose is to define the constituent element of the minimum rates of pay guaranteed to posted workers. Some sectoral agreements may specifically refer to the status of posted workers but this does not mean that there is a global set of rules dedicated to this category of workers. France is an exception since several ad hoc rules have been adopted at legal level, but they are still far from dealing with all aspects. In practice, there can be a combination of specific rules for posted workers⁶² and of "standard rules"⁶³ which are more or less overtly transposed to the posted workers.

Most countries are governed by a system where constituent elements of minimum rates of pay are directly linked to the standard rules on the minimum wage applicable to domestic employment relationships. This approach is understandable: they consider that posted workers are subject to the same minimum wage rules as any other workers on the national ground. However, in some cases, it is not easy to determine if - and to what extent - the rules relating to the domestic minimum wage are transposable/transposed to posted workers (e.g. Belgium, Poland). It should also be taken into account that there may be important differences between the provisions of the legislation and the way it is applied. In Belgium, for example, the legislation implementing the Posting Directive declares virtually the full set of wage conditions applicable to posting employers across the sectors. In practice, however, only a few components are effectively enforced as being part of the minimum rates of pay.

⁵⁹ A. van Hoek and M. Houwerzijl, Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, p. 189.

⁶⁰ A. van Hoek and M. Houwerzijl, Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, p. 377.

⁶¹ Contributions to funds; the possibility to combine levels of protection, in particular with regard to overtime rates; comparability and exchangeability of special benefits; special payments related to the posting and the distinction between pay and reimbursements of costs; complications caused by taxes and premiums (the gross/net problem); withholding of costs from the wages due to the worker. See A. van Hoek and M. Houwerzijl, Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, p. 21.

⁶² E.g. status of overtime compensation.

⁶³ Rules in the area of minimum wage applicable to domestic employment relationships.

Table 3-1 Are there specific rules – statutory and/or conventional - determining the elements of the minimum rates of pay (MRP) to posted workers (PWs)?

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Rules specific to PWs' MRP	no	no	no	yes	no	no	no	no ⁶⁴	no
Irrelevant									

Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Rules specific to PWs' MRP	no ⁶⁵	no	no ⁶⁶	no	no ⁶⁷	yes ⁶⁸	no		no ⁶⁹
Irrelevant								X ⁷⁰	

The absence of clear rules on the components of the minimum rates of pay is true from the host country perspective (3.1). From the sending perspective, solutions are also unclear about the payments made to posted workers which can (or cannot) be considered for the purposes of assessing compliance with the host country's minimum rates of pay (3.2). Both perspectives need indeed to be distinguished. A former report rightly stated in this regard that *"it is important to realize that there are two distinct elements involved in the comparison of wages under the Posting Directive: first the minimum rate of pay of the host state has to be established and then the actual wages paid by the foreign service providers are to be measured against the compulsory minimum"*⁷¹. Before presenting some conclusive remarks (3.4), we will also see how the differences in the definition of the minimum rates of pay impact income levels of posted workers (3.3).

⁶⁴ No legislation relates only to posted workers. The general legislation is applicable both to domestic workers and posted workers.

⁶⁵ Note that two universally applicable collective labour specifically refer to the case of posting of workers, without however containing specific rules: CLA of 13 September 2007 (No 87,528) dealing with weather and fidelity stamps in the construction sector and CLA of 13 March 2014 (No 121,724) entitled 'Equal Pay for Equal Work' in the road transport sector. For a discussion, see the reply to Q17 of the Belgian report.

⁶⁶ For the four sectors.

⁶⁷ For the four sectors.

⁶⁸ For construction and temp sector.

⁶⁹ For the four sectors.

⁷⁰ At this moment there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

⁷¹ A. van Hoek and M. Houwerzijl, Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, p. 191.

3.1 The host country perspective: the constituent elements of the minimum rates of pay

The objective is to establish the minimum rates of pay of the host country, in other words the minimum sum to be guaranteed to posted workers by the host State as required by the Posting Directive. This sum may comprise of a number of individual elements. The sub-sections below analyse the main elements of remuneration with the aim to provide a better overview of what is the “minimum rates of pay”.

3.1.1 Basic salary

Gross or net salary

The basic salary is the core component of the remuneration: posted workers should be at least entitled to it. However its definition is not obvious. For instance, in countries where there is more than one type of basic wage, there may be controversies between stakeholders as to which one should be the reference for posted workers (Sweden).

A common question is the following: does basic salary have to be understood as a gross or net amount? The CJEU ruled incidentally that “It is the gross amounts of wages that must be taken into account”⁷². This assertion was made by the Court of Justice in a context where the objective was to identify the elements of remuneration paid by the sending employer which should be taken into account for the purpose of calculating the minimum wage of the host country. However, it could also be understood from the host country perspective as the “compulsory minimum” which is guaranteed to the posted workers. As a matter of fact, most host countries consider that, whether through law or collective agreement, their minimum rates of pay refer to the **gross salary** (e.g. Belgium, France, Germany, Netherlands, Romania) as displayed by Table 3-2.

Table 3-2 Host country basic salary guaranteed to posted workers: gross or net?

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
gross		X	X	X		X	X	X ⁷³	X
net									
unclear									
Irrelevant	X				X ⁷⁴				

Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
gross	X	X	X ⁷⁵	X	X	X ⁷⁶			X ⁷⁷
net									
unclear									
Irrelevant							X	X ⁷⁸	

⁷² CJEU Commission v. Germany, case C-341/02.

⁷³ The legislation/collective agreements always refer to gross wage.

⁷⁴ No legal mechanism applicable.

⁷⁵ For the four sectors.

⁷⁶ For the four sectors.

⁷⁷ For the four sectors.

⁷⁸ At this moment there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

Employees' classification, skills, seniority

The CJEU ruled that the posted workers' minimum rates of pay can be determined according to the **employees' classification and their categorisation into pay groups**⁷⁹. It entails that posted workers with certain skills or experience should be entitled to higher minimum rates of pay corresponding to their classification in the host country.

At national level, the minimum wage paid to domestic employees is often connected to a classification. The transposition to posted workers is far from being evident – even if a majority of countries seem to follow this path. As demonstrated by Table 3-3 below, it is mainly through collective agreements that most countries envisage the classification as a component of the minimum rates of pay. It was predictable since the topic of classification is often dealt with at sectoral level. At legal level, all situations are observed: classification can or cannot be a component or the situation is undetermined.

There is a great variety of practices and ways to consider the application of a classification system to posted workers. When the classification system is expressly applicable to posted workers, it can only be for some sectors (e.g. Denmark, Germany, Sweden). A pragmatic view can be chosen for the application of the classification system to posted workers: if the minimum rates of pay are understood as referring to the host country minimum wage scales, the one but lowest scale is used by default when the actual function of the worker and the corresponding scale cannot be determined (Belgium). In some countries though, the situation is not as clear. The classification system may be only transposed implicitly to posted workers (e.g. Romania: "hierarchy coefficients"). In other cases, it is unsettled if wage supplements related to the possession of special skills are a component of minimum rates of pay due to posted workers (e.g. France, Poland). There can also be controversies about the extension of the skills reference to posted workers (Sweden: construction sector).

⁷⁹ CJEU, Sähköalojen ammattiliitto ry, case C-396/13.

Table 3-3 Classification: element of determination of the minimum rates of pay due to posted workers?

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Component		no	yes ⁸⁰		yes	yes ⁸¹			
Unclear				X ⁸²			X		
Irrelevant	X							X ⁸³	X

Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Component	yes	yes ⁸⁴	yes ⁸⁵		yes	yes ⁸⁶		yes ⁸⁷	yes ⁸⁸
Unclear				X ⁸⁹					
Irrelevant							X		

⁸⁰ Partly in the road transport sector which 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.

⁸¹ Though not formally inserted in the law.

⁸² Statutory law does not provide explicitly that classifications/seniority apply to posted workers in order to determine their minimum wage. Although article R1261-2 of the French Labour Code provides that extended collective agreements apply to posted workers there is no special mention to classifications.

⁸³ Not as a part of basic salary. This is an optional right.

⁸⁴ All three (no minimum wage agreement in transport) sectors have East-West classification. In construction sector there are also two wage groups for low/unskilled and skilled workers.

⁸⁵ In the construction and road transport sectors. For posted workers, working in accordance with a collective agreement (which the social partners argue that many posted workers do), there are no components, determining the minimum rates of pay, that are due to the worker being posted. However, for posted workers, working in accordance with an adoption agreement, a minimum wage has either been calculated based on the relevant components of the collective agreements, called 'deprivation of agreement' (minimal wage) or the minimum wage is the same as in the relevant collective agreement, which the adoption agreement refers to (normal wage).

⁸⁶ For the four sectors.

⁸⁷ No difference is made between domestic workers and posted workers. At this moment though, there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

⁸⁸ In construction and road transport sectors.

⁸⁹ None of the relevant collective agreements provides explicitly that classifications/seniority apply to posted workers. As a result it seems that when posted work comes into question only the lowest wage provided for by the relevant classification becomes applicable in practice. Some classifications such as the one in the construction sector takes into account qualitative criteria such as initiative or autonomy which are difficult to appreciate regarding posted workers because of their temporary presence to the French territory. Within the road transport sector, it is questionable whether seniority is taken into account with regard to posted workers in order to determine their minimum wage, although, according to the relevant collective agreement, seniority is a highly relevant criterion in order to define minimum wage. The road transport collective agreement makes no reference at all to posted workers.

The seniority criterion sometimes impacts the national minimum wage amount. Is it transposed to the posted workers' minimum rates of pay? The question is far from being resolved – to say the least - and most countries remain silent on this matter. Since such advantages presuppose a stable, long-lasting employment relationship, it can be difficult to conceive their application in situations of posting (Belgium). This seems to be the reasoning adopted in France.

Other components of the minimum rates of pay

The incorporation of other components linked to the basic salary into the posted workers' minimum rates of pay raises specific issues which emphasize the lack of shared understanding among countries. Let us give two examples with opposite outcomes:

- the concept of basic salary entails that posted workers should be granted a supplement to the minimum wage called "deprivation of agreement" covering posted workers' loss of wages which are normally negotiated at company level (Denmark).
- a state "activity bonus" with the objective to encourage workers with modest revenues to take up a new professional activity is not seen as a component of the minimum rates of pay since it alters the relation between the worker's service and the consideration provided in exchange (France⁹⁰).

3.1.2 Overtime rates

According to the Posting Directive, the host country's minimum rates of pay include **overtime rates**.

For a vast majority of countries overtime rates are a constituent element of the minimum rates of pay (see Table 3-4). This principle is set by the law (e.g. France) or by collective agreement, usually for the four sectors (e.g. Denmark, Netherlands, Sweden). In some cases, the application of overtime rates is commonly regarded but without any legal grounds (e.g. France: collective agreements).

Table 3-4 Overtime rates: component of the minimum rates of pay due to posted workers?

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Component of MRP	yes			yes		yes ⁹¹	yes	yes	
Excluded from MRP									
Unclear									
Irrelevant		X			X				X

⁹⁰ See opinion of Conseil d'Etat, 16 April 2015

⁹¹ Though not formally inserted in the law.

Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Part of MRP	yes ⁹²	yes ⁹³	yes ⁹⁴	yes ⁹⁵	yes	yes ⁹⁶			yes ⁹⁷
Excluded from MRP									
Unclear									
Irrelevant		X ⁹⁸					X	X ⁹⁹	

3.1.3 Bonuses (and supplements)

The CJEU gives useful indications. Bonuses, such as a reward in respect of the 13th and 14th salary months “which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return” are constituent elements of the minimum rates of pay¹⁰⁰. On the contrary, the CJEU considered in the same ruling that account need not be taken as component elements of the minimum rates of pay, of “flat-rate sums calculated on a basis other than that of the hourly rate”. These orientations have been taken in a case where the host country refused to take into account the bonuses paid by the sending employer for the purpose of calculating the minimum rates of pay.

