

## Translation

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### **Applicability of the Minimum Wage Act in the Transport Sector**

Dear Mr Dinescu,

Thank you for your letter addressed to Federal Minister of Labour and Social Affairs Andrea Nahles and dated 5 February 2015 in which you requested answers to several questions regarding the application of Germany's Minimum Wage Act. Thank you for your understanding that due to the large numbers of letters she receives, the Minister is unable to personally reply to all of them. She has consequently asked me to reply on her behalf. I would also like to use this opportunity to reply to your letter to Chancellor Angela Merkel dated 13 January 2015 as well.

The Minimum Wage Act established the first-ever general, blanket minimum wage in Germany. The introduction of a minimum wage was undertaken with the aim of ensuring adequate minimum protection for all workers who work in Germany. By passing the Minimum Wage Act, Germany also responded to international criticism, not least of all from other EU Member States. According to this criticism, not only does Germany allow low wages to be paid and thus distorts competition; in addition, employees of foreign enterprises are exploited in Germany. In order to counter this criticism, Germany attached great importance to ensuring that not just workers who are employed by German enterprises, but all persons who work in Germany are protected.

The fact that companies based in other countries that transport freight in Germany by road criticise the requirement that the minimum wage be applied to all persons working in Germany for employers based abroad is known here from corresponding submissions from your international umbrella organisation, the International Road Transport Union (IRU), which has expressly written on behalf of its members as well regarding this. The Parliamentary State Secretary in my Ministry, Ms Annette Kramme, has already replied in this connection.

In the current discussion regarding the question whether the new law is compatible with European Union law, I am convinced that the provisions of the Minimum Wage Act are compatible with European law. They serve a central public interest and pursue the legitimate objective of supporting the Single Market with flanking social measures. In light of the fact that these provisions protect workers, they should also be recognised in principle and implemented in practice in the transport sector.

At the same time, we have naturally noted that the application of the minimum wage, particularly to purely transit transport through Germany, the associated documentation requirements and possible penalties for violations have been cause for concern in neighbouring countries. The European Commission has meanwhile requested Germany to comment, in the course of a pilot process, on the compatibility of the Minimum Wage Act with European Union law in the transport sector, with particular regard given to two Regulations of the European Union from the transport sector. During this pilot process, Germany will seek an open and constructive dialogue with the Commission with the aim of clarifying the questions that have been raised.

Out of consideration for our neighbours we decided within the Federal Government in late January to provide, with immediate effect - and limited to the area of pure transit through Germany, an interim solution for the time until the issues arising under European law have been clarified. Under this interim solution, the checks performed by state agencies to monitor compliance with the Minimum Wage Act will be - limited to the area of pure transit through Germany - suspended, and proceedings for administrative offences pursuant to the Minimum Wage Act will not be instituted. In the event that proceedings have already been instituted, they will be discontinued. For the sake of completeness, I also want to make it clear here that the suspension does not apply to the area of cabotage transport or to cross-border road transport with loading or unloading in Germany. Further details are also available on the customs authorities' website ([www.zoll.de](http://www.zoll.de)).

You can find extensive information regarding the Minimum Wage Act and the resulting obligations in German, English and French on the customs authorities' website as well.

With regard to the individual questions raised in your letter dated 5 February, for which extensive information in German, English and French can also be found on the customs authorities' website, I can state the following:

### **Calculation of the minimum wage**

The system you describe of calculating wages in the form of a monthly wage is also common practice in many sectors in Germany. Payment of this type of set monthly wage will continue to be permissible under the Minimum Wage Act when it is ensured that the minimum wage is paid for the hours worked in Germany. You mention in this connection that there can be fluctuations in the level of the hourly wage simply due to variations in the actual number of workdays in a calendar month and consequently payment of a fixed monthly wage might be unlawful. Here, the following applies: Under Section 2 (2) of the Minimum Wage Act, an hour of actual work does not, as an exception, have to be paid by the prescribed due date for payment when the employee receives a set wage and the employer and employee have agreed in writing to keep a working hours account. In the view of the Federal Ministry of Labour and Social Affairs, this type of written agreement is also given when the employee and employer have formally agreed in writing on the payment of a set monthly wage. Fluctuations arising solely due to the differences in the number of workdays in the individual months can be balanced out with this provision. However, when an individual's employment ends, it must be ensured that any hours that have already been worked but not yet been paid are paid with the last wages. This could be particularly pertinent when the individual's employment ends during a month with a larger number of workdays.

Where you address the question of which elements of a worker's wages can be counted toward the minimum wage, your description of the legal situation is substantially correct. The guidelines you cite which are posted on the website of the German customs authorities are based on rulings of the European Court of Justice which Germany's Federal Labour Court adopts. Hence:

A daily allowance can be counted towards the minimum wage when it is paid **in addition to** the reimbursement of actual expenses that the employee incurs for transport and accommodation, that is to say, serves the purpose of compensating for disadvantages resulting from the fact that the worker is not at his place of residence and cannot perform his work in his usual environment, and the amount of the daily allowance depends on the country in which the worker is deployed, and the differences between Romania and Germany in the cost of living are offset in this way.

As I understand your comments, under Romanian law it is clear which of the employer's payments constitute reimbursement for expenses and which payments are supposed to compensate the general disadvantages arising from the work performed abroad. In the event that this is not the case and the employer pays an aggregate amount that is supposed to compensate the worker's actual expenses as well as the additional disadvantages arising from working abroad, the different purposes of the payment must be considered separately. The part that is attributable to expenses would first have to be subtracted and only the remaining amount may be counted toward the minimum wage to be paid. Further details regarding this calculation can be found on the website of Germany's customs authorities ([www.zoll.de](http://www.zoll.de)) in the section "Mindestlohn nach dem Mindestlohngesetz, Berechnung und Zahlung des Mindestlohns" ([http://www.zoll.de/DE/Fachthemen/Arbeit/Mindestarbeitsbedingungen/Mindestlohn-Mindestlohngesetz/mindestlohn-mindestlohngesetz\\_node.htm](http://www.zoll.de/DE/Fachthemen/Arbeit/Mindestarbeitsbedingungen/Mindestlohn-Mindestlohngesetz/mindestlohn-mindestlohngesetz_node.htm)).

#### **Requirement to provide documentation**

You correctly assume that employers who submit a duty roster for mobile employees using Form No. 0330307 must submit the documents needed to monitor compliance with the minimum wage only when requested to do so by the customs authorities. For the transport sector, this constitutes a considerable easing of the requirement to hold these documents ready in Germany that otherwise applies under the Minimum Wage Act.

As a rule, the customs authorities can request the following documents:

- **Employment contract** or the documents that contain the essential elements of the employment relationship (Council Directive on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, Official Journal of the European Communities No. L 288/32 from 18 October 1991),
- **Time-sheets,**
- **Payslips** and
- **Proof of payment of wages.**

The above-mentioned documents all correspond to the documents which may also be required under the European Directive 2014/67/EU of 15 May 2014 on the enforcement of the Directive concerning the posting of workers which the Member States must implement by June 2016.

I hope that the above information will help you to answer the questions from everyday practice that you raised.

Yours sincerely,

[signed: Astrid Schneider-Sievers]