

# **Study on the remuneration and payment of 'posting-related' expenses in selected EU Member States**



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# Table of Contents

<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>1. INTRODUCTION .....</b>	<b>3</b>
1.1. CONTEXT OF THE POSTING ALLOWANCE AND REIMBURSEMENT OF COSTS .....	3
1.2. LESSONS DRAWN FROM THE COMMISSION IMPLEMENTATION REPORT AND PURPOSE OF THE STUDY .....	5
<b>2. WHAT CAN WE LEARN FROM RECEIVING COUNTRIES?.....</b>	<b>6</b>
2.1. TRANPOSITION OF ARTICLE 3(1)(H) OF THE POSTING DIRECTIVE .....	7
2.2. ENFORCEMENT MEASURES OF THE RULES ON REIMBURSEMENT OF EXPENDITURE IN ACCORDANCE WITH ARTICLE 3(7) .....	9
2.3. DISTINCTION BETWEEN REMUNERATION, POSTING ALLOWANCE AND REIMBURSEMENT OF COSTS.....	10
2.3.1. <i>The assessment of the posting allowance's content .....</i>	10
2.3.2. <i>The assessment of a lump sum payment: remuneration or reimbursement of costs?.....</i>	12
2.3.3. <i>Conditions for triggering the presumption of Article 3(7) .....</i>	14
2.4. CONTROL OF THE REIMBURSEMENT OF COSTS PROVIDED IN ACCORDANCE TO THE LEGISLATION OF THE HOME MEMBER STATE .....	16
2.4.1. <i>Documents and records the employer must provide to the enforcement bodies .....</i>	16
2.4.2. <i>Proof of non-reimbursement of costs requirements in the home Member State.....</i>	17
2.4.3. <i>Consequences of infringements of the rules on posting allowance and reimbursement of costs .....</i>	18
2.5. PRACTICAL INFORMATION PROVIDED IN THE RECEIVING COUNTRY TO ENSURE CORRECT APPLICATION OF THE RULES ON REIMBURSEMENT OF EXPENDITURE .....	20
2.6. FOCUS ON TWO RECEIVING COUNTRIES: BELGIUM AND FINLAND .....	21
<b>3. WHAT CAN WE LEARN FROM SENDING COUNTRIES? .....</b>	<b>22</b>
3.1. ARE THERE RULES FOCUSING ON OUT-GOING POSTINGS IN THE CONSTRUCTION SECTOR? .....	23
3.2. DO SENDING COUNTRIES APPLY THE PROVISIONS CONTAINED IN ARTICLE 3(7) FOR POSTING TO ANOTHER COUNTRY?.....	23
3.3. IS THE RIGHT TO A POSTING ALLOWANCE DEFINED BY SENDING MEMBER STATE FOR WORKERS SENT TO ANOTHER MEMBER STATE? .....	24
3.4. DO SENDING COUNTRIES PROVIDE FOR THE REIMBURSEMENT OF POSTED WORKERS' EXPENSES?.....	25
3.5. WHAT FORM DOES THE REIMBURSEMENT OF POSTING-RELATED EXPENSES TAKE? .....	27
3.6. ENFORCEMENT PROCEDURES AND PRACTICAL IMPLEMENTATION OF ARTICLE 3(7) BY SENDING COUNTRIES FOR OUT-GOING POSTINGS .....	28
3.7. INFORMATION DUTIES.....	29
3.7.1 <i>Obligation for the sending employer to inform the posted worker on the remuneration and the posting allowance .....</i>	29
3.7.2 <i>Practical information to ensure correct application of Article 3(7) by sending employer .....</i>	29
<b>4 FINAL CONCLUSIONS .....</b>	<b>31</b>
4.1 OBSERVATIONS BASED ON THE EIGHT RECEIVING COUNTRIES EXAMINED .....	31
4.2 OBSERVATIONS BASED ON THE SIX SENDING COUNTRIES EXAMINED .....	32



## List of tables

Table 1: Are conditions of the workers' accommodation provided by the employers to workers away from their regular place of work defined by means or standards or by a specific allowance? .....	8
Table 2: Are there enforcement measures on reimbursement of expenditures in accordance with Article 3(7) of the Posting Directive? .....	10
Table 3: Assessment (or not) of the "posting allowance" actual coverage .....	11
Table 4: Possible assessment of a lump sum payment: remuneration or reimbursement of costs? .....	13
Table 5: Consequence of a posting allowance making no reference to reimbursement of expenditure .....	15
Table 6: Which documents relating to the reimbursement of costs must the sending employer provide at the request of the receiving countries' competent authorities?17	
Table 7: Does the posting employer have to prove that he does not have to reimburse expenses according to the home Member State rules? .....	18
Table 8: Sanctions provided in the case of non-compliance with rules on posting allowance.....	19
Table 9: Practical information available in the receiving country about the rules on reimbursement of expenditures.....	21
Table 10: Existence of rules focusing on out-going posting in the construction sector	23
Table 11: Does Article 3(7) apply to posted workers sent to another Member State?24	
Table 12: Existence of a specific regulation on posting allowance for employees sent to another Member State .....	25
Table 13: Type of legal instrument used to reimburse expenses incurred on posting to another Member State .....	26
Table 14: Form taken by the reimbursement of posting-related expenses to workers posted abroad.....	27
Table 15: Enforcement procedures for the compliance of Article 3(7) by the sending employer .....	28
Table 16: Obligation for the employer to inform the posted worker sent abroad on remuneration, posting allowance and reimbursement of costs.....	29
Table 17: Information on Article 3(7) provided for out-going postings.....	30

## Executive summary

The Revised Posting of Workers Directive 2018/957/EU (amending Directive 96/71/EC) entered into force on 29 July 2018. A key measure is that posted workers are now entitled to the same remuneration as local workers.

However, regarding the reimbursement of posting related expenses, the revised directive provides that such expenses shall be reimbursed in accordance with the national law and/or practice applicable to the employment relationship, i.e. the law or the practice in the sending country (hereafter "country of origin-principle"). In connection with the right to equal remuneration, one of the provisions of the 2018 Directive deals with the so-called "**posting allowances**" which are usually paid to posted workers in order to reach the amount of remuneration due in the country of temporary assignment. To avoid the risk that the posting allowance is used for the purpose of reimbursing expenditure, the revised directive provides that it is part of remuneration unless it is paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. For this purpose, a legal **presumption** has been added in the revised directive: where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance must be considered to be paid in reimbursement of expenditure.

The official **report released by the Commission on 30 April 2024** on the application and implementation of the revised Posting Directive indicates that not all Member States have already transposed the abovementioned country of origin-principle regarding the reimbursement of posting related expenses as well as the legal presumption.

The purpose of the study initiated by the Swiss State Secretariat for Economic Affairs (Seco) is to analyse how selected Member States (receiving and sending MS) have implemented these new elements of the revised directive, i.e., the abovementioned country of origin-principle regarding the reimbursement of posting related expenses as well as the abovementioned legal presumption, and the extent to which national authorities in those Member States are enforcing the rules in practice.

To carry out the study, **8 "receiving countries" (Austria, Belgium, Denmark, Finland, France, Germany, Italy and Norway) and 6 "sending countries" (Croatia, Czech Republic, Hungary, Poland, Romania and Slovakia)** have been selected.

The report shows that among the **8 receiving countries**, not all of them incorporate enforcement measures of the presumption. When they do so, the enforcement rules are general. It is likely that the terms of "posting allowance", "daily allowance" and "lump sum payments" are, in most cases, taken at face value, meaning that the payments made through these terms are included in the scope of remuneration, although they may in fact correspond to actual reimbursement of expenses. There is no indication as regards the reality, the depth and intensity of checks operated by control bodies (such as labour inspectors).