In countries the regulations, the status of bonuses and other supplements is complex. It is hard to come up with a clear-cut response on whether a given advantage is part or not of the constituent elements of the minimum rates of pay. A case by case analysis of the bonus purpose has to be carried out. An effort can be made by countries to follow the reasoning of the CJEU and to find out whether the bonus alters the relationship between the service provided by the worker and the consideration which they receive by way of remuneration for that service (e.g. Belgium, France, Germany). Not all countries are familiar with such a method though. Furthermore, it is not always apparent if the status of bonuses and other supplements is analysed by countries from the perspective of the component of the minimum rates of pay of the host country or from the perspective of the sums paid by the sending employer that can be compared to the minimum rates of pay of the host country. In this context, it is not surprising if responses are partial and lead somehow to conflicting solutions.

⁹² All sectors, in practice mainly construction sector.

⁹³ Construction sector.

⁹⁴ For the four sectors.

⁹⁵ Although in the relevant collective agreements there is no mention of posted workers, it is assumed that posted workers are entitled to overtime rates on top of their minimum wage. As a result, overtime rates are undoubtedly part of posted workers’ minimum rates of pay.

⁹⁶ For the four sectors.

⁹⁷ For the four sectors.

⁹⁸ Care, agency work, transport.

⁹⁹ At this moment though there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

¹⁰⁰ CJEU Commission v. Germany, case C-341/02.

Bonus/supplements granted on a regular basis can be excluded as a component of the minimum rates of pay (e.g. Denmark: construction sector; Italy), but a thirteenth month or Christmas bonus is included (e.g. Belgium, France, Netherlands). Christmas allowances/bonuses for the month they have actually been paid to the posted worker are a component of the minimum rates of pay (France). The status of the annual bonus may be unknown (Poland).

Bonus/supplements as one-time flat sum are at times removed from the list of the components of the minimum rates of pay (e.g. Belgium; Denmark: temp. sector; Poland: jubilee award), but solutions may vary between sectors within the same country (e.g. Denmark). A **dismissal compensation** is part of the minimum rates of pay (e.g. Denmark: transport sector) or is kept out (Belgium).

Bonuses/supplements based on individual/collective objectives are often rejected from the list of components of the minimum rates of pay. However, this conclusion is usually deducted from standard rules applicable to domestic workers. Attendance bonuses, bonuses linked to the undertaking results and productivity are kept out because they are unpredictable in advance (e.g. France, Denmark: construction sector). Bonuses which do not have a regular character or which are granted on the basis of personal qualities, whereby there is no relation with the performance of work, are removed (e.g. the Netherlands: distribution of profits; special payments such as an incidental payment for turnover achieved). Accordingly, profit share distributed to employees should be excluded, but this is a mere interpretation of the law applicable to domestic employees (Poland). However, profit sharing or saving schemes that may be foreseen in collective agreements can be counted toward the minimum wage under conditions (Germany). Likewise, an accident-free driving bonus is part of the minimum rates of pay (the Netherlands: construction sector) as well as a driver's bonus (the Netherlands: construction sector). Some situations are reported to be controversial. It can be illustrated with one example: national stakeholders disagree on the classification of an incentive scheme (France - "intéressement"¹⁰¹).

Bonuses/supplements can be related to **working conditions**. According to the CJEU, "if an employer requires a worker to carry out additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage". Dealing with so-called "quality bonuses and bonuses for dirty, heavy or dangerous work", the Court added that "it is entirely normal that, if an employer requires a worker to perform additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage"¹⁰². If the status of the elements of remuneration paid by the sending employer compensating for work under particular conditions is clear (they cannot be measured against the host country's minimum rates of pay), the CJEU case law leaves unanswered the question from the host country's point of view (are bonuses related to working conditions guaranteed by the host country regulations part of the host country minimum rates of pay?)

At country level, the status of elements of pay compensating for working conditions is also subject to various interpretations in many countries.

¹⁰¹ According to interviewees though, incentive bonuses are not part of the "minimum wage". This is rather normal, taken that incentive bonuses are negotiated at undertaking level. As a result they do not apply to posted workers, because they derive from a non-universally applicable collective agreement.

¹⁰² CJEU Commission v. Germany, case C-341/02.

In a lot of cases, countries do not specify whether these additional payments are part of the minimum rates of pay guaranteed to posted workers. This creates a state of unpredictability (e.g. Poland). An additional payment is granted for particular, difficult, dangerous or embarrassing working conditions: does it apply to posted workers? (Romania). It is often with an assumption – the transposition to posted workers of rules designed for domestic workers – that a solution is put forward by national reports.

Sometimes, solutions are more firm. For instance, extra-payment for night work and Sunday work are regarded as being included in the scope of the minimum rates of pay by the law (e.g. France). Bonuses related to the geographical position of the working site (insularity, construction site, dam etc.) are integrated as well in the posted workers' minimum rates of pay (France). It is normally through collective agreements that the question is addressed. A compensation for working clothes and equipment is a component of the minimum rates of pay due to posted workers (e.g. the Netherlands: construction sector). Collective agreements applicable to posted workers include an "additional remuneration based on working condition" in the minimum rates of pay (e.g. Denmark: construction sector, transport sector; the Netherlands: construction sector). A Supplement for shift work or a supplement for diving work is part of the minimum rates of pay (Sweden: construction sector). The allowance for masonry work or a driver's bonus are part of the minimum rates of pay (the Netherlands: construction sector); it is also true for a bonus for irregular working hours (the Netherlands: temp. sector), for various allowances for work in specific circumstances: this is 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 (Belgium: construction sector), for work under specific schedules (Belgium: construction sector). Unsocial hours supplement is a component of the minimum rates of pay (Sweden: construction sector) as well as supplements for on-call duties (Sweden: Temp. sector).

There is therefore no global consensus among countries or sectors. The sectoral agreements of one country can even adopt opposite solutions (e.g. Belgium, the Netherlands), a situation which may not be inconsistent: sectors have their own peculiarities. Table 3-5 reflects the diversity of solutions applicable to additional payments relating to working conditions

Table 3-5 Bonuses (and additional payments) related to working conditions: components of the minimum rates of pay due to posted workers?

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Working condition in general	irrelevant	no	no	Yes	no	no	yes	yes ¹⁰³	no
Work equipment expenses	irrelevant	no	no	? ¹⁰⁴	no	no	no		no
Hard work	irrelevant	no	no	yes	no	no	yes	yes ¹⁰⁵	no

¹⁰³ No difference is made between domestic workers and posted workers

¹⁰⁴ This would not amount to pay but to reimbursement of expenses.

¹⁰⁵ No difference is made between domestic workers and posted workers.

Specific working time ¹⁰⁶	irrelevant	no	no	yes	no	no	yes	yes ¹⁰⁷	no
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Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Working condition in general	yes ¹⁰⁸ ? ¹⁰⁹	yes ¹¹⁰	yes ¹¹¹	yes ¹¹²	No	yes ¹¹³	?	? ¹¹⁴	no
Work equipment expenses	no	yes ¹¹⁵	no	? ¹¹⁶	No	yes ¹¹⁷ ? ¹¹⁸ no ¹¹⁹	?	no	no
Hard work	no	yes ¹²⁰	no	yes	No	yes ¹²¹ ? ¹²² no ¹²³	?	? ¹²⁴	yes ¹²⁵
Specific working time ¹²⁶	?	yes ¹²⁷	yes ¹²⁸	yes	No	yes ¹²⁹	?	? ¹³⁰	yes ¹³¹

Extra-payments can take the form of **payments in kind**. Can social advantages which are provided by collective agreements such as entitlement to food stamps, movie tickets, free access to a care system, free housing, free means of transportation from home to work fall within the constituent elements of the host country's minimum rates of pay? The question seems to be hardly debated. If payments in kind are overtly excluded (e.g.

¹⁰⁶ Sunday work, public holiday work, night work...

¹⁰⁷ No difference is made between domestic workers and posted workers.

¹⁰⁸ Limited number of bonuses (for work at heights, roof works and in Seveso companies) in the construction sector.

¹⁰⁹ Other sectors.

¹¹⁰ Construction supplement.

¹¹¹ In construction and road transport sectors: "Additional remuneration based on working conditions".

¹¹² No difference is made between domestic workers and posted workers.

¹¹³ For all sectors, except interim for which it is unclear.

¹¹⁴ No difference is made between domestic workers and posted workers. At this moment though, there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

¹¹⁵ Paid as a reimbursement to expenses.

¹¹⁶ This would not amount to pay but to reimbursement of expenses.

¹¹⁷ Construction sector.

¹¹⁸ Temp sector (dependent on user undertaking collective agreement).

¹¹⁹ Transport / care sectors.

¹²⁰ Construction sector.

¹²¹ Construction sector.

¹²² Temp sector (dependent on user undertaking collective agreement).

¹²³ Transport / care sectors.

¹²⁴ No difference is made between domestic workers and posted workers. At this moment though, there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

¹²⁵ Construction sector.

¹²⁶ Sunday work, public holiday work, night work...

¹²⁷ Construction sector.

¹²⁸ For the four sectors.

¹²⁹ For the four sectors. For temp sector, also dependent on user undertaking collective agreement.

¹³⁰ No difference is made between domestic workers and posted workers. At this moment though, there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

¹³¹ For the four sectors.

Germany¹³², the Netherlands), in most cases, the status of such advantages is undetermined.

3.1.4 Mobility-related payments

The CJEU follows a transparent direction: whereas reimbursement of costs effectively incurred are excluded from the constituent elements of the minimum rates of pay, all payments which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return are part of it. For example, a compensation for daily travelling time, provided by a host country collective agreement, which is paid to the workers on the condition that their daily journey to and from their place of work is of more than one hour's duration, "*is not paid in reimbursement of expenditure actually incurred by the worker on account of the posting*" and is therefore a constituent element of the minimum rates of pay¹³³. Reversely, but from the perspective of the sending country, the coverage of accommodation costs as well as an allowance taking the form of meal vouchers provided to the posted workers by their employer are not to be considered part of the minimum wage¹³⁴.

From a practical point of view, the CJEU's classification is not simple to implement at national level. Let us illustrate this remark with some concrete examples:

- Does a small displacement bonus (provided by a transport collective agreement when the working site is situated less than 50 or 100 kilometres from the administrative office of the undertaking) constitute a component of the minimum rates of pay due to posted workers? The collective agreement does not say anything about this matter and social partners share opposite points of view on the outcome (France).
- For the payment of a boarding and housing allowance subject to a long distance between the place of residence and the place of work, where should the place of residence of a posted worker be located? The place of residence 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 the host country. In other words, workers posted to that country are (in principle) automatically entitled to boarding and housing (Belgium: construction sector).
- A *per diem*/flat rate compensation for working abroad is considered to be left out from the components of the minimum rates of pay (e.g. Denmark: temp. sector). On the contrary, compensation for meals and housing at flat rates is a constituent element of the minimum rates of pay (Sweden: transport sector).

Table 3-6 underlines the absence of an overall trend with respect to the status of the "mobility-related payments". At statutory level, these payments are from time to time a component of the minimum rates of pay, but at other times not, and sometimes the solution is unclear. At collective agreement level, the same observation is made. There can be contradictions between sectoral agreements of one country (e.g. the Netherlands, Sweden). However differences are more understandable at this level since sectors have their own features.

¹³² Save exceptions for seasonal workers.

¹³³ CJEU Sähköalojen ammattiliitto ry, case C-396/13.

¹³⁴ CJEU Sähköalojen ammattiliitto ry, case C-396/13.

Table 3-6 Mobility-related payments (transportation, accommodation, food, etc.): components of the minimum rates of pay due to posted workers?

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Component of MRP				X ¹³⁵				X ¹³⁶	
Excluded from MRP		X				X	X		
Unclear									
irrelevant	X		X		X				X

Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Component of MRP			X ¹³⁷			X ¹³⁸			X ¹³⁹
Excluded from MRP	X ¹⁴⁰	X				X ¹⁴¹			
Unclear				X ¹⁴²		X ¹⁴³			X ¹⁴⁴
irrelevant					X		X	X ¹⁴⁵	

¹³⁵ Article L1262-4 of the Labour Code: Minimum rates of pay include legally or conventionally established supplements.

¹³⁶ Only if their value is within the limit of 2 .5 times the allowance granted to public institution employees.

¹³⁷ For the four sectors.

¹³⁸ Construction and transport sectors.

¹³⁹ Construction and road transport.

¹⁴⁰ This notwithstanding, compensation of boarding and housing costs is imposed upon foreign employers in the construction sector.

¹⁴¹ Care sector.

¹⁴² Stakeholders do not seem to agree on the nature and status of these components even regarding domestic workers. The relevant collective agreements make no difference between domestic and posted workers. Nevertheless, the sending undertaking has no headquarters in the host country in order to calculate the distance to the working site (construction sector).

¹⁴³ Temp sector: dependent on user undertaking collective agreement.

¹⁴⁴ It is not sure whether the social partners in temporary agency work and/or health and care services include allowances for travel and accommodation into the minimum rates of pay.

¹⁴⁵ At this moment though, there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

3.1.5 Annual holiday and other periods of leave related payments

The CJEU defines a specific status to compensations for periods of annual leave. The reason for this is, as recalled in case C-396/13, that that *“the right to paid annual leave must be regarded as a particularly important principle of EU social law, is thus granted to every worker, whatever his/her place of employment”*. Hence, *“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”*. The CJEU explains that *“the pay which the worker receives during the holidays is intrinsically linked to that which he receives in return for his services”*¹⁴⁶.

The implementation at national level (see Table 3-7) reveals the difficulty to extract common denominators when it comes to annual holiday pay. A law may state explicitly that posted workers are entitled to annual paid holiday (e.g. Germany, France); collective agreements can stipulate that a holiday allowance is a component of the minimum rates of pay (e.g. Sweden: construction sector; Germany: construction sector ; Denmark: construction sector). Nevertheless, solutions are not uniform: some countries keep the holiday pay out of the components of the minimum rates of pay either by law (e.g. the Netherlands) or by collective agreement (e.g. Belgium).

For other holiday allowances, solutions are even less stable and occasionally they can be contradictory. For instance, a public holiday allowance can be a component of the minimum rates of pay (e.g. Denmark: construction sector; France), but social partners may disagree on the issue (Sweden). Sectoral agreements within the same country can have a conflicting view (e.g. the Netherlands). Some countries do not seem to have any settled opinion (e.g. Italy).

How does the entitlement to annual holiday pay impact the minimum rates of pay? Case C-396/13 does not directly address this subject. In France, posted workers 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/she had continued to work during annual holiday. In Denmark and in Sweden, a similar system seems to apply in some sectors. Problems can arise in the process aiming to translate annual holiday pay into minimum rates pay: if, for the CJEU, the minimum paid annual holidays correspond to *“the minimum wage to which that worker is entitled during the reference period”*, when the annual holiday pay corresponds to a percentage of the worker’s wage, should every single component of the minimum rates of pay (e.g. supplements for unsocial hours) be set at the minimum level (Sweden)? In the same spirit, another question is raised: if holiday pay should in principle apply to posted workers and their employers, should it be so if posted workers and their employers are subject – and continue to be so during the posting period – to a more or less similar regime in the sending state (Belgium)?

¹⁴⁶ CJEU Sähköalojen ammattiliitto ry (C-396/13).

Table 3-7 Holiday pay: component of the minimum rates of pay due to posted workers?

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Holiday pay	no	yes	yes	yes	no	no	no	yes	yes
Other holiday periods	no	no	no	yes	no	no	yes	yes	

Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Holiday pay	no	yes ¹⁴⁷	yes ¹⁴⁸	yes	no	yes ¹⁴⁹	?	? ¹⁵⁰	yes ¹⁵¹
Other holiday periods	no	yes ¹⁵²	yes ¹⁵³	yes	no	yes ¹⁵⁴ no ¹⁵⁵	?	? ¹⁵⁶	no

3.1.6 Social protection *sensu lato*

In the context of a “daily allowance” granted by the host country, the CJEU ruled that advantages intending “to ensure the social protection of the workers concerned, making up for the disadvantages entailed by the posting” are constituent elements of posted workers’ minimum rates of pay¹⁵⁷. The concept of “social protection” is meant in a broad sense: it goes well beyond social security related benefits. However, the Court of Justice pays attention to maintaining the scope of the components of the minimum rates of pay within reasonable limits. Hence, a monetary contribution to allow the formation of a capital amount on behalf of the worker - the “capital formation” - is not a constituent element of the host country’s minimum rates of pay. Indeed, “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”¹⁵⁸.

Pursuant to Article 3(1)(c) Posting Directive, **supplementary occupational retirement** pension schemes are not part of the host country’s minimum rates of pay. For the purpose of evaluating if the posted employee has received an amount equivalent to the

¹⁴⁷ All sectors.

¹⁴⁸ For the four sectors.

¹⁴⁹ For the four sectors (based on normal wage received by posted workers).

¹⁵⁰ At this moment, there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

¹⁵¹ For the four sectors.

¹⁵² Holiday supplement in the construction sector.

¹⁵³ Public holidays (SH) for all sectors.

¹⁵⁴ Construction sector.

¹⁵⁵ Care sector and temp sector (depends on user undertaking collective agreement).

¹⁵⁶ At this moment, there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

¹⁵⁷ CJEU Sähköalojen ammattiliitto ry, case C-396/13. The CJEU considers that the daily allowance is an allowance specific to posting.

¹⁵⁸ CJEU Isbir, case C-522/12.

host country minimum rates of pay, the CJEU also ruled that an account need not be taken of contributions to supplementary occupational retirement pension schemes¹⁵⁹.

National level regulations (see Table 3-8) reflect the European framework depicted above and go even further. Statutory rules usually exclude occupational social security advantages from the scope of the minimum rates of pay (e.g. Germany). This remark is also true at collective agreement level. It means that employers' contributions to medical expenses are not a component of the host country minimum rates of pay (e.g. the Netherlands). The same rule applies to the supplementary/occupation pension (e.g. BE: construction sector; Germany). Welfare fund advantages granted by collective agreements often presuppose a stable, long-lasting employment relationship, to such an extent that it is sometimes difficult to conceive their application in situations of posting (Belgium).

Still, the situation is less homogeneous than it seems. French law for instance does not exclude explicitly supplementary occupational retirement pension schemes from the scope of the posted workers' rights, but in practice it seems that posted workers are left out from them and that, consequently, the benefits should not be part of the minimum rates of pay. Furthermore, not all countries consider that occupational social security advantages alter the relation between the worker's service and consideration provided by the employer. A collective agreement can incorporate into the minimum rates of pay an additional amount corresponding to pay during sickness, education and cooperation fund, maternity and pension contributions (e.g. Denmark: transport sector). Likewise, various occupational social security coverages (maternity, sickness) can result in an additional amount to the minimum rates of pay (e.g. Denmark: transport sector). A collective agreement incorporates a special saving scheme in the minimum rates of pay (Denmark: transport sector).

Table 3-8 Occupational social security: component of the minimum rates of pay due to posted workers?

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Component of MRP									
Excluded from MRP		X	X			X	X	X	X
Unclear				X ¹⁶⁰					
Irrelevant	X				X				

¹⁵⁹ CJEU Commission v. Germany, case C-341/02.

¹⁶⁰ Occupational social security schemes are not explicitly excluded from the scope of minimum rates of pay unlike the Posting Directive provisions. Article L1262-4 of the Labour Code only provides for those advantages that are expressly included within the minimum rates of pay.

Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Component of MRP			X ¹⁶¹						
Excluded from MRP	X	X	X ¹⁶²			X ¹⁶³			X ¹⁶⁴
Unclear				X ¹⁶⁵					
Irrelevant					X		X	X	

As far as **social security *stricto sensu*** is concerned, contributions are excluded from the minimum rates of pay applicable to a posted worker (e.g. Belgium; Germany; Denmark; the Netherlands). Consequently, a statutory system of sick pay where the employer maintains the salary of the sick employee for a limited amount of time is not a component of the minimum rates of pay. 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 (Sweden). The solution is less obvious for maternity pay (the maintaining of salary by the employer during the maternity leave) because the statutory nature is unclear (Sweden). This last example highlights the difficulty in determining the status of compensations granted for time off work¹⁶⁶.

Income tax elements are not a component of the minimum rates of pay applicable to a posted worker (e.g. Belgium; Denmark: construction sector; the Netherlands; Italy).

3.2 The sending perspective: how to meet the host country requirements?

What are the processes used for comparing the remuneration (in all its components) actually paid to the posted workers by the sending company to the minimum rates of pay of the host state? This question can find answers from the positions of the host country's authorities (3.2.1) and of the sending employers (3.2.2).

¹⁶¹ Partly for the road transport sector. According to the collective agreement between 3F Transport and DI (Danish Industri) "Transport- og logistikoverenskomst 2014-2017" Article 8, workers are entitled to full pay during sickness for a period of up to seven weeks, if they have been employed for a minimum of eight weeks and have been working for at least 74 hours (Requirements are in accordance with Article 3 in lov om dagpenge ved sygdom eller fødsel (Law on unemployment benefits in case of sickness and birth).

¹⁶² Construction sector.

¹⁶³ For the four sectors.

¹⁶⁴ For all sectors.

¹⁶⁵ None of the relevant collective agreements provide explicitly that occupational social security schemes are excluded from posted workers' minimum rates of pay. It seems however that social partners are aware, take into account and abide by the exclusion in the Posting Directive.

¹⁶⁶ See, also, annual holiday and other periods of holiday (point 3.1.5).

3.2.1 The position of the host country authorities

There is a number of different processes currently applied by employers from the sending countries to comply with the minimum rates of pay requirements of the host country. The analysis reveals that there is a difference across the studied Member States with regards the extent to which the host States include different payments when comparing the sums received by the posted worker with its minimum rates pay and as to the extent to which such payments are disregarded in the comparison (e.g. as payments made in reimbursement of expenditure actually incurred on account of the posting). The means reported in the studied Member States to comply with the minimum rates of pay of the host country include:

- A **posting allowance** paid by the posted workers' employer is a way to meet the minimum rates of pay of the host country in the majority of the countries studied - see Table 3-11 below.
- **Actual expenses** are usually excluded for the calculation of the host country's minimum rates of pay, the same applies to travel reimbursement (e.g. NL: construction sector), to transportation costs, accommodation and meals (e.g. DE, RO). Host countries ensure that actual travelling, accommodation and meal expenses are not included for the calculation of the local minimum rates of pay (e.g. FR). More precisely, meal tickets, amounts received by the employees to cover transportation expenses and accommodation allowances should not be part of the minimum wage if rules applicable to standard workers were transposed to posted workers (e.g. PL).
- **Other forms of payment** raise debates and show the complexity of the situation. For example, remuneration components paid by foreign employers are not taken into account towards the minimum rates of pay if they are not directly linked to the work performance (BE, DE: purely flat-rate payments; FR: social protection related advantages, such as premiums for supplementary health coverage, overtime increments and incentive bonuses that bare no direct relation with work provision).