Nevertheless, it is not yet possible to draw any definite conclusions about the specific enforcement or implementation models of all countries. The abovementioned country of origin-principle regarding the reimbursement of posting related expenses as well as the legal presumption are new and require from national authorities implementing measures at national and local level. In particular, the application of detailed guidance for labour inspectors on the conditions to be met to trigger the legal presumption and clear processes for inspections must be devised. A good information system for foreign employers takes time to be built.

At this stage, it is unclear whether the Commission evaluates Member States' implementation of these elements (country of origin-principle and legal presumption) as

in conformity with EU law or if and when it would launch infringement procedures against Member States. On its side, the Court of Justice has not yet ruled on the revised Directive 2018.

The analysis of the **6 sending Member States** show that most of them do not have any specific rules for the reimbursement of costs by employers for their workers posted abroad. The risk of confusion between the various payments made by the sending employer (with potential inclusion of expense reimbursement into the posting allowance), is not well monitored. After all, it is worth mentioning that national laws, collective agreements or companies' internal regulations and/or employment contracts in sending countries, allow for the reimbursement of posting related expenses to workers.

# 1. Introduction

## 1.1. Context of the posting allowance and reimbursement of costs

The Revised Posting of Workers Directive 2018/957/EU (amending Directive 96/71/EC, hereafter, “the Posting Directive”) defines the mandatory rules in relation to the terms and conditions of employment which have to be applied to posted workers.

As a general rule, the **mandatory terms and conditions of employment, which are in place in the receiving (host)<sup>1</sup> Member State<sup>2</sup>** - also called the “hardcore” provisions<sup>3</sup> in the context of the Posting Directive – **apply** to posted workers to the extent that they are more favourable than those guaranteed by the employment law of the sending (home)<sup>4</sup> Member State (or the law applicable to the employment contract).

The matter of ‘**posting-related expenses**’, which should fall outside the scope of the hardcore provisions (and which therefore are to be reimbursed in accordance with the laws and/or practice of the sending country) and, one side, the conditions of workers’ accommodation” and, on the other side, the ‘**expenses covering travel, board and lodging**’, which are both listed in the hardcore provisions, is dealt with in various provisions of the Posting Directive. The text and way the provisions have been formulated are complex and may lead to misinterpretations<sup>5</sup>.

Posted workers are entitled to the same remuneration as the remuneration granted to local workers. This requirement is an application of the hardcore provisions<sup>6</sup>. Pursuant to Article 3(7) of the Posting Directive, **allowances specific to the posting** which are paid to the posted worker **must be considered to be part of remuneration**. In practice, the posting allowance is an additional payment made by the sending employer to the posted worker which, when the posting is from a “low salary Member State” to a “high salary Member State”, makes it possible to reach the remuneration amount due in the receiving Member State. The purpose of the posting allowance is also to provide compensation for the disadvantages entailed by the posting, as a result of the workers being removed from their usual environment.

<sup>1</sup> The terms “host” and “receiving” country will be used interchangeably.

<sup>2</sup> The report also examines Norway. Although it is not a member of the EU, the term “Member State” will be used for reasons of simplicity.

<sup>3</sup> The “hard core provisions” of the host Member State are listed in Article 3(1) of the Posting Directive: (a) maximum work periods and minimum rest periods; (b) minimum paid annual leave; (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people ; (g) equality of treatment between men and women and other provisions on non-discrimination; (h) the conditions of workers’ accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

<sup>4</sup> The terms “home” and “sending” country will be used interchangeably.

<sup>5</sup> The analysis undertaken under the present study will not deal with expenditures covered by Article 3(1)(i) of the revised Posting Directive - allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons - which are part of the hardcore provisions, and concern “in-country” expenses which are reimbursed to workers according to the legislation of the *receiving* country. Point (i) applies exclusively to travel, board and lodging expenditure incurred by posted workers where they are required to travel to and from their regular place of work in the Member State to whose territory they are posted, or where they are temporarily sent by their employer from that regular place of work to another place of work. This may for instance be the case when a national legislation regulates the travel costs or time (travel time being considered as working time) between the workers’ home and the place of work and/or when a worker is sent to another location than that of the regular place of work in the host Member State (e.g., a worker is sent by his employer from Berlin in Germany to Munich to work there for 2 weeks after which he returns to Berlin).

<sup>6</sup> See point (c) of the list of hardcore provisions set out in Article 3(1) of the Posting Directive.

Article 3(7) is worded in such a way to ensure that the posting allowance is not used for the purpose of reimbursing expenditure actually incurred by the posted employee. Such a practice would subvert the objective of the Posting Directive to achieve parity of pay between posted and non-posted workers – the normal labour force of the receiving state.

### **Art. 3(7) of the Posting Directive**

*7. Paragraphs 1 to 6 shall not prevent the application of terms and conditions of employment which are more favourable to workers.*

*Allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. The employer shall, without prejudice to point (h) of the first subparagraph of paragraph 1, reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship.*

*Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.*

The risk is indeed that, in practice, the posting allowance serves as a reimbursement of costs incurred by the posted worker. By doing so, the sending employer would reduce the actual remuneration amount, which would be to the detriment of the posted worker but also to the companies established in the receiving Member State or in other EU Member States, since this would imply unfair competition. The principle of equal remuneration set out in Article 3(1)(c) of the Posting Directive would be breached.

The practice of concealing reimbursement of costs as part as a posting allowance is unlawful according to the Posting Directive which underlines the necessity to **distinguish clearly between the posting allowance and the reimbursement of expenditures** by setting up a presumption favourable to workers when the distinction is not sufficiently made. The sending employer must “reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship”, but “Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure”.

In two **key rulings based on the former Directive 96/71<sup>7</sup>**, the CJEU clarified what belongs to the posting allowance category (included in the scope of remuneration) and what amounts to reimbursement of costs (excluded from the scope of remuneration).

It remains to be seen whether the *Rapidsped* case<sup>8</sup> remains relevant under the revised Posting Directive.

<sup>7</sup> Directive 96/71 already provided that “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, such as expenditure on travel, board and lodging” (Art. 3(7)§2).

<sup>8</sup> In *Rapidsped* (case C-428/19), a judgment delivered on the basis of the original Directive 96/71, a Hungarian transport company posted their employees in France. They received a gross monthly salary of €545 (corresponding to €3.24/hour), supplemented by a daily allowance. On an hourly basis, the employees thus received €10.40/hour, daily allowance included, whereas the French minimum hourly rate was €9.76. As a result, the Hungarian employees have been lawfully paid €3.24/hour during their assignment in France – with the daily allowance being paid on top of that.

If *Rapidsped* were still applicable, it could give the impression that, as long as the posting allowance is compatible with the rules applicable in the sending Member State, it would be possible for sending employers to bypass the “reimbursement

## 1.2. Lessons drawn from the Commission implementation report and purpose of the study

The Commission released a report on the application and implementation of the Posting Directive on 30 April 2024<sup>9</sup>. It observes that, at the date where the survey has been carried out<sup>10</sup>, not all Member States<sup>11</sup> have included in their national legislation a specific provision that posting allowances are part of remuneration unless they are paid in reimbursement of expenditure actually incurred on account of the posting. In addition, the national legislation of some Member States does not include or does not clearly specify that the reimbursement of travel, board and lodging expenditure for the posted worker is done in accordance with the national law and/or practice of the home Member State<sup>12</sup>. Only 12 Member States have explicit provisions on conditions of accommodation when the workers are away from their regular place of work and these provisions are applicable to posted workers whereas 18 Member States include national provisions on the reimbursement or compensation of expenditure related to travel, board and lodging for workers away from home for professional reasons<sup>13</sup>. Finally, some Member States do not clarify the distinction between remuneration and reimbursement of expenditure.