In general however, not too much attention is paid by countries to this question. Table 3-9 provides an overview of the extent to which posting allowance is applied as a means to meet the minimum rates of pay requirements. Subsequently, the various means used to meet the minimum rates of pay of the host country are analysed in detail.

Table 3-9 Posting allowance: a way to meet the minimum rates of pay due to posted workers

Statutory rules

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Yes		X ¹⁶⁷		X ¹⁶⁸			X		
No						X			
Unclear					X ¹⁶⁹			X ¹⁷⁰	
Irrelevant	X		X						X

Collective agreements (specify per sector)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Yes	X ¹⁷¹	X ¹⁷²	X ¹⁷³						
No						X ¹⁷⁴			
Unclear					X ¹⁷⁵				
Irrelevant				X ¹⁷⁶				X ¹⁷⁷	X ¹⁷⁸

A posting allowance

When establishing whether the Belgian minimum rates of pay have been respected, the Belgian social inspection services accept all payments which are directly linked to the work performed. Accordingly, flat-rate allowances (regardless of whether paid daily,

¹⁶⁷ Posting allowances can be used to meet the minimum rates of pay insofar they are not reimbursing actual occurred costs (e.g. for accommodation, meals, travel). If they include such reimbursement, this amount has to be deducted.

¹⁶⁸ Explicitly provided for by article R1262-8 of the Labour Code.

¹⁶⁹ Please note that for local workers it is possible to identify the minimum wage, provided by the NCBA as already explained, and the minimum rates of pay as his global remuneration including also local workers' individual agreement(s) clause(s). The same cannot be said about posted workers, as for them the two concepts of minimum wage and minimum rates of pay collides and are basically synonymous each other.

¹⁷⁰ Depending on the scope of the allowance.

¹⁷¹ Insofar as they are directly linked to the work performance and not intended to cover costs actually incurred.

¹⁷² For all sectors.

¹⁷³ For all sectors.

¹⁷⁴ For the four sectors. Home state law may determine otherwise.

¹⁷⁵ Same remark as for statutory rules.

¹⁷⁶ The relevant collective agreements have no provisions regarding posting allowances. Nevertheless, if such an allowance is paid in practice, then according to statutory law it will be included in the minimum wage. The collective agreement on posting of temporary workers (2 December 1986, Article 8) explicitly excludes travelling expenses for the calculation of the minimum wage.

¹⁷⁷ At this moment there is no collective agreement universally applicable within the meaning of Article 3(8) Posting Directive.

¹⁷⁸ The social partners, who are the only ones who would know, could not provide any information about it.

weekly or monthly) are generally considered to be paid in the reimbursement of expenditure incurred on the account of posting and hence disregarded for the purposes of assessing whether the minimum rates of pay are met. There are nonetheless two derogations from this rule: (1) if the employer demonstrably bears the costs associated with the posting and, additionally, pays a per diem allowance (normally intended to cover such costs) or another flat-rate allowance, such allowance can be regarded as a component of minimum rates of pay; (2) the employer proves that the allowance serves a different purpose than covering costs (e.g. an expatriation allowance) and/or is directly related to the work carried out.

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 rates of pay requirements. The assessment of whether a particular payment can be counted towards minimum rates of pay or whether it is made in the reimbursement of costs incurred on the account of posting is made on a case-to-case basis. As a rule, there is a presumption that the payment was made in the reimbursement of the costs incurred (in particular when it is paid without deducting contribution to social security) and it is for the foreign service provider to prove that it should be considered to constitute an element of the minimum rates of pay. For example, an allowance paid in addition to the (documented) reimbursement of transportation and accommodation costs, where the posted workers in question have not incurred any additional expenses, was considered to be capable of being included in the calculation of the minimum rates of pay (case AR2012.0618).

According to the trade union FNV Bouw in the construction sector in the **Netherlands** the wages paid to posted workers regularly contain a tax-free compensation according to the regulations applicable in the home state (e.g. a posting bonus of 25 per cent). The trade union is of the opinion that such compensation must be paid in addition to the gross wage to reduce the actual hourly wage costs for the employer.

A specific posting allowance has also been reported in Germany, France and Italy. However, limited information is available on how such an allowance is calculated. In Germany posting companies are matching the minimum rates of pay by paying posting allowances and other financial bonuses that can be included for the comparison.

Similarly, in **France** the sending undertakings complete, as a rule, their national or sectoral wage by a specific posting allowance in order to reach the level of the French minimum wage or the sectoral minimum wage. The allowance is typically paid on a daily or weekly basis. As long as the allowance is not provided with the view to reimburse costs incurred, but rather to – for example – compensate discomfort arising from posting, it would normally be taken into account in order to determine whether the French minimum rates of pay have been reached. To determine whether the French minimum rates of pay have been reached, French inspectorates are particularly vigilant to ensure that the National Minimum Wage is being complied with. The control as regards the compliance with the relevant national/sectoral collective agreement, is rather limited. As regards the latter, the lowest minimum salary of the pay scale is systematically used for the comparisons (road transport sector).

In **Italy**, only the wage of highly-skilled workers usually includes a specific posting allowance and other advantages in kind. Wages of low-skilled workers, in contrast, do not incorporate any components other than the basic salary and, accordingly, do not as a rule reach the requirements of the host Member States with regards minimum rates of pay.

Other payments and advantages

Other payments and advantages reported in the Member States that are typically accepted for the calculation of whether minimum rates of pay have been reached include:

- Belgium: wage supplements (i.e. not a flat-rate payment) specifically paid to posted workers to comply with the requirements of the Belgium minimum rates of pay
- France, Germany: one-off payments (e.g. Christmas bonus/holiday bonus) for the period (e.g. month) in which they are due and paid to the posted workers
- France: productivity bonuses provided that they constitute a predictable component of pay
- France: increments compensating conditions of work such as night or dangerous/hazardous work
- France: a per diem/ flat rate compensation for working abroad as long as this does not amount to reimbursement of expenses, but serves other purposes such as compensating inconveniences arising from posting and residing away from home.

Other payments and advantages reported in the Member States that are typically *not* accepted for the calculation of whether minimum rates of pay have been reached include:

- Belgium: payments made in connection with costs that are not really necessary or are linked with the situation of the posted worker rather than with their work (e.g. contributions towards television, internet, etc.)
- France: social protection related advantages, such as premiums for supplementary health coverage
- France: overtime increments and incentive bonuses that bare no direct relation with work provision.

Finally, based on the available information, it is possible to identify a number of potential misapplications of the rules relating to minimum rates of pay:

- Sending companies may include unreasonably high expenses to housing and transportation as a part of the allowances specific to the posting (e.g. Denmark, Belgium);
- Sending companies may use as a reference the statutory minimum wage instead of the sectoral (national and/or regional) applicable collective agreements (e.g. France)
- Wages are paid in cash and accounts are not created (Germany)
- Workers' social rights, in particular pensions or unemployment insurance, are withheld (Germany)

As regards Member States that are primarily sending Member States (Poland, Romania) the wages for posted workers in Poland and Romania are considerably higher than those received by domestic workers and, accordingly, the employers do not normally have to seek recourse to a specific posting allowance to reach the Polish/Romanian minimum rates of pay, although such recourse may in principle be available (cf. Table 3-11 above).

3.2.2 The sending employers' position

For companies established in sending countries with high minimum wages (e.g. Belgium, Germany, Denmark, France, the Netherlands, Sweden) the question of granting the minimum rates of pay of the host country is often not relevant and there is little information available on compliance. Where a gap exists, it is covered by a differential payment taking the form of a specific posting allowance (e.g. France: "expatriation allowance"; Romania: including "external diurnal", Italy: "specific posting allowance").

In **France** the gap is covered by an increment taking the form of a specific posting allowance usually called expatriation allowance. The expatriation allowance covers the difference between the cost of living in France and that of the host Member State, as well as compensation for the discomfort caused by the workers' displacement during posting. There is, however, no information available on the individual elements to be applied as part of the allowance.

Usually, in case of private employers, workers posted from **Romania** receive a wage, which amounts at least to the legal minimum wage in Romania, and a posting allowance, including external per diem (diurnal), to reach the minimum rates of pay in the host Member State. The per diem is set to cover the transport and accommodation expenses and is calculated using 'the posting and delegation allowance' for state employees as a benchmark. The per diem amount may not exceed 2.5 times the allowance granted to public institutions employees. Currently, the upper limit set for public institutions for EU countries is 35 EUR/day. Accordingly, a private company may grant external diurnal up to 87.5 EUR/day (35x2.5). This amount is not subject to tax and social security contributions. In contrast, the allowance paid to workers during posting which exceeds 2.5 times the legal limit established for employees of public institutions is subject to wage tax and included in the monthly calculation basis of social compulsory contributions. To overcome the difficulties related to the expenditure accounts, the daily allowance is determined independently by the company and expenses (travel, posting and transfers) are recorded in a separate account. The rules described above are identical for cases of domestic travel/posting and travel/posting abroad and are fully complied with by Romanian employers.

Since the level of daily allowance is determined independently by the employers, there is no information available as regards the level of the allowance. Employers' representatives in the construction sector have nonetheless stated that Romanian employers must provide remuneration that provides sufficient financial motivation for workers in order for them to stay employed for a Romanian company and to be posted abroad. This is because wages for skilled workers in the construction sector are usually considerably higher than the minimum wage while, at the same time, the construction sector suffers shortages in the supply of skilled workers.

In **Italy**, the National Collective Bargaining Agreements (NCBAs) may provide for specific indemnities to be paid to the workers in the case of posting. Where provisions to this effect are lacking in the NCBA, the posting employer may also apply their own policy on

international posting, if any, or agree with the posted workers for a specific posting allowance (e.g. Italy).

3.3 How do the differences in the definition of the minimum rates of pay impact income levels of posted workers?

Regarding the impact of differences in the definition of the minimum rates of pay (i.e. in the context of general or sector-related basic rates) on the income of posted workers, most of the stakeholders were not able to provide any information because as outlined elsewhere in this report, there is no information about the actual income of posted workers.

Having said this, and based on the experience of sector-level social partners as well as monitoring and control authorities, some general observations have been made that it is important highlight here.

- Generally, universal minimum wages, i.e. applicable to every worker irrespective the sector, manual or non-manual, seem to be the main reference of the actual rate of pay posted workers receive.
- If minimum rates of pay are defined at sectoral level by collective agreements that are applicable to posted workers, stakeholders often stated that the basic wage level is taken as a reference and that further pay-elements (e.g. the classification in higher wage groups, overtime rates, bonuses, further allowances) often are seen as add-ons for domestic workers – either because sending companies are not aware of the legal obligations (as mentioned for example in the French country report) or because sending companies know that the posted worker is not aware of this.
- From the interviews it has been also found that the correct application of rules and obligations to include all relevant elements of pay in the minimum rates of pay in all sectors is rather the exception than the rule (see again the report on France but also the German report on evidence from the construction sector).
- A further result of the stakeholders' interviews at sectoral level was that the actual gap between (sectoral) average wage levels in the sending countries and the wage level in the receiving country is very important. The higher this gap, the more unlikely it is that a posted worker would also receive the minimum rates of pay that should be paid according to the host country's regulation. This correlation has been highlighted particularly strongly with regard to the construction sector, where the average hourly wage gaps between countries are huge as shown in our report and reported by stakeholders. At least with a view on this sector, we also learned that rather the average wage level plus an additional component (allowances, per diem, etc.) in the sending country is the major reference point for sending companies as well as workers and not the minimum rates of pay of the hosting country.