The implementation report, which exclusively looks at how Article 3(7) is applied by *receiving* Member States ("in-coming" postings), shows that there is still confusion between the concepts (and their interactions) of remuneration, posting allowance and actual reimbursement of costs. This situation could make it **possible for sending employers to include the reimbursement of costs – counted as posting allowance – into the scope of remuneration without being challenged by labour authorities of receiving Member States.**

The Commission has left open the question of whether and, if so, to what extent legal consequences could be foreseen on the basis of the analysis of the report. In the meantime, it needs to be seen if the case law of the Court of justice dealing with posting related expenses<sup>14</sup> will continue to be applied, or whether it will be abandoned, in the context of the revised Posting directive, given that it was ruled in accordance with the former Directive 96/71.

**The first objective of this report is to determine how receiving Member States, which are in a comparable situation as that of Switzerland (high wages and high volume of incoming posting) interpret and apply Article 3(7).**

In order to assess how Article 3(7) is applied in practice by receiving Member States, several questions merit answers:

- Are there enforcement measures of the rules on reimbursement of expenditure in accordance with Article 3 (7)?

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function" of a payment made to the posted worker by using a system of lump-sum (or a payment not strictly correlated to the duration of the assignment), with the result that this payment would be considered as remuneration. If it is not established that the allowance would be paid as reimbursement for expenses actually incurred, such as travel, accommodation or food, it is a posting allowance and, therefore, it must be counted as an element of remuneration, even if, in practice, the purpose of the fixed amount is to reimburse the worker's actual costs.

<sup>9</sup> COM (2024) 320 final.

<sup>10</sup> Since then, the legislation of some Member States may have evolved.

<sup>11</sup> Including Member States with high wages: Austria, Denmark, Sweden, etc.

<sup>12</sup> Point 2.6, COM (2024) 320 final

<sup>13</sup> Point 2.2.3, COM (2024) 320 final

<sup>14</sup> See footnote 8.

- Is the existence of a formal “posting allowance” or “daily allowance” or “lump sum payment” granted to the posted worker sufficient to consider this is not reimbursement of costs?
- Is the mere fact that the posted worker’s pay slip mentions a posting allowance, but makes no reference of expenses reimbursement, sufficient to trigger the presumption that the allowance is, in its entirety, equivalent to reimbursement of expenses, and not to remuneration?
- Do competent authorities in the host country proceed to additional inquiries – if so, which ones and how? - on the component of the posting allowance before activating the presumption?

More generally, the question is to what extent the presumption set out in Article 3(7) of the Posting Directive is applied by the host Member States, and how vigilant they are regarding the potential practices consisting of including reimbursement of costs into remuneration.

The implementation of Article 3(7) from a **host country perspective is challenging for various reasons**. First, it implies a good knowledge of the rules on the sending Member States about remuneration, posting allowance and reimbursement of costs. Second, it supposes to have access to reliable information concerning the payments that have been actually made to the posted worker by the sending employer. Third, when an allowance is paid to the posted worker in addition to the salary, the exact purpose of this amount (is it really remuneration or, at least in part, reimbursement of actual costs?) must be assessed in practice.

**However, it is also useful from the perspective of a receiving country to examine how sending Member States view Article 3(7) of the Posting Directive in the context of out-going postings. This is the second objective of the report which will focus on the construction sector.**

Several questions posed to sending countries can help have a better view on this matter:

- Are there rules on posting allowance and/or on reimbursement of costs<sup>15</sup> applicable to sending employers?
- Are there rules like that of Article 3(7) for out-going postings which require to clarify the distinction between the posting allowance and the reimbursement of costs?
- Are sending employers informed by their own country on the EU rules applicable in the receiving Member States with regard to remuneration, posting allowance and reimbursement of costs?

## 2. What can we learn from receiving countries?

The aim of this part of the report is to determine how *receiving* Member States, which are in a comparable situation as that of Switzerland in terms of posting flows, interpret and apply Article 3(7).

In this respect, eight countries have been selected to carry out an in-depth analysis: **Austria, Belgium, Denmark, Finland, France, Germany, Italy and Norway**. One expert per country has filled out a questionnaire for the purpose of this report (hereafter, “national fiche”).

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<sup>15</sup> For receiving countries, the challenge stems from the fact that reimbursement of costs incurred by postings are proceeded in accordance with the national law and/or practice applicable to the employment relationship, which is, in general, the sending Member State’s law and/or practice (in accordance with Art. 3(7) of the revised Posting Directive).

## 2.1. Transposition of Article 3(1)(h) of the Posting Directive

Article 3(1)(h) of the revised Posting Directive includes in the hardcore provisions "*the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work*". In addition to paying remuneration equivalent to that which a local worker would receive in the host Member State (art. 3(1)(c)), the sending employer must therefore comply with the host country's rules on accommodation.

Article 3(1)(h) does not mean that the sending employer must provide accommodation to the posted workers in the host country. Article 3(1)(h) means instead that, if the host Member State sets rules on accommodation for workers away from their regular place of work, such rules are applicable to posted workers since they are away from their regular place of work. It is the duty of the sending employer to ensure that such rules are complied with. It is also the duty of the inspection authority of the receiving Member State to check the correct application of their accommodation rules.

On top of this requirement, Article 3(1)(i) of the revised Posting Directive includes in the hardcore provisions "*allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons*". Article 3(1)(i) covers situations where posted workers are required to travel within the host Member State, either to and from their regular place of work or to another work location<sup>16</sup>. Such "intra-posting" expenses incurred during the posting assignment within the receiving Member State must be covered according to the rules (if any) of the host country.

The differences between expenses incurred under article 3(1)(h) and Article 3(1)(i) are slim. They target in the first case workers *away from their regular place of work* (consequence of the posting) and in the second case workers *away from home for professional reasons* ("intra-posting expenses"<sup>17</sup>). In the first case, accommodation standards are concerned whereas the second case refers to travel, board and lodging expenses.

Article 3(1)(h) has been transposed by most countries under focus (AT, BE, DE, DK, IT, NO)<sup>18</sup>. **The conditions of the workers' accommodation provided by the employers to workers away from their regular place of work are defined by means of standards and, except in very rare cases<sup>19</sup>, not by specific allowances or reimbursement schemes.**

<sup>16</sup> For instance, a worker is posted from Warsaw to Bern to carry out plumbing activities. During the assignment, he has to go to Zurich for three days to collect construction materials. Article 3(1)(i) will cover travel, board and lodging expenses incurred during the mobility between Bern and Zurich. Such expenses must be covered according to Swiss law.

<sup>17</sup> When a posted worker during his posting assignment is required to travel to and from the regular place of work in the host Member State, or is temporarily sent from that regular place of work to another location in the host country, or expenses that may be reimbursed when they travel from their place of stay to their place of work (home-work travels, e.g.. public transportation reimbursement).

<sup>18</sup> In France, there has been no formal transposition of Article 3(1)(h). The law makes a global statement, encompassing article 3(1)(h) and Article 3(1)(i), that "Reimbursements of professional expenses corresponding to special charges inherent to the employee's function or job, incurred by the seconded employee in the course of his or her assignment, in respect of travel, meals and accommodation" (Article L1262-4, 11° of the labour code).

<sup>19</sup> See Belgium below.

Countries' regulations include detailed indications concerning the standards of accommodation that must be complied with in case of in-coming posting (AT<sup>20</sup>, BE<sup>21</sup>, DE<sup>22</sup>, DK, FI<sup>23</sup>, FR<sup>24</sup>, IT, NO). The idea is to align the standards of accommodation for posted workers with the existing standards for accommodation for non-posted workers (DK).

In Belgium, in some sectors, accommodation is paid for by the employees who receive an additional allowance for these purposes (BE).

The country replies often highlight that the remuneration of the posted worker does not include reimbursements or compensation for professional expenses incurred or borne by the employee during the posting (BE, FR). It is also stated that if "*remuneration for living quarters made available by the employer is deducted from the posted employee's salary, the amount of the remuneration must be in reasonable proportion to the employee's net salary and the quality of the living quarters*" (NO).