With a view on these results, the following causalities and correlations seem to be crucial with regard to the minimum rates of pay and their impact on the income of posted workers. From the host countries' perspective, the employment of posted workers is mainly driven by wage-advantages (in particular in those sectors that are most relevant in terms of the number of posted workers) and thus sending companies compete mainly on the basis of wage levels. Both hosting and sending companies have a strong interest

in 'competitive' wage expenditures. As the national analyses shows, general and sectoral minimum wages in this context function as a bottom-line of reference.

This system works as long as there is a sufficient supply of labour, i.e. workers in sending countries that are willing to become a posted worker. For this the main motivation is to achieve an income that is higher than that in their home country and compensates for the disadvantages linked to be a posted worker. Thus, for posted workers the expectation is that the achieved wage income would be somewhere between the average wage level in the own country and the – insofar they are aware of this – the minimum rate of pay in the receiving country. With view on this awareness and in particular the awareness of MRPs also as arising from collective agreements at sector level, a strong involvement of social partners and information campaigns by public authorities matter a lot (as we found for example in relation to the construction sector where both the presence and joint interests of unions and employer organisations as well as controlling bodies are stronger than in the other sectors covered by our study).

3.4 Conclusion

At EU level, there are two categories of obstacles when it comes to the minimum rates of pay. Firstly, it is not clear neither in the Directive nor in the CJEU case-law if it has the same meaning (and therefore the same scope) from the perspective of the host country (which elements of remuneration are counted for the determination of the minimum rates of pay of the host country) and from the sending perspective (which payments made to posted workers by their employers can be considered for the purposes of assessing compliance with the host country minimum rates of pay). A table shows the ambiguity at EU level (see Table A, General Introduction). Secondly, the Directive and the existing case-law are far from dealing with all the possible elements of remuneration. Only a few of them have been subject to the interpretation of the CJEU. Therefore, in many concrete cases at national level, it remains challenging to evaluate whether an element of remuneration is classified by the host country as a constituent element of the minimum rates of pay – and for sending employers to evaluate which elements of remuneration actually paid to the posted workers are taken into account for the calculation of the minimum rates of pay of the host country. The doubts are increased by the circumstance that some elements of remuneration provided by the host country presuppose a long-lasting employment relationship, to such an extent that it is difficult to conceive their application in situations of cross-border posting.

The many uncertainties surrounding the solutions at EU level have a direct impact on the national rules. It is not surprising since similar problems exist in national law when it comes to determining the minimum wage due to a domestic worker. Few national instruments (law or collective agreements) provide specific rules on the minimum rates of pay due to posted workers. The interviews carried out by national experts have confirmed that the stakeholders do not always distinguish the host country and the sending perspective. Another source of misunderstanding derives from the neighbouring expressions of "minimum wage" and "minimum rates of pay". Stakeholders have a tendency to consider them as being equivalent.

If we look at the results from an instrumental point of view (statutory *versus* collective agreements), the impression is that social partners are more likely to address the matter of the minimum rates of pay than the law. The analysis of the four sectors indicates that there are no transversal solutions between collective agreements whether we look at the

results from a national perspective (all sectoral agreements of one country) or from a sectoral perspective (collective agreements of one sector for all countries). This observation is also the consequence of the specificities of each sector.

Looking at the constituent elements of the minimum rates of pay, there is a narrow area of well-settled solutions: **the minimum rates of pay refer to the gross salary; they include overtime rates.** These are the most convergent solutions. They could be qualified as the *core* components of the minimum rates of pay. As also illustrated in Tables 3-10 and 3-11 (see below), there are more blurry areas. Depending on countries and/or sectors the classification, mobility-related costs, bonuses, holiday pay, social protection advantages are/are not constituent elements of the minimum rates of pay. It is not unusual to find that there is no tangible solution for these elements of remuneration. The status of bonuses and supplements is probably one of the key issues: it seems impossible to present any trend.

Based on the information collected in the studied Member States Tables 3-10 and 3-11 provide a comparative overview of the extent to which different wage elements are included in the concept of minimum rates of pay¹⁷⁹. The tables provide a summarised – and thus to a large degree simplified – overview of the main wage elements in the Member States and, accordingly, should be interpreted with caution and with due regard to the more detailed analysis of the minimum rates of pay as presented above. Since a number of sectoral differences have been reported in the Member States, the summary results are presented separately for the construction sector – where most detailed information on the constituent elements of minimum rates of pay is available – (Table 3-9) and for the remaining sectors (Table 3-10).

The tables make use of the following colour code: **green** indicates the elements included in the minimum rates of pay for posted workers, **orange** indicates the elements excluded and **grey** indicates those elements that are in the grey zone, i.e. those elements where no tangible solution can be identified in the Member State. For Table 3-10 the colour is chosen to match the situation in the majority of the sectors subject to the detailed analysis.

¹⁷⁹ For more detailed information, see the national reports in Annex.

Table 3-10 Summary of the main wage components (construction)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Employee classification								(1)	
Overtime rates									
Bonus related to working conditions (general)									
Bonus for work equipment expenses									
Bonus for hard work									
Bonus for specific working time									
Mobility related payments					not relevant			(2)	
Holiday pay									
Other holiday periods									
Occupational social security					not relevant				

Note: ⁽¹⁾ Classification is part of minimum wage in the case of employees in the public sectors. In the private sector, seniority bonus is the result of direct negotiation between employer and employee. Accordingly, classification is an optional right and, as such, does not form part of the basic salary.

⁽²⁾ Only if their value is in the limit of 2.5 times the allowance granted to public institution employees.

Table 3-11 Summary of the main wage components (all sectors)

	BE	DE	DK	FR	IT	NL	PL	RO	SE
Employee classification		(+) construction, TWA and health and care services	(+) construction and road transport					(1)	(+) construction and road transport
Overtime rates		not relevant							
Bonus related to working conditions (general)	(+) construction, (?) other sectors	(+) construction	(+) construction and road transport			(+) construction, road transport sector and health and care services, (?) TWA			
Bonus for work equipment expenses		(+) construction				(+) construction, (?)TWA, (-) road transport and health and care services			
Bonus for hard work		(+construction)				(+) construction, (?) TWA, (-) road transport and health and care services			(+) construction
Bonus for specific working time		(+construction)				(?) in temporary work agencies (+) all other sectors			
Mobility related payments					not relevant	(+) construction and road transport, (-) health and care, (?) TWA		(2)	(+) construction and road transport, (?) health and care and TWA
Holiday pay						(+) construction, (-) in health and care and TWA			
Other holiday periods		(+) construction				(+) construction, (-) TWA and health and care			
Occupational social security			(+) road transport (partly), (-) construction		not relevant				

Note: (+) included in the specific sector, (-) excluded in the specific sector, (?) unclear in the specific sector.

⁽¹⁾ Classification is part of minimum wage in the case of employees in the public sectors. In the private sector, seniority bonus is the result of direct negotiation between employer and employee.

⁽²⁾ Only if their value is in the limit of 2.5 times the allowance granted to public institution employees.

4. CONCLUSION

In the introduction to the present report, under 'Purpose and scope of the study', we listed the different research questions to be tackled by the study. As explained, these can be divided into two main groups, one pertaining to wage-setting mechanisms in relation to posting (corresponding to chapter 2 of the report) and the other dealing with the interpretation of the concept of minimum rates of pay (cf. chapter 3).

In the following lines, and based on the research carried out at national and central level, the replies to these study questions will be summarised (accompanied by an indication of the relevant (sub-)section where the matter is dealt with in extenso).

Wage-setting mechanisms and posting (chapter 2)

Mapping of wage-setting mechanisms (sections 2.1 and 2.3)

The detailed analyses carried out for the nine focus countries shows that wage-setting mechanisms and key characteristics of wage-setting practices vary significantly between countries. Actually, the sample of countries is well-chosen and may be regarded as the 'EU-28 in a nutshell' when it comes, for example, to varieties with regard to the dominant level of wage bargaining, the degree of bargaining coordination, bargaining coverage, extension practices and the membership strength of employer and trade union organisations.

When it comes to sectoral wage-setting, the study shows (as documented in various parts of the report) that these are obviously determined by general patterns of wage-setting practice and systems in the national context. However, at the same time sectoral wage-setting is influenced by additional factors such as the specific economic and employment context, industrial relations within the sector, the existence and bargaining strength of sectoral social partner organisations, etc. These framework conditions not only have a significant influence on wage levels but also on the coverage of collective bargaining, minimum rates of pay and further aspects regarding the terms and conditions of employment.

Impact of differences in wage-setting mechanisms on minimum wage levels and coverage (sub-sections 2.3.4 and 2.3.5; section 2.4)

The study finds that it is not feasible to establish significant statistical relationships between wage-setting mechanisms and the actual *levels of the minimum wages* on the basis of information from the nine focus countries. This is not least because the levels of the minimum wages are determined by many other factors, such as the costs of living and overall wage levels in general. Hence, our analysis shows that in general the higher the minimum wage, the higher the overall wage level in the country.

There are, however, some differences in the ratio of the minimum wage level in the overall wage level. In the older Member States (Belgium, Denmark, France, Germany, Italy, the Netherlands and Sweden) minimum wages amount to around 50 per cent of overall wages. The ratio is with 73.3 per cent particularly high in Italy. This is, however, partly a result of the fact that the minimum wage rate used in the calculation is an estimate based on a sample of sectoral minimum wages – as Italy does not have a universal minimum wage – which tends to be higher than universal minimum wages. This being said, the ratio in Denmark – where the calculation is also based on data for

sectoral minimum wages – is with 56.5 per cent only slightly higher than the average. A reason for this lower ratio, compared with Italy, is assessed to be the relatively even wage structure in Denmark. For the newer Member States, Poland and Romania, it is notable that while they have the lowest average wages, they have relatively even lower minimum wages leading to ratios of around 30 per cent of overall wages.

Our findings are also supported in the, albeit limited, literature. For example, Boeri (2012) shows that a minimum wage set by the government in the absence of consultation with social partners is generally lower than the wage floor set after formal consultation¹⁸⁰, and Kampelmann et al. (2013) found that not only collectively negotiated minimum wages lead to higher wage levels compared to universal minimum wages but also that there is a positive correlation between wage rates and collective bargaining coverage¹⁸¹.

With regard to the impact of the differences in wage-setting mechanisms on *minimum wage coverage rates*, the study finds that, for the workforce as a whole, the share of workers earning less than 105 per cent of the minimum wage – which can be argued to be the share that must be under observation regarding compliance with minimum rates of pay - differs significantly. Another indicator discussed in the study has been the share of low-pay workers (i.e. earning less than two thirds of the medium hourly earnings). Here, comparative figures also indicate a significant gap between countries, ranging from 2.5 per cent in Sweden to more than a quarter in Poland and Romania.

For posted workers specifically, the study acknowledges that there are no official statistics on actual earnings of posted workers, nor was it feasible for the stakeholders interviewed in the focus countries to point to good sources to inform on this issue. However, we found indications of posted workers earning low wages or at least lower wages than the comparable local workers in the older Member States. While foreign companies which sign Danish collective agreements pay their posted workers accordingly, many companies do not sign such agreements and surveys reveal that they do offer their workers lower pay on average. In the Netherlands, posted workers subject to expiring generally binding collective agreements may only be entitled to the universal minimum wage. Hence, for these Member States, it can be assumed that the average earnings of posted workers lies somewhere in between the minimum wages and the respective average sectoral wages.