**Table 1: Are conditions of the workers' accommodation provided by the employers to workers away from their regular place of work defined by means or standards or by a specific allowance?**

	<b>By means of standards</b>	<b>Specific allowances / reimbursement</b>	<b>Both systems</b>
<b>AT</b>	<b>X<sup>25</sup></b>		
<b>BE</b>			<b>X</b>
<b>DE</b>	<b>X</b>		
<b>DK</b>	<b>X</b>		
<b>FI</b>	<b>X</b>		
<b>FR</b>	<b>X</b>		
<b>IT</b>	<b>X</b>		
<b>NO</b>	<b>X</b>		

<sup>20</sup> For instance, accommodation must be close to the construction site and easily accessible; dormitories are subject to size rules; for each employee accommodated, an air space of at least 10 m3 must be available.

<sup>21</sup> The employer must provide accommodation for posted employees. The law prohibits sleeping in the workplace, in a garage or in barracks or barracks or caravans set up on the site. It is prohibited for too many workers to stay together in a small area.

<sup>22</sup> They depend on the number of occupancy and the duration of the stay Living and sleeping area (beds, cupboards, tables, chairs), dining area, sanitary facilities. If the accommodation is shared by men and women, this must be taken into account when allocating the rooms

<sup>23</sup> The law does not oblige the employer to arrange accommodation for the posted worker during the posting. But if the employer arranges accommodation, it must meet the requirements laid down in the Health Protection Act and in collective agreements.

<sup>24</sup> Posted workers may not be accommodated in premises used for industrial or commercial purposes. The habitable surface area and volume must not be less than 6 square meters and 15 cubic meters per person. Parts of premises with a height of less than 1.90 meters are not counted as living space. These premises must be ventilated, with windows or other openings with a transparent surface giving direct access to the outside, and fitted with a blackout device. The worker must be able to close off the dwelling and access it freely.

<sup>25</sup> No separate national provisions were required under Austrian law, as the living quarters and accommodation provided to the workers posted or hired out to Austria had already to comply with the requirements of the relevant national provisions of the Austrian Workplace Ordinance.

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## 2.2. Enforcement measures of the rules on reimbursement of expenditure in accordance with Article 3 (7)

The transposition of Article 3(7) is not general. Most receiving countries examined have made a literal transposition (BE<sup>26</sup>, DE, FI<sup>27</sup>, FR<sup>28</sup>, IT<sup>29</sup>, NO<sup>30</sup>). One Member State may have not transposed this provision yet (AT).

The transposition of Article 3(7) of the Posting Directive into national regulations can be followed by enforcement measures to maximise the chances of a correct implementation. However, among all countries which have duly transposed this provision, only a few of them have adopted specific enforcement measures regarding the reimbursement of expenditures. **In most countries, there is no specific enforcement measure of Article 3(7).**

As it is mentioned in the Austrian fiche, the absence of enforcement measures can be explained by the fact that the reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging, is paid in accordance with the national law and/or practice applicable to the employment relationship and not in accordance with the law of the receiving country<sup>31</sup>.

Where they exist, the enforcement measures are fairly general and do not concern the reimbursement of expenditures but their interplay with the posting allowance and the presumption that has been set out in Article 3(7). In Norway, the content of the law is simply repeated on the labour inspection authority website (NO)<sup>32</sup>.

In France, an implementing decree provides that "*If the employer does not provide proof that all or part of the allowance for the posting has been paid in respect of remuneration or expenses actually incurred as a result of the posting, in application of the employment contract or the law governing it, the entire allowance is deemed to have been paid in reimbursement of expenses, and is excluded from remuneration*". It is made clear that the burden of proof lies with the sending employer (FR). Similarly, in the preparatory works of the law transposing the revised Posting Directive, the Danish minister's comments clarify that it is the employer's duty to make clear whether a payment relating to the posting is reimbursement for expenses or is salary (DK).

In Germany, the presumption set out in Article 3(7) is expressly classified as irrebuttable (DE). In Denmark, the Ministry insists on the fact the reference is the gross salary, that collective agreements for similar work set standards for expenses to travel, food and lodging for posted workers and that trade unions are in charge of controlling remuneration

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<sup>26</sup> See Art. 6/1 of Law of 12 June 2020: [https://etaamb.openjustice.be/fr/loi-du-12-juin-2020\\_n2020202691.html](https://etaamb.openjustice.be/fr/loi-du-12-juin-2020_n2020202691.html)

<sup>27</sup> See Section 5, law (amended) 447/2016: <https://www.finlex.fi/en/laki/kaannokset/2016/en20160447.pdf>

<sup>28</sup> Article R1262-8 of the French labour code.

<sup>29</sup> <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2020-09-15;122>

<sup>30</sup> <https://www.arbeidstilsynet.no/en/laws-and-regulations/regulations/regulations-relating-to-posted-employees/section3a/>

<sup>31</sup> See section 2.4.

<sup>32</sup> <https://www.arbeidstilsynet.no/en/laws-and-regulations/regulations/regulations-relating-to-posted-employees/section3a/>

of posted workers since remuneration is set out in collective agreements (DK). In Denmark, the presumption is also mentioned in collective agreements (DK).

**Detailed guidance on the meaning and condition of concrete application of Article 3(7)**

It is possible for a Member State to provide its labour inspection with detailed guidance on the meaning of Article 3(7), in particular on the conditions to be fulfilled to trigger the presumption provided for by this provision. Such guidance would facilitate the effective application of Article 3(7) and a uniform application throughout the country.

In some countries, no enforcement authorities can be involved since the matter refers technically to civil law and not employment (DE).

**Table 2: Are there enforcement measures on reimbursement of expenditures in accordance with Article 3(7) of the Posting Directive?**

	<b>Strong enforcement measures</b>	<b>Light enforcement measures</b>	<b>No enforcement measure</b>
<b>AT</b>			<b>X</b>
<b>BE</b>			<b>X</b>
<b>DE</b>			<b>X</b>
<b>DK</b>		<b>X</b>	
<b>FI</b>			<b>X</b>
<b>FR</b>		<b>X</b>	
<b>IT</b>			<b>X</b>
<b>NO</b>		<b>X</b>	

## 2.3. Distinction between remuneration, posting allowance and reimbursement of costs

### 2.3.1. The assessment of the posting allowance's content

Is the mere mention of a posting allowance on the posted workers' pay slip, in the form of an amount that enables him to reach the receiving country remuneration, equivalent to remuneration? Or is there an assessment of the exact nature and purpose of the posting allowance and is this assessment systematic or left to the discretion of the labour inspectors / competent enforcement authority of the receiving country?

**The responses by Member States show that, in general, the enforcement authorities are entitled to carry out further investigations to determine whether**

**the posting allowance includes reimbursement of costs. However, the reality, the depth and the frequency of such inspections are unclear. It is likely that, in practice, the posting allowance is usually taken at face value in these countries and treated as remuneration.**

Local labour authorities in charge of compliance with posting rules can consider that the existence of a posting allowance is sufficient to classify it as remuneration (FR). But the wording of "posting allowance" does not prevent labour inspectors/authorities, on their own initiative, to look further into the case and ask the employer for details of the content of the posting allowance in order to check if it includes expenses actually incurred on account of the posting, such as expenditure on travel, board and lodging (AT, BE, FR, IT, NO). In one country, the assessment is declared as systematic (FI).

**On the contrary, payment of "posting supplements" without any further explanation, and the nature of the payments on the pay slips, i.e., varying and/or no deductions similar to usual deductions from pay, can be enough to establish a presumption by a court (DK).** Assessment of the evidence is in the hands of the judges, but the threshold for proof is very high. Only in the case where the posting entity can document expenses paid for travels each weekend, and the trips home every weekend allowed the workers to stock up on food, and the fact that the accommodation included a kitchen for cooking, the judge assessed that the burden of proof had been lifted (DK).

#### **Good practice (BE)**

To determine the nature of the posting allowance, the labour inspectorate liaises with the authorities in the country of origin. When the country of origin indicates that it is an allowance paid by way of reimbursement of expenses actually incurred as a result of the posting, such as travel, accommodation and food expenses, it is considered that this allowance is, a priori, not remuneration. Nevertheless, the employer is also questioned as to whether he provides accommodation and food for the posted workers.

If this is the case and the employer is providing accommodation and food, all proof that these expenses have been covered (rental contract for accommodation, proof of payment of rent, hotel bills, proof of payment for food.... etc.) are requested. In this case, it is considered that the allowance that was intended to reimburse food, lodging and travel expenses is no longer, in whole or in part, a posting allowance. All or part of the allowance will then be considered as remuneration: the costs already covered by the employer for the provision of accommodation and food, or even travel expenses are deducted.

If the employer does not provide accommodation or food, and does not cover travel expenses, it is stated they do not consider the allowance as remuneration, provided that the country of origin has confirmed to them that it is an allowance paid as reimbursement for expenses actually incurred as a result of the posting, such as travel, accommodation and food expenses.

One country did not provide a response since the matter would exclusively belong to courts and is not subject to labour inspection inspections (DE).

**Table 3: Assessment (or not) of the "posting allowance" actual coverage**

	Equivalent to remuneration	Systematic assessment if it hides reimbursement of expenses	Possible assessment if it hides reimbursement of expenses
AT			X
BE			X
DE	-	-	-
DK			X
FI		X	
FR	X		X
IT	X		
NO			X

### 2.3.2. The assessment of a lump sum payment: remuneration or reimbursement of costs?

Several questions emerge when considering the assessment of a lump sum payment. Is a lump sum payment – for instance a *per diem* / daily allowance – analysed as a means of covering the actual costs incurred abroad by the workers, or as a compensation for the disadvantages entailed by the posting, as a result of the workers being removed from their usual environment? The former is not remuneration while the latter is part of the remuneration.

Additionally, the question arises whether receiving Member States' competent authorities consider this type of payment to be always equivalent to a posting allowance and is therefore counted as remuneration. Or do they proceed to additional inquiries to determine what the lump sum corresponds to and require the employer to justify the purpose of the amount?

**Despite the fact that the Directive would make it possible to systematically verify whether a lump sum payment includes reimbursement of expenditure actually incurred on account of the posting, the findings suggest that a *per diem* or a daily allowance could be often seen by the Member States examined as a posting allowance and therefore as remuneration without any further investigation.**

In one country, labour inspectors/ labour authorities can automatically consider that this type of payment is equivalent to remuneration (FR). However, in most cases, labour inspectors are simply entitled to ask the sending employer to provide elements on what the lump sum corresponds to and to justify its purpose (AT, BE, FR, IT, NO).

**In Denmark, it has been ruled in several cases that it is not sufficient that the pay slip indicates a payment in addition to the basic salary in the country of origin in the form of a "lump-sum assignment related costs" to consider that it is a**

**posting allowance.** For instance, judges confirmed that expenses incurred to the accommodation and transportation of the workers could not be included in the calculation of salaries in the collective agreement.<sup>33</sup> *In casu*, the Czech posting entity had paid the posted workers a posting supplement of 50 EURO per day. According to the Danish judges, there is a presumption that these daily payments aim to cover the actual extra expenses to food and other necessities incurred in relation to the posting. The judges remarked that in comparison the Danish tax-free rate cover extra expenses for food and necessities for travelling workers amount to approx. 70 EURO per day. No evidence was provided that could be used as basis for viewing the payments as part of a salary (DK).

However, **in all the countries that refer to a system of control, there is no indication as to the reality, the depth and the frequency of such controls.** In only one country, the assessment could be systematic (FI).

#### Good practice (FR)

If the foreign employer does not reply to a request for information made by labour inspectors/ labour authorities on the exact purpose of the posting allowance, the liaison office from the sending Member State is contacted with the purpose of asking counterparts of the sending country to approach the company to get answers to the questions posed.

One country did not provide a response since the matter would exclusively belong to courts and is not subject to inspections of the labour inspection (DE).

**Table 4: Possible assessment of a lump sum payment: remuneration or reimbursement of costs?**

	Equivalent to a posting allowance	Not equivalent to a posting allowance	Additional inquiries to determine if equivalent to remuneration or reimbursement of costs
AT			X
BE			X
DE	-	-	-
DK			X
FI			X
FR	X		X
IT			X
NO			X

<sup>33</sup> Industrial Arbitration ruling FV2018.0165 of 14 October 2018.

### 2.3.3. Conditions for triggering the presumption of Article 3(7)

As was already mentioned, Article 3(7) of the Posting Directive states that '*Where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure.*'

**It is possible for any receiving Member State to provide its control bodies with detailed guidance on the conditions to be met in specific cases to trigger the presumption provided for by this provision.** Such guidance should facilitate the effective application of Article 3(7) and a uniform application throughout the country. But how is this legal presumption set out in Article 3(7) of the Posting Directive enforced in the examined Member States?

Is the mere fact that the posted worker's pay slip mentions a posting allowance, but makes no reference of reimbursement expenditure, sufficient to trigger the presumption that the allowance is, in its entirety, equivalent to reimbursement of expenses, and not to remuneration? Or do competent authorities proceed to additional inquiries on the nature and purpose of the posting allowance before activating the presumption?

**National responses show that Member States prefer to proceed to further inquiries on the posting allowance content rather than to systematically trigger the presumption.**

As mentioned in the Danish fiche, there is no indication that the assessment of evidence has changed since the introduction of the presumption in Article 3(7). However, **courts have anticipated the revision of Article 3(7) and created an equivalent presumption** (see illustration below).

#### **An illustration among other cases of an anticipated judicial implementation of the presumption set out in Article 3(7)**

In the first Danish Labour Court ruling AR2008.464 of 8. November 2011 on the issue of the nature of payments as either part of remuneration or as reimbursement of costs, the trade union had claimed that a Polish posting entity had breached the collective agreement by not providing correct salaries to the posted workers.

The question concerned specifically the nature of several 'posting supplements', and whether these could be included in the calculation of the remuneration paid by the posting entity to the posted workers.

The judge held that the term 'minimum pay' in the Danish collective agreement should be interpreted in line with the term in the (then) Posting Directive. The Judge added that as the 'posting supplements' varied in size from worker to worker, as the supplements are paid out without deduction of social security contributions, pension or taxes, there was a presumption that the supplements were paid as reimbursement of costs related to the posting, and not as salaries. It was then up to the posting entity to document otherwise, if the supplements paid should be calculated as entirely or in part payment of salaries. Furthermore, the posting entity should in that case also document which part of the paid supplements, that could be calculated as part of the payment of salary.

The court further concluded that the posting entity had to 'lift the burden of proof, that the posting supplements were not paid (in full or in part) as reimbursement of expenses related to the posting, and in that case, whether the supplement constitutes a payment, that can be calculated towards the minimum pay.'

Other similar cases have been ruled accordingly<sup>34</sup>.

In one country, if the pay slip does not mention the reimbursement of expenses and exclusively refers to the posting allowance, this is sufficient to trigger the presumption. Inspection bodies do not normally carry out any further inquiry (IT).

However, in most countries, the circumstance that the pay slip mentions a posting allowance, without making any reference to expenses, does not automatically trigger the presumption. Further inquiries can be carried out to determine what precisely makes up the posting allowance, and ask the sending employer to justify the posting allowance components (BE, FI, FR, NO). The decision to proceed to additional inquiries can be left to the discretion of control inspections (FR). In some countries, the pay slip is always checked to see whether other expenses are listed on it and if they are not deducted from the remuneration, but the presumption does not seem to be activated as such (AT).