Furthermore, from the receiving country perspective, posted construction and transport workers are pointed out as being particularly subject to lower wages than their local counterparts. In contrast, the situation with regards to temporary agency work as well as health care seems to be more differentiated as here not only (low) cost-related motivations but also other factors (e.g. shortage of qualified labour) are important driving factors in some cases. In contrast, workers posted to the newer Member States, Poland and Romania, are assessed to be relatively highly qualified compared to the average local workers, and so they do in general earn above the average local wages. This appears to be case for all four sectors analysed. Hence, compliance with minimum wage requirements will almost never be an issue.

¹⁸⁰ T. Boeri, "Setting the minimum wage", *Labour Economics* 2012, 19(3).

¹⁸¹ S. Kampelmann, A. Garnero and F. Rycx, *Minimum wages in Europe: does the diversity of systems lead to a diversity of outcomes?*, 2013, etui report 128.

Italian stakeholders suggest that the mere fact that service providers using posted workers are able to offer lower prices is evidence of lower labour costs. The Danish employers' organisations also provide evidence via surveys, mainly covering the construction sector that posted workers on average earn 10-15 per cent less than local workers. Similar indications have been provided by Dutch, French, Swedish and Danish stakeholders. In Germany, the relatively lower pay to posted workers is actually formalised by classifying all posted workers, irrespective of their professional qualification, as belonging to the lowest minimum wage group. In other words, German workers with comparable qualifications to the posted workers receive higher wages than the posted workers (if they do not belong to the lowest wage group). In turn and as already described above, workers posted to Poland and Romania are assessed to be relatively highly qualified compared to the average local workers, and so they do in general earn above the average local wages.

Trends in collective bargaining (section 2.2)

With regard to longer-term structural trends, our study confirmed that in particular in those countries where multi-level systems of collective bargaining and wage-setting exist, the lower company level has gained a stronger influence on wage-setting. A further indicator of this decentralisation and stronger flexibility within collective bargaining are various rules of opting-out or deviating from national agreements.

With regard to this trend, it is important to take into account a fundamental difference between systems of wage-setting, both with regard to countries as a whole and as regards sectoral contexts: in the Nordic countries and Western Europe, multi-level bargaining is still the dominant practice, while in the Central and Eastern European region there was never a strong sectoral or national level of bargaining. Thus 'decentralisation' mainly is happening in Western Europe. Such varieties also exist with regard to sectors. For example, in sectors such as transport and care there is a much stronger fragmentation and decentralised pattern of wage-setting compared to the stronger coordination and centralisation in the sectors of construction and agency work.

Impact of an extension of the instruments available for determining the terms of employment of posted workers (section 2.5)

Regarding a possible extension of the instruments available for determining the terms of employment, our study found that the impact of an extension would be quite marginal and less relevant for those countries that only have a universal system of minimum wage setting as – due to the absence of sectoral or regional level bargaining – no alternative instruments of determining the terms of employment exist outside labour law. In that regard those countries where terms of employment and minimum wage-setting is determined by collective bargaining, the situation is different and various scenarios exist that would have a significant effect. According to stakeholder views, an extension of the hard-core to further instruments (e.g. company-wide collective agreements, inclusion of further collectively-agreed provisions) would not have an effect on the number of posted workers covered in the respective countries but – depending also on the specific sector – significantly affect the minimum rates of pay and protection of posted workers.

With regards possible administrative consequences, additional costs for sending companies and the reduction of displacement effects in hosting countries, the assessments by stakeholders varied strongly and reflect the current situation that differs significantly between sectors. While trade union representatives took the position that such an extension would support the principle of equal treatment of workers at the

company level (which by the way is an obligation already in the temporary agency work sector through Directive 2008/104/EC on Temporary Agency Work), employer organisations stressed that any further extension would increase the administrative burden, costs for sending and receiving companies and would add to the already strong problems in the field of monitoring and controlling the implementation and enforcement of rules and obligations. Stakeholders from public administrations and employer organisation in the important sending countries of our study (i.e. Poland and Romania) have also highlighted that a further extension of the 'hard-core' may not only increase the costs for sending companies but may also result in situations of 'unfair competition', i.e. higher wage costs for posted workers (due to posting-related expenses) than for domestic workers.

Apart from these differences in assessment, a quite important finding of the study, however, has been a strong consensus of stakeholders across countries and affiliations that the current challenges arising in the field of posting of workers are not resulting from the more or less narrow definition of instruments to determine terms of employment but from the poor enforcement, lack of information on existing rules (as highlighted by stakeholders in Poland and Romania) and 'creative' ways of circumventing existing rules in regard to determining and actually matching the requirements of employment terms and conditions. Here, the study also found significant sector-related differences in enforcement, e.g. massive problems in the road transport sector.

The definition of the concept of 'minimum rates of pay' (chapter 3)

Mapping of minimum rates of pay (sections 3.1 and 3.2)

The report shows that the notion of the minimum rates of pay is unclear. Few national instruments provide specific rules for posted workers. Confusion between the neighbouring expressions of 'minimum wage' (national concept) and 'minimum rates of pay' (EU concept) is commonly encountered. Furthermore, the distinction between both relevant perspectives is not consistently made by the countries nor for that matter by the CJEU; in particular, the division of the host country perspective, dealing with the establishment of the components of the minimum rates of pay of the host country, and the sending perspective, concerned with the components paid by posting employers and considered or not by the relevant host country stakeholders for the purposes of assessing compliance with the host country's minimum pay rates, is not always clear-cut.

It follows that there is only a narrow area of well-settled solutions with regard to the concept of 'minimum rates of pay': it refers to the gross salary; and it includes overtime rates. There is no tangible solution in other cases. From an instrumental point of view (statutory versus collective agreements), social partners are more likely to have addressed the matter of the constituent minimum rates of pay than the legislature. Allowances specific to the posting are a commonly applied instrument when it comes to topping up posted workers' remuneration in view of attaining the host country's minimum rates of pay. Actual expenses are usually excluded for the calculation of the host country's minimum rates of pay.

Constituent elements of a 'social protection nature' (sub-sections 3.1.4 and 3.1.6)

With regard to the constituent elements in the notion of minimum rates of pay that have a 'social protection nature', regulations at national level reflect the solutions set out in the Posting Directive and by the CJEU (see section 3.1.6). Statutory rules usually exclude

occupational social security advantages from the scope of the minimum rates of pay. This remark is also true at collective-agreement level. Still, the situation is less homogeneous than it seems. Some instruments (law/collective agreement) may not explicitly exclude supplementary occupational retirement pension schemes from the scope of the posted workers' rights. Furthermore, not all countries consider that occupational social security advantages alter the relation between the worker's service and consideration provided by the employer – which is a criterion used by the CJEU to deny classification as a constituent element of the minimum pay rates.

For mobility-related payments such as accommodation allowances, Table 3-6 underlines the absence of an overall trend. At statutory level, these payments are from time to time a component of the minimum rates of pay, but at other times they are not, and sometimes the solution is unclear. At collective agreement level, the same observation is made; there can be contradictions between sectoral agreements of one country. As various sectors have their own features, differences are, however, more understandable at this level.

Impact of differences in the definition on posted workers' income levels (section 3.3)

Regarding the question as to the impact of the differences in the definition of the minimum rates of pay on the income levels of posted workers, we cannot avoid reiterating the lack of official and reliable quantitative data on the earnings levels of posted workers. Moreover, most of the stakeholders were not able to provide useful information in this respect. However, based on the experience of sector-level social partners as well as of national authorities, it appears from the host countries perspective that the employment of posted workers is mainly driven by wage-advantages: sending companies compete mainly on the basis of wage levels. Both hosting and sending companies have a strong interest in 'competitive' wage expenditures. As the national analysis reveals, general and sectoral minimum wages in this context function as a bottom-line of reference. This system works as long as there is a sufficient supply of labour, i.e. workers in sending countries who are willing to be posted. For these workers the main motivation is to reach an income higher than that in their home country which compensates for the disadvantages linked to the posting. Therefore, the expectation is that the actual wage would be somewhere between the average wage level in the home country and the – insofar they are aware of this – the minimum rate of pay in the receiving country.

Concluding remarks

Firstly, with regard to (minimum) wages in relation to posting, the absence of (accurate) data makes it sometimes difficult to draw firm conclusions. (Even consistent) assessments by stakeholders, anecdotal evidence and intuitive analysis cannot entirely make up for the lack of objective and reliable quantitative data. For some study questions, in particular those involving a quantitative assessment, the replies had to be formulated with more caution and reserve than we would have liked. Prospectively, there is a real need for dedicated statistical information relating to the earnings levels for posted workers and, more in general, to posting as such.

Secondly, stakeholders share a common concern over two aspects of the Posting Directive, i.e. the difficulty to understand correctly the definition and mechanism of the minimum rates of pay, and the deficient application of the existing rules. These two remarks deal with the implementation of the Posting Directive's principles and with their

enforcement, respectively. For the latter source of concern, the Enforcement Directive (Directive 2014/67/EU) should address some of the problems encountered in practice once it will be transposed into the legal orders of the 28 Member States. For the former, the response may depend firstly on the initiative that will be taken in relation to the Posting Directive in the framework of the Commission's forthcoming Labour Mobility Package – which the present study feeds into.

As a final remark, it should be acknowledged that issues relating to minimum wages are but one of multiple, often interrelated problems associated with the posting of workers. Other problematic or even fraudulent practices and phenomena in relation to posting have gained importance in recent years, notably the setting up of letter-box subsidiarities; all kinds of schemes and constructions involving intermediaries and characterised by triangular relations; and bogus self-employment. Other practices may be expected to gain importance in the future, such as third-country posting.