As it is well summarised in the Finnish fiche, the matter is not, in principle, resolved on the basis of a pay slip alone (FI).

One country does not provide a response since the matter would exclusively belong to courts and is not subject to labour inspection controls (DE<sup>35</sup>).

**Table 5: Consequence of a posting allowance making no reference to reimbursement of expenditure**

	<b>Posting allowance with no reference of expenses triggers presumption</b>	<b>Posting allowance with no reference of expenses does not trigger presumption</b>	<b>Further inquiries to determine if presumption is triggered</b>
<b>AT</b>			<b>X</b>
<b>BE</b>			<b>X</b>
<b>DE</b>		<b>X</b>	
<b>DK</b>			<b>X</b>
<b>FI</b>			<b>X</b>
<b>FR</b>			<b>X</b>
<b>IT</b>	<b>X</b>		
<b>NO</b>			<b>X</b>

<sup>34</sup> See Danish fiche completed for the purpose of this report.

<sup>35</sup> The presumption set out in Article 3(7) is expressly classified as irrebuttable.

## 2.4. Control of the reimbursement of costs provided in accordance to the legislation of the home Member State

Do the receiving Members State check whether the reimbursement of costs is effectively in line with the legislation of the home Member State (or to the employment contract) when they check the compliance with the Posting Directive rules on remuneration?

### 2.4.1. Documents and records the employer must provide to the enforcement bodies

Inspection bodies of the receiving Member States are entitled to check whether the costs incurred by workers posted on their territory have been reimbursed in accordance with the national law and/or practice applicable to the employment relationship.

The question raises which documents and records the foreign employer must provide to the control bodies with regard to the reimbursement of costs.

**In the examined Member States, though, control bodies do not check the reimbursement of costs which have to be made by the sending employer according to the legislation of the home Member State (AT, BE, DE<sup>36</sup>, FI, NO).** National authorities do not monitor foreign companies and only check the necessary documents that must be submitted by employers who post workers to their territories (AT).

Receiving countries' regulations sometimes enumerate the documents that the sending employer must provide in case of control. The documents required can however be insufficient to check the reimbursement of the costs if they focus only on remuneration. In France, it is required that the sending employer provides the employment contract, the pay slips, the gross remuneration and "*any document establishing the actual payment of remuneration*", but there is no specific indication concerning the reimbursement of costs (FR). In Finland, each inspection concerning the minimum terms and conditions of employment requires, among other things, employment contracts, pay slips and documents proving the payment of wages (FI).

Other countries ask for the provision of a pay slip translated into the host country language, which details the items composing the final amount (remuneration, posting allowance and reimbursement of costs) (IT).

**In practice, it is only indirectly, through the verification of the compliance with the rules on remuneration, that a control of the reimbursement of costs can be conducted in the examined Member States.**

**It also appears that in some countries such as Finland and Denmark<sup>37</sup>, reimbursement of expenses for travel, food and accommodation have to be made at the same level as what local employers are obliged to pay for the performance of equivalent work** (instead of taking as a reference the reimbursement of costs of

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<sup>36</sup> The matter would exclusively belong to courts and is not subject to labour inspection controls.

<sup>37</sup> See point 3.1.1.4.7 of the Commission Staff Working Document SWD (2024) 320 final, 30 April 2024, on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

travel, board and lodging applicable in the home Member State, as is stated by the Posting Directive).

**Table 6: Which documents relating to the reimbursement of costs must the sending employer provide at the request of the receiving countries' competent authorities?**

	<b>Documents specific to the reimbursement of costs</b>	<b>Documents focusing on remuneration</b>	<b>No control</b>
<b>AT</b>		<b>X</b>	
<b>BE</b>		<b>X</b>	
<b>DE</b>			<b>X</b>
<b>DK<sup>38</sup></b>			
<b>FI</b>		<b>X</b>	
<b>FR</b>		<b>X</b>	
<b>IT</b>		<b>X</b>	
<b>NO</b>		<b>X</b>	

#### 2.4.2. Proof of non-reimbursement of costs requirements in the home Member State

In order to verify compliance with Article 3(7), inspection bodies of the receiving Member State are entitled to claim proof of non-reimbursement of costs requirements in the home Member State.

The quest for proof is tricky since the host countries' competent authorities are not supposed to be acquainted with the home countries rules (here, concerning reimbursement of expenses), especially when such rules are found in collective agreements or in companies' internal regulations.

In this context, **a majority of receiving Member States examined do not require proof of non-reimbursement of costs requirements in the home Member State.**

This situation is explained by the fact that the labour authorities of a given Member State focus on compliance with their own legislation and do not control the reimbursement of the costs according to the legislation of the home Member State (AT, BE, FI, IT, NO).

This said, in one country, any element of proof can be potentially provided by the sending employer, and labour control authorities can refer to the liaison office of the sending

<sup>38</sup> Data missing.

Member State for more information on their domestic law and, if necessary, ask their counterparts to approach the company themselves (FR).

**Table 7: Does the posting employer have to prove that he does not have to reimburse expenses according to the home Member State rules?**

	<b>Ad hoc elements of proof</b>	<b>Standard elements of proof</b>	<b>No control by receiving Member State</b>
<b>AT<sup>39</sup></b>			
<b>BE</b>			<b>X</b>
<b>DE</b>			<b>X</b>
<b>DK<sup>40</sup></b>			
<b>FI</b>			<b>X</b>
<b>FR</b>		<b>X</b>	
<b>IT</b>			<b>X<sup>41</sup></b>
<b>NO</b>			<b>X</b>

#### 2.4.3. Consequences of infringements of the rules on posting allowance and reimbursement of costs

The Posting Directive makes it possible for receiving Member States to set specific sanctions for non-compliance with rules on reimbursement of costs, even if reimbursement for such expenditure must be made in accordance with the national law and/or practice applicable to the employment relationship.

**Instead of setting specific sanctions for non-compliance with rules on reimbursement of costs, Member States examined prefer to tackle the matter indirectly by providing sanctions based on non-compliance with the rules on equal remuneration.**

The infringement of the principle of equal remuneration, which can be the result of the failure to comply with the rules on reimbursement of costs, is subject to a broad range of sanctions in the examined receiving countries.

Fines are usually applied (AT, DE, DK, FI, FR, NO). Such fines (usually of administrative nature), which can follow a system of "written advice" to comply with the rules applicable (FI, FR), can be notified directly by the labour authorities. This avoids the complex and ill-adapted procedures before criminal courts (BE, FI, FR, NO). The amounts of the fines can

<sup>39</sup> Data missing.

<sup>40</sup> Data missing.

<sup>41</sup> No control is carried out.

depend on the sum of the withheld remuneration (AT, DK). Fines can be applied as many times as the number of employees concerned by the breach (FR). The maximum fine can be doubled in the event of a further breach within two years of the date of notification of the fine for a previous breach of the same kind (FR).

Sending employers can also be notified on a suspension of the provision of services. Such sanction is limited in time (BE, FR, NO), yet it can go up to 5 years (AT). Some companies may be temporarily excluded from taking part in competitive bidding for public supply, construction, or service contracts (DE).

### Good practice (BE)

The competent administration may submit a request for notification of the decision imposing an administrative fine to the competent body of another Member State of the European Union. The competent administration submits, without undue delay, the request for notification via the IMI system using a uniform instrument and indicates at least the following data: a) the name and address of the addressee, and any other data or information relevant to the identification of the addressee; b) a summary of the facts and circumstances of the offence, its nature and the applicable regulations; c) the instrument permitting enforcement in Belgium and any other relevant information or documents - including data or documents of a legal nature - concerning the corresponding complaint and administrative fine; d) the name, address and other contact details of the competent administration and; e) the purpose of the notification and the time limit within which the notification must be made.

Criminal proceedings are possible when the violation of posting rules on remuneration are classified as a criminal offence (BE, FR, NO).

**Table 8: Sanctions provided in the case of non-compliance with rules on posting allowance**

	<b>Fines</b>	<b>Suspension of service provision / similar penalties</b>	<b>Criminal sanctions</b>
<b>AT</b>	<b>X</b>	<b>X</b>	
<b>BE</b>	<b>X</b>	<b>X</b>	<b>X</b>
<b>DE</b>	<b>X</b>	<b>X</b>	
<b>DK</b>	<b>X</b>		
<b>FI</b>	<b>X</b>		<b>X</b>
<b>FR</b>	<b>X</b>	<b>X</b>	<b>X</b>
<b>IT</b>	-	-	-
<b>NO</b>	<b>X</b>	<b>X</b>	<b>X</b>

## 2.5. Practical information provided in the receiving country to ensure correct application of the rules on reimbursement of expenditure

Access to practical information provided by or in the host country to ensure correct application of the rules on reimbursement of expenditure (and, therefore, to the rules on equal remuneration) by foreign employers is essential. Posted workers and their employers must be informed that expenses actually incurred on account of the posting, such as expenditure on travel, board and lodging must be borne by the employer even if it is left to the home (sending) Member States (legislation, practices, collective agreements or employment contract) to regulate the issue. They also need to know that these expenses cannot count as elements of remuneration.

**In most receiving Member States, information is available and can be found on a website accessible to foreign employers in several languages where it is explained which components are classified as remuneration and how to deal with costs reimbursement.**

It is indicated that the posting allowance cannot include reimbursement of expenditures actually incurred (FR), that any contributions in kind cannot be counted towards meeting the minimum pay requirement<sup>42</sup> (DE), that *"If you make deductions from an employee's pay for lodging (innkvartering), the deduction must be reasonably proportionate to the quality of the lodging and the employee's pay"* (NO). The website helps sending employers to find the right collective agreements which are applicable to posted workers in the relevant sectors (AT).

On the Finnish website, rules about the compensation of expenses are well explained, but no information is provided on the distinction between such reimbursements and the posting allowance (FI). Also, in Denmark, the presumption rule is not specifically mentioned in the website for information to posting entities (DK).

Information can include the right to contact the Labour Inspectorate in case where the remuneration would not be paid, if necessary, anonymously (NO).

### Good practice (FR)

A detailed fiche, translated in several languages, is published on an official website. It is explained, with concrete examples, how to calculate the worker's remuneration in the construction sector.

In some Member States, the websites of enforcement authorities do not provide any specific advice to foreign employers on reimbursement of expenditures (BE, IT).

<sup>42</sup> The sole exception to this principle concerns the remuneration of seasonal workers to the extent that their board and lodging may count towards the minimum wage.

**Table 9: Practical information available in the receiving country about the rules on reimbursement of expenditures**

	<b>Detailed information on reimbursement of expenditure</b>	<b>General information on reimbursement of expenditure</b>	<b>No information on reimbursement of expenditure</b>
<b>AT</b>	<b>X</b>		
<b>BE</b>			<b>X</b>
<b>DE</b>	<b>X</b>		
<b>DK</b>	<sup>–43</sup>	<sup>–44</sup>	<sup>–45</sup>
<b>FI</b>	<b>X</b>		
<b>FR</b>	<b>X</b>		
<b>IT</b>			<b>X</b>
<b>NO</b>	<b>X</b>		

## 2.6. Focus on two receiving countries: Belgium and Finland

An additional questionnaire has been sent to the Belgian and Finnish experts. The purpose of this new set of questions was to delve deeper on the issue whether receiving Member States apply Article 3(7) of the revised Posting Directive effectively in practice. More specifically, it requested detailed descriptions of the methods employed to achieve this result. The questionnaire asked for an in-depth explanation of any specific practices used in this context, aiming to gather comprehensive information on the practical application and impact of Article 3(7).

**The main question asked is whether it can be considered that article 3(7) is applied effectively, thereby ensuring an effective fight against practices aiming to include reimbursement of costs into remuneration / posting allowance?**

In **Finland**, the revised Article 3(7) “*has improved the possibilities for supervision in this regard. However, inspectors have found the provision unclear and difficult to supervise*”. The Finnish report indicates that there are no specific methods (other than the usual ones such as written instructions from the central authorities, information published on the official website or replies to employers’ questions) are used in practice to reach the result of excluding the reimbursement of costs from the posting allowance/remuneration.

In **Belgium**, there is a control methodology which explains how to act when the posting employer pays an allowance which is intended to reimburse food/accommodation costs and, at the same time, provides accommodation/food. In Belgium, there is an active application of the presumption set out in Article 3(7): When it is impossible to determine which elements of

<sup>43</sup> Response depends on sectoral collective agreements.

<sup>44</sup> Response depends on sectoral collective agreements.

<sup>45</sup> Response depends on sectoral collective agreements.

the allowance specific to the posting are paid as reimbursement of expenses and which elements are, in reality, remuneration, the entire allowance is considered to be reimbursement of expenses and is rejected in the salary comparison which is made to establish whether or not the worker benefits from the remuneration due in Belgium.

**Respondents were asked whether there is data/any feedback available on the frequency of controls carried out on Article 3(7)? Are some companies/ sectors of activity specifically targeted? If so, the question was asked whether it is possible to provide this data or share feedback?** In **Belgium** and in **Finland**, the answers provided revealed that there is no data available on frequency of controls. The inspections are not carried out only on the basis of Article 3(7) as the scope of the supervision is always wider. If observed, the matter in question is addressed as part of the supervision of the remuneration. The sanction is the same as for non-compliance with the rules governing the remuneration of posted workers. Therefore, it is not possible to sort out which controls have dealt with this issue (i.e. Art. 3(7) situations) or the frequency of such controls. In Belgium and in Finland, inspections target sensitive sectors. In Finland, inspections are distributed across sectors in the same proportion as notifications.

**There is no data/feedback available in Belgium and in Finland on sanctions notified in relation with the inclusion of reimbursement of costs into the remuneration / posting allowance, and no case law on the enforcement of the law in its "remuneration compliance" dimension** concerning the inclusion of reimbursement of costs into the remuneration / posting allowance (FI).

### 3. What can we learn from sending countries?

The aim of this part of the report is to determine how sending Member States interpret and apply Article 3(7) of the Posting Directive for out-going postings in the construction sector, considering that the conditions under which the reimbursement of expenditure actually incurred on account of the posting are defined in accordance with the national law and/or practice applicable to the employment relationship (or in accordance with the employment contract), and consequentially to the law of the sending country.

Several questions arise in this respect:

- What rules does the sending employer follow concerning the reimbursement of costs?
- Does he/she have to provide a posting allowance?
- Is there a clear distinction made between all types of payment, and, in this respect, is Article 3(7) applicable to out-going postings?

The answers to such questions require a good knowledge of the rules applicable in the sending country, whether they are set in the law, in a collective agreement, in a company's regulation or in the employment contract. The correct application of Article 3(7) in receiving countries may also depend on the degree of awareness by sending employers of the posting rules as well as on monitoring procedures that may be in place in the home country for out-going postings.

To conduct this analysis, six typical sending countries have been selected: **Croatia, Czech Republic, Hungary, Poland, Romania and Slovakia**. One expert per country has filled out a questionnaire for the purpose of this report (hereafter, "national fiche").