ANNEXES

1. Nine country reports (separate annex)
2. List of interviewees
3. List of relevant publications
4. National tables on data collection (separate annex)

ANNEX 1. Nine country reports (separate annex)

ANNEX 2. List of interviewees

	First Name, Last Name	Name of organisation	Type of Organisation	Sector	Date interview	Method of interview
EU	Maxime Cerutti / Magdalena Bober	BusinessEurope	employers' organisation	cross-sectoral	31-Jul	face-to-face
	S�everine Picard	ETUC	employees' organisation	cross-sectoral	10-Aug	face-to-face
	Werner Buelen	European Federation of Building and Woodworkers (EFBWW)	employees' organisation	construction	03-Jul	face-to-face
	Domenico Campogrande	European Construction Industry Federation (FIEC)	industry federation	construction		declined (with reference to national affiliated organisations)
	Cristina Tilling / Roberto Parrillo	European Transport Workers' Federation (ETF)	employees' organisation	road transport	17-Aug	face-to-face
	Richard Pond	European Federation of Public Service Unions	employees' organisation	health and care services		declined (posting not being an issue they addressed)
	Emilie Sourdoire / Tjitte Alkema	European Hospital and Healthcare Employers' Association (HOSPEEM)	industry federation	health and care services	08-Jul	phone
	Denis Pennel	European Confederation of Private Employment Services (Eurociett)	industry federation	temporary work agencies	28-Jul + 27 or 28-Aug	phone
BE	Philippe Van Den Broeck, Hilaire Willems	Algemene Directie Toezicht op de Sociale Wetten (General Direction	inspection service	cross-sectoral	30-Jun, 18-Sep	face-to-face, phone

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

		Monitoring Social Laws), Ministry of Employment, Labour and Social Dialogue				
Jean-Pierre Waeytens	Bouwunie	employers' organisation	construction	09-Jul	face-to-face	
Gabriel Delporte	Confederatie Bouw	employers' organisation	construction	29-Jun	face-to-face	
Marc Van Engeland	Constructiv FBZ - FSE	paritarian social fund	construction	8-Jul, 16-Sep	phone, e-mail	
Fabrice Meeuw / Tom Deleu	ACV Bouw-Industrie & Energie	trade union	construction	07-Jul	face-to-face	
Tom Peeters	BTB ABVV	trade union	road transport	09-Jul	face-to-face	
Jan Sannen	ACV Transcom	trade union	road transport	26-Jul	face-to-face	
Lode Verkinderen / Evy Van Der Paelt	Transport & Logistiek Vlaanderen	employers' organisation	road transport	05-Aug	face-to-face	
Philippe Degraef	Febetra	employers' organisation	road transport	02-Jul	face-to-face	
Nancy Pauwels	LBC-NVK	trade union	health and care services	no interview, posting not being regarded as an issue of concern		
Sylvie Slangen	UNISOC	employers' organisation	health and care services	no interview, posting not being regarded as an issue of concern		
Miek Peeters / Debbie Verschueren	Zorgnet Icuro	employers' organisation	health and care services	no interview, posting not being regarded as an issue of concern		
Anne Cattelain / Charlotte Dekeersmaeker	Federgon	employers' organisation	temporary work agencies	06-Jul	in writing	
Bruno De Pauw / Ingrid Verbeeck	National Social Security Office (RSZ/ONSS)	competent institution	cross-sectoral	05-Aug	face-to-face	
Michèle Claus	Verbond van Belgische Ondernemingen / Fédération des Entreprises belges	employers' organisation	cross-sectoral	07-Jul	face-to-face	

DE	Astrid Schneider-Sievers (Head of Division International Labour Law), Andreas Zeus (Posting, targeted review), Jürgen Kolb (empirical questions, statistical data), Oliver Reisinger (Posting, International Cooperation), Anja Schröder (EU law)*	Federal Ministry of Labour	Public authority	cross-sectoral	06-Aug	face-to-face/group
	Gabriele Eustrup, Stefan Scholz	National Liaison Office for posted workers / Federal Ministry of Finance	government / inspection	cross-sectoral	16-Jul	face-to-face
	Christina Breit (Senior Adviser EU), Andre Müller (Head of Department CB Unit), John Schilling (Labour Law)	Bundesvereinigung der Deutschen Arbeitgeberverbände	employers' organisation	cross-sectoral	29-Jul	face-to-face
	Johannes Jakob , Helga Nielbock, Alexandra Kramer	DGB	trade union	cross-sectoral	29-Jul	phone
	Jan Wulfetange , Head of Department, Legal and international affairs	Bundesverband Zeitarbeit	employers' organisation	temporary work agencies	05-Aug	phone
	Verena Dohna-Jäger , Federal Secretary	IG Metall	trade union	temporary work agencies	13-Aug	written reply/email
	Thomas Greiner(President), Steffen Ritter (Press spokesman), Friedhelm Fiedler (managing director, Victor's Unternehmensgruppe)	Arbeitgeberverband Pflege	employers' organisation	health and care services	03-Aug	face-to-face
	Carla Dietrich, Jens	ver.di	trade union	health and care services,	17-Jul	phone

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

	Schubert, Anne Karrass			temp work agencies, road transport		
	Frank Schmidt-Hullmann	IG BAU	trade union	construction	10-Jul	phone
	Ines Wagner	University Duisburg-Essen	Expert	cross-sectoral	14-Jul	phone
	Claudia Weinkopf	Minimum Wage Commission	Expert	cross-sectoral	16-Jul	phone
	Niels Beuck (EU Affairs), Andreas Stommel (Labour Law, posting)	DSLVL Deutscher Speditions- und Logistikverband	employers' organisation	road transport	27-Aug	face-to-face
	**	Hauptverband der Deutschen Bauindustrie (HDB)	employers' organisation	construction	26-Aug	written statement
		Zentralverband Deutsches Baugewerbe (ZDB)	employers' organisation	construction	28-Aug	written statement
DK	Ane Lorentzen	LO - Hovedorganisation for fagforeninger	Central Organisation of Trade Unions	cross-sectoral	17-Jun	face-to-face
	Martin Steen Kabongo	DA - Dansk Arbejdsgiverforening	Central Danish Employers Association	cross-sectoral	25-Jun	face-to-face
	Kim Renee Busch	3F - Transportgruppen	Trade Union	road transport	26-Jun	face-to-face
	Arne Grevsen	3F - Den grønne gruppe	Trade Union	temporary work agencies (horticulture & agriculture)	17-Jun	face-to-face
	Ove Holm	DTL	Employees' organisation	road transport	02-Jun	face-to-face
	Jens Bjørn Poulsen	GLS-A	Employees' organisation	temporary work agencies (horticulture & agriculture)	24-Jul	phone
	Henriette Olofsen	3F - Privat Service, Hotel og Restauration	Trade Union	temporary work agencies (cleaning)	18-Jul	phone

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

	John Andersen	3F - Industrigruppen	Trade Union	temporary work agencies (industry)	18-Jul	phone
	Gunde Odgaard	BAT-kartellet	Central organisation of Trade Unions within the construction sector	construction	24-Jul	face-to-face
	Søren Lange	Dansk Byggeri	Central organisation of Employees' organisation within the construction sector	construction	01-Jul	face-to-face
	Ole Lund Jensen	Danske Regioner	Employees' organisation	health and care services	18-Jun	phone
FR	Florence Berthelot and Erwan Pומרoulie	Fédération nationale des transports Routiers (FNTR)	Employers' Organisation	road transport	10-Jun	phone
	Laurent David	Fédération nationale des chauffeurs routiers (FNCR)	Trade union	road transport	26-Jun	skype
	Chrystèle Akkaoui	DGT Ministry of Labour	Public authority	cross-sectoral	30-Jul	phone
	Eric Bayle	URACTI	Labour Inspection	cross-sectoral	01-Jul	phone
	Pascale Dessen	Fédération Française du Bâtiment (FFB)	Employers' Organisation	construction	25-Jun	phone
	Gilles Letort	Fédération Nationale des salariés de la Construction CGT	Trade union	construction	11-Jun	phone
	Mathilde Bonnichon et Norbert Katz	Professionnels de l'Interim, services et métiers de l'emploi (PRISME)	Employers' Organisation	temporary work agencies	10-Jul	phone
	Patrick Oster	Labour Inspection Lorraine	Labour Inspection	cross-sectoral	03-Jul	face-to-face
	Fabienne Muller	Institut du travail, Alsace	Research Institution	construction	29-Jun	phone
	Jean-Michel Crandal	Ministère de l'écologie, du développement durable	Public authority	road transport	03-Jul	phone

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

	Nathalie Couderette	FNTF Fédération nationale des Travaux publics	Employers' Organisation	construction	01-Jul	phone
	Jean-Michel Gillet	Fédération nationale des salariés de la Construction et du bois CFDT	Trade union	construction	01-Jul	phone
	Alain Wagmann	Union syndicale de l'Interim CGT	Trade union	temporary work agencies	30-Jun	phone
	Nancy Noël	TLF Union des entreprises de Transport de logistique	Employers' Organisation	road transport	10-Jul	phone
	Lionel de Taillac	Bureau de Liaison	Public authority	cross-sectoral	08-Jul	phone
	André Fadda	Union syndicale Multiprofessionnelle CGT	Trade union	temporary work agencies	26-Aug	phone
	Claire Perrault	FNAAFP /CSF	Employers' Organisation	health and care services	11-Sept	phone
IT	Danilo Papa	Ministry of Labour	Public Adm. /Inspection	cross-sectoral	July/Sep.	phone
	Irene Vecchioni	FORMATEMP	Paritarian - Vocational Training and Social Security Institutions	temporary work agencies	16-Jul	face-to-face
	Mauro Miracapillo	Casse Edili	Paritarian - Social Security Institutions	construction	16-Jul	phone
	Salvatore Barone/Rosario Strazzullo	CGIL	Trade union	cross-sectoral	15-Jul	phone
	Paolo Carraro/Francesco Lauria	CISL	Trade union	cross-sectoral	15-Jun	phone
	Guglielmo Loi	UIL	Trade union	cross-sectoral	09-Jul	face-to-face
	Pierangelo Albini	Confindustria	Employers' Organisation	cross-sectoral	Jul/Sept.	phone
	Stefano Di Niola	CNA	Employers' Organisation	construction	13-Jul	face-to-face
	Antonino Sgroi	INPS	Social Security Authority	cross-sectoral	8-Jul, 16-Sep	phone

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

	Elvira Massimiano	Confesercenti	Employers' Organisation	health and care services	8-Jul, 16-Sep	face-to-face
	Carlo Marignani	Legacoop	Employers' Organisation	road transport	15-Jul	phone
	Maurizio De Carli	CNA	Employers' Organisation	road transport	13-Jul	face-to-face
	Nevio Boscariol	ARIS	Employers' Organisation	health and care services	15-Jul	phone
NL	Wim van der Maas	Inspectie SZW	Inspection	public authority		written
	Erik Pentinga	FNV Bondgenoten	trade union	temporary work agencies	09-Jul	written/phone
	Mauricer Rojer	ABU (Manager Arbeidsvoorwaarden)	employers' association	temporary work agencies	08-Jul	written/phone
	Peter Kievit	TLN	employers' association	road transport	08-Jul	written/phone
	Egon Groen	FNV Transport en Logistiek	trade union	road transport	09-Jul	written/phone
	Jørgen Hulsmans	Bouwend Nederland	employers' association	construction	09-Jul	written/phone
	Bernet van Leeuwen	FNV Bouw	trade union	construction	07-Jul	written/phone
	Wim van der Hoorn	ABVAKABO	trade union	health and care services	08-Jul	written/phone
	Andre van Rijs / Mr. Beniers	Ministry SZW	ministry	cross-sectoral		no reply
	Joyce van Dongen	Bureau Naleving Bouwsector	social partner compliance office	construction /enforcement		no reply
	Martin Jukema	CNV	trade union	cross-sectoral		no reply
	Tjitte Alkema	NVZ	employers' association	health care/hospitals	phone	Posting Directive not relevant
PL	Tomasz Limon (director) / Adam Roszczyk (president of Gdansk construction cluster)	Pomerian employers	Employers' Organisation	construction/infrastructure	16/19-Jun (Limon); 29-Jun and 2-Jul (Roszczyk)	face-to-face & e-mail
	Michał Maksymium	Pomeranian Employers - Management Board	Employers' Organisation	road transport	18-Aug	face-to-face

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

	Jędrzejczak-Kułaga	Pomeranian Employers - Chairwoman of section	Employers' Organisation	health and care services	17-Jun	face-to-face
	Paweł Barton	Deputy of Marshal of the Pomeranian Province	Voivodship self- government	temporary work agencies	22-Jul	face-to-face
	Anna Szekalska	Deputy of Marshal of the Pomeranian Province	Voivodship self- government	health and care services	22-Jul	face-to-face
	Ryszard Trykosko	Gdańsk Municipal Investments Management Board Żaglowa 11	regional public investor	construction/infrastructure	18-Jun and 22-Jun	face-to-face
	Barbara Surdykowska	National Committee of NSZZ "Solidarność"	Trade union - national	cross-sectoral	25-Jun	face-to-face
	Andrzej Adamczyk / Robert Szewczyk	National Committee of NSZZ "Solidarność"	Trade union - national	cross-sectoral	29-Jun	face-to-face
	Sławonir Adamczyk /Andrzej Matla	National Committee of NSZZ "Solidarność"	Trade union - national	cross-sectoral	25-Jun	face-to-face
	Krzysztof Lisowski	District Labour Inspectorate	public administration in voivodship	cross-sectoral	17-Jul	in writing
RO	Mircea Oros	Romanian Association of Construction Entrepreneurs, ARACO	Employers' Organisation	construction	02-Jul	face-to-face
	Tiberiu Andrioaiei	Construction Employer's Organisation, PSC	Employers' Organisation	construction	09-Jul	face-to-face
	Roxana Ilie	UNTRR - National Union of Romanian Road Transporters - Radu Dinescu	Employers' Organisation	road transport		interview refused on the grounds that the Directive does not apply to transport sector
	Cristina Pasat	UGIR	Employers' Organisation	temporary work agencies	16-Sept	face-to-face
	Camelia Slivneanu	Romanian Association of Temporary Work Agents'	Employers' Organisation	temporary work agencies	26-Jul	face-to-face/in writing
	Radu Godeanu	UGIR	Employers' Organisation	cross-sectoral	26-Jul	face-to-face

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

	Gabriela Radu	Labour Inspection	Inspection Service	cross-sectoral	29-Jun	face-to-face
	Simona Neacsu	Labour Inspection	Inspection Service	cross-sectoral	29-Jun	face-to-face/in writing
		Ministry of Labour, Labour legislation	National administration	cross-sectoral	08-Jul	face-to-face
		Ministry of Labour, Wage directorate	National administration	cross-sectoral	06-Jul	in writing
		Ministry of Labour, European Affairs	National administration	cross-sectoral	08-Jul	face-to-face
		Department for social dialogue, Social partners	National administration	cross-sectoral	23-Jun	face-to-face
		Department for social dialogue, Statistics	National administration	cross-sectoral	23-Jun	face-to-face
		Department for social dialogue	National administration	cross-sectoral	11-Aug	in writing
		Ministry of Finance	National administration	cross-sectoral	23-Jun	face-to-face
	Dan Cristescu	Trade union "Familia"	Trade union	construction	19-Jun	face-to-face
		Trade union SANITAS	Trade union	health and care services	17-Aug	in writing
	Albu Ion	National Confederation Of Trade Unions Meridian	Trade union	cross-sectoral	20-Aug	in writing
SE	Sofie Rehnström	Swedish Trade Union Confederation	Trade union	cross-sectoral	1-Jul	face-to-face
	Hanna Byström	Bemanningsföretagen	Employers' organisation	temporary work agencies	22-Jun	face-to-face
	Mats Åkerlind	The Swedish Construction Federation (BI)	Employers' organisation	construction	22-Jun	face-to-face
	Torbjörn Hagelin	Swedish Building Workers Union	Trade union	construction	8-Jul	face-to-face

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

	Sofie Thörne	Swedish Association of Local Authorities and Regions	Employers' organisation	health and care services	5-Jun	phone
	Johan Mann	The Association of Private Care Providers	Employers organisation	health and care services	15-Jun	phone
	Marcel Carlstedt	Swedish Transport Workers Union	Trade union	road transport	8-Jul	face-to-face
	Mariella Roman	The Swedish Work Environment Authority	National public administration	cross-sector	15-Jun	phone, in writing
	John Ekberg	Swedish National Mediation Office	National public administration	cross-sector	15-Jun	phone
	Oskar Taxén	The Municipal Workers Union	Trade union	health and care services	15-Jun	phone
	Kent Ackholt	Swedish Trade Union Confederation	Trade union	cross-sector	22-Jun	face-to-face
	Ida Eklöf	Swedish Association of Health Professionals	Trade union	health and care services	30-Jun	phone
	Johanna Bång	Swedish Association of Health Professionals	Trade union	health and care services	25-Jun	phone, in writing
	Karin Söderberg	Ministry of labour	National public administration	cross-sectoral	2-Jul	phone, in writing
	Sören Öman	Utstationeringskommittén	Public inquiry on posting of workers	cross-sectoral	2-Jul	phone
	Sverker Rudeberg	Confederation of Swedish Enterprises	Employers' organisation	cross-sectoral	2-Jul	declined
	Anders Norberg	The Swedish Road Transport Employers' Association	Employers' organisation	road transport	8-Jul	phone
	<i>* names in bold for DE =</i>					

<i>those attending interviews or gathering written replies</i>						
<i>** missing interviewee names denote that the persons concerned wish to remain anonymous</i>						

ANNEX 3. List of relevant publications

EU

BISPINCK, R. and SCHULTEN, T., Sector-level bargaining and possibilities for deviations at company level: Germany, Dublin, European Foundation for the Improvement of Living and Working Conditions.

BOERI T., "Setting the minimum wage", *Labour Economics* 2012, 19(3), 281-290.

DG Employment, Social Affairs and Inclusion, Maximising the minimum: a review of minimum wage approaches and trends in European Member States, Thematic Paper, 2014.

European Commission, Revision of the legislative framework on the posting of workers in the context of provision of services, Impact Assessment, Brussels, SWD(2012) 63.

European Commission, Wage setting systems and wage developments, European Semester Thematic Fiche, Brussels, 2014,
http://ec.europa.eu/europe2020/pdf/themes/26_wage_settings.pdf

ETUI, Who earns minimum wages in Europe, New evidence based on household surveys, Report 124, 2012.

Eurofound, Pay in Europe in the 21st century, Dublin, 2014.

Eurofound, Changes to wage-setting mechanisms in the context of the crisis and the EU's new economic governance regime, Dublin, 2014.

Eurofound, Wages: A working conditions and industrial relations perspective, Background Paper, 2013.

Eurofound, Extension of collective bargaining agreements in the EU, Dublin, 2011.

Eurofound, Posted workers in the European Union, Dublin, 2010.

European Labour Law Network, Challenges of cross-border mobility, Thematic report under Contract No VC/2007/0591, 2008, 78 p.

GARNERO, A., KAMPELMANN, S. and RYCX, F., Minimum wage systems and earnings inequalities: Does institutional diversity matter?, IZA Discussion Paper No. 8419, August 2014, 32 p.

GRIMSHAW, D. (ed.), Minimum Wages, Pay Equity and Comparative Industrial Relations, Routledge, 2012, 272 p.

GRIMSHAW, D. and RUBERY, J., Minimum Wage Systems and Changing Industrial Relations in Europe, Comparative Report, prepared for the research project VS/2009/0159, 2010.

HASSEL, A, "The Paradox of Liberalization — Understanding Dualism and the Recovery of the German Political Economy", *British Journal of Industrial Relations* 2014, 52 (1), 57–81.

IDEA Consult, ECORYS Netherlands, Study on the economic and social effects associated with the phenomenon of posting of workers in the EU, Final report, VT/2009/062, 2011 (+ annexes).

ISMERI EUROPA, Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, Final Report, 2012.

KAMPELMANN, S., GARNERO, A. and RYCX, F., Minimum wages in Europe: does the diversity of systems lead to a diversity of outcomes?, 2013, *etui report* 128, 113 p.

MARX, I., MARCHAL, S. and NOLAN, B., Net Incomes of Minimum Wage Workers in the EU and the US, IZA Discussion Paper No. 6510, April 2012, 25 p.

OECD, Minimum wages after the crisis: Making them pay, 2015, 12 p.

PACOLET, J. and DE WISPELAERE, F., HIVA – KU Leuven, Posting of workers Report on A1 portable documents issued in 2012 and 2013, prepared under framework of Contract No VC/2013/0301, 2014.

PORTA, J. "Le salaire minimal, un instrument national pour lutter contre le dumping social?", *Le droit Ouvrier* 2015, 316 e.s.

SCHÖMANN, I and CLAUWAERT, S., The crisis and national labour law reforms: a mapping exercise, Country by Country analysis, *etui*, 2012.

SCHULTEN, T., Contours of a European Minimum Wage Policy, 2014, Friedrich Ebert Stiftung, 17 p. (2014a)

SCHULTEN, T., Minimum Wage Regimes in Europe...and What Germany Can Learn from them, 2014, Friedrich Ebert Stiftung, 18 p. (2014b)

SCHULTEN, T. et al., Pay and other social clauses in European public procurement, study commissioned by EPSU, Düsseldorf, 2012, 112 p.

VAUGHAN-WHITEHEAD, D. (ed), The minimum wage revisited in the enlarged EU, ILO, Geneva, 2010, 552 p.

VAN HOEK, A. and HOUWERZIJL, M., Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, 2011, commissioned by the European Commission's DG EMPL under Contract VC/2011/0096.

VAN HOEK, A. and HOUWERZIJL, M., Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, 2011, commissioned by the European Commission's DG EMPL under Contract VT/2009/0541.

NATIONAL¹⁸²

Belgium

Doctrine (books, articles/commentaries in reviews/journals)

BEERNAERT, J. and MAES, S., "LIMOSA onder de Europese loep Belgische controle-aspecten van detacheringen in het licht van het arrest dos Santos Palhota (*LIMOSA under European scrutiny: Belgian control aspects of postings in the light of the ruling in dos Santos Palhota*), Or. 2011, 5, 147-160.

BEERNAERT, J. and MAES, S., "Detacheren naar België: navigeren in woelige Europese wateren" (*Posting to Belgium: navigating in stormy European waters*), Or. 2010, 9, 221-239.

BLANPAIN, R., *Arbeidsmarktrecht*, Bruges, die Keure, 2011, 389 p.

DEMEULEMEESTER, S. "Verboden terbeschikkingstelling bij detachering naar België" (*Prohibited posting in case of cross-border posting to Belgium*), *Soc. Kron.* 2012, afl. 10, 495-499.

ELIAERTS, L., *Terbeschikkingstelling van werknemers en uitzendarbeid (Posting of workers and temporary work)*, Mechelen, Kluwer, 2014, 662 p.

FEENSTRA, S., "Detachering van werknemers in het kader van het verrichten van diensten – Het arbeidsrechtelijke kader – Richtlijn 96/71/EG" (*Posting of workers in the content of the provision of services – the labour law framework – Directive 96/71/EC*), in JORENS, Y., BUYSSE, B. 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, 227-314.

FILHON, G., "Ingénierie sociale et détachement européen" (*Social engineering and posting in Europe*), *Revue des affaires européennes* 2012, 1, 115-131.

GARNERO, A., KAMPELMANN, S. and RYCKX, F., *Sharp teeth or empty mouths? Revisiting the minimum wage bite with sectoral data*, Dulbea, ULB, 2013, 36 p.

JORENS, Y. and GILLIS, D., "De inspecteur in het Europa van de 21ste eeuw: Sisyphus of Hercules?" (*The inspector in 21st century Europe: Sisyphus or Hercules?*), in HUMBLET, P. and VAN DE WOESTEYNE, I., (eds.), *Sociaal en fiscaal recht: 'Elck Wat Wils'*, XXXIXste Postuniversitaire Cyclus Willy Delva, Mechelen, Kluwer, 2013, 181-282.

JORENS, Y., "Le détachement des travailleurs en droit européen" (*Posting of workers in European law*), *Journal de Droit européen* 2011, 89-95.

JORENS, Y., BUYSSE, B. et al., *Handboek Europese detachering en vrij verkeer van diensten: economisch wondermiddel of sociaal kerkhof? (Manual on posting in Europe*

¹⁸² The usual citation methods in the countries concerned were followed.

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ANNEX 4. National tables on data collection (separate annex)