### 3.1. Are there rules focusing on out-going postings in the construction sector?

**The comparative study carried out in six sending Member States (CZ, HU, HR, PL, RO, SK) shows that, in the construction sector, there are no specific rules focusing on out-going postings which would address the matters of the posting allowance and reimbursement of costs.**

Romanian law is an exception. It provides general rules for out-going posting. Such rules apply in the construction sector (RO).

Table 10: Existence of rules focusing on out-going posting in the construction sector

	Yes	No	Unclear
CZ		X	
HU		X	
HR	X		
PL		X	
RO		X <sup>46</sup>	
SK		X	

### 3.2. Do sending countries apply the provisions contained in Article 3(7) for posting to another country?

The presumption set out in Article 3(7) has been designed for Member States in their capacity of "host/receiving countries". The purpose of this provision is to ensure that Member States which host posted workers do not allow that the remuneration is concealing reimbursement of expenses.

Article 3(7) can also be looked at reversely, namely from the perspective of the sending countries which may wish to ensure, in order to protect the posted workers' interests, that the companies established on their territory and which post workers to other Member States, comply with host countries' rules on remuneration and posting allowance. The purpose of the question asked to sending countries is to know:

- whether the presumption set out in article 3(7) is extended to out-going postings (e.g. application by RO for postings from RO to DE)<sup>47</sup>,
- and/or if sending employers are made aware that such presumption applies in host countries,

<sup>46</sup> There are legal rules on out-going postings, see below part 3.3 and 3.4.

<sup>47</sup> Let us recall that Art. 3(7) must be transposed only by receiving countries for "in-coming postings" (e.g. transposition by DE for posted workers sent to DE from other Member States).

c) if there are enforcement measures provided by sending countries to insure the correct distinction between the posting allowance and reimbursement of expenditures.

**Responses given by the six sending Member States show that except in one country, Article 3(7) is applied only to in-coming posted workers.**

Romania is the only country where Article 3(7) also applies to workers who are posted from Romania to another Member State.

**Table 11: Does Article 3(7) apply to posted workers sent to another Member State?**

	Yes	No	Unclear
<b>CZ</b>		X	
<b>HU</b>		X	
<b>HR</b>		X	
<b>PL</b>		X	
<b>RO</b>	X		
<b>SK</b>		X	

### 3.3. Is the right to a posting allowance defined by sending Member State for workers sent to another Member State?

As the Posting Directive applies to in-coming postings, sending Member States are not obliged to set up a system of posting allowance for out-going postings. However, sending employers (from countries where wages are low) must use a system of allowance to reach the remuneration amount due in the receiving Member State. In practice, the six examined sending Member States can be divided into four categories as regards the existence of a posting allowance:

- a) The system of posting allowance is not regulated at all (PL). It means that the existence and terms of "posting allowance" will depend on the company's internal regulation or will be found in the employment contract<sup>48</sup>.
- b) There are no specific rules on posting allowances, but posted workers are entitled, like other workers who are in a situation of work-related mobility, to "travel allowances" (CZ, SK). In Czech Republic, posted workers are entitled to a "travel allowance" if a place of work has been agreed, or a regular workplace abroad. Compensation is provided to employees for the days of the first trip from the Czech Republic to the place of work or regular workplace and back as during a business trip abroad (CZ).

<sup>48</sup> In Poland, if an employer chooses not to regulate the matter internally, general regulations of the Labour Code on business travel related costs will apply.

- c) Posting allowances are regulated and take the shape of a progressive per diem (HU<sup>49</sup>).
- d) Posting allowances are regulated in a same way as for in-coming postings (RO). In Romania, the posting allowance for workers sent abroad is granted through a per diem. It is defined as an allowance intended to ensure the social protection of employees, granted to compensate for the inconveniences caused by the posting, such as the removal of the employee from their usual environment. The posting allowance is considered part of the remuneration. Its amount is negotiated between the parties, but it is usually based on tax advantages granted to sending employers<sup>50</sup> (RO). In Croatia, the matter of posting allowance is subject to specific rules applicable in the construction sector (HR).

**Table 12: Existence of a specific regulation on posting allowance for employees sent to another Member State**

	<b>Specific regulation on posting allowance</b>	<b>No regulation on posting allowance</b>	<b>Standard regulation on daily allowance</b>
<b>CZ</b>			<b>X</b>
<b>HU</b>	<b>X<sup>51</sup></b>		
<b>HR</b>	<b>X<sup>52</sup></b>		
<b>PL</b>		<b>X</b>	
<b>RO</b>	<b>X<sup>53</sup></b>		
<b>SK</b>			<b>X</b>

### 3.4. Do sending countries provide for the reimbursement of posted workers' expenses?

**The majority of examined sending Member States do not have any specific regulation providing for the reimbursement of costs of workers posted abroad (HR, SK, PL, CZ).**

<sup>49</sup> Under Hungarian law, according to *Rapidsped*, workers are entitled to a daily allowance (per diem) for work carried out abroad. The amount of those per diems is higher the longer the period during which the worker is posted abroad.

<sup>50</sup> Tax advantages are connected to a *per diem* of 35 euros/day (and an accommodation allowance of 150 euros/day).

<sup>51</sup> F *Rapidsped*, the Court of Justice held that "Under Hungarian law, workers are entitled to a daily allowance (per diem) for work carried out abroad" (paa 26). There are no further indications except that, in this case, the amount of those per diems was higher the longer the period during which the worker was posted abroad.

<sup>52</sup> Collective agreement in the construction sector.

<sup>53</sup> Provided by the law. For EU countries, the per diem is 35 euros/day, and the accommodation allowance is 150 euros/day. According to the Romanian tax Code, this allowance is tax-exempt up to 2.5 times the legal level set for the per diem of public employees, up to a limit of three base salaries corresponding to the occupied job

**One country though has adopted specific legal rules on the reimbursement of costs for employees posted in another Member State (RO).** In Romania, the law states that expenses generated by the posting, which include any expenses for transport, accommodation, and meals, must be specified in the addendum to the employment contract. These expenses cannot be included in the minimum remuneration that the employer must pay to posted workers.

**There are no such rules either in the construction sector, except in Croatia. The collective agreement applicable in the construction sector provides a rule for outgoing posted workers which is hard to interpret.** As a principle, it is stated that "*On construction sites in foreign countries, the Annex to the Collective Agreement applying to posted workers applies to them when working abroad if this does not conflict with the regulations of the country of work (i.e., receiving country)*". Thus, "*in the case where a worker is posted to countries where there is a significant difference between salaries in Croatia, compared to the salaries abroad, the contracting parties agree to a reduction in the scope of the material rights of workers posted abroad, which are recognized in accordance with paragraph 2 of this article. As a rule, the employer provides the posted worker with the "Additional Payment for Posting" by providing accommodation or paying compensation for accommodation. The amount of compensation referred to in paragraph 2 of this article is determined by the employer, depending on the amount of actual accommodation costs*" (HR). Concretely, it would mean that if a worker is posted to countries where wages are higher, the posted worker's rights are reduced for the amount of "Additional Payment for Posting" which is intended to cover accommodation costs. For example, if the salary would be € 2000 in Croatia and € 4000 in the receiving country, and if the employer should pay accommodation costs of €1000 if the work was carried out in Croatia, the sending employer should finally pay only a total remuneration of €4000 (including the accommodation costs), instead of €5000. The conformity of this mechanism with the Posting Directive is questionable since remuneration granted to the posted worker, although higher than that he would receive in the home country, includes reimbursement of actual costs.

In Hungary, since the posting may involve significant additional costs for the employee (e.g. travel, accommodation, meals), the employer is obliged to compensate them. The employer must reimburse the employee for necessary and justified expenses incurred in connection with fulfillment of the employment relationship. However, there is no specific legal provision clarifying the type of costs and the exact form in which they must be reimbursed (HU).

In the absence of specific rules for posting, the **general reimbursement of work-related costs rules** provided by the national regulation is extended to posted workers, including in the construction sector (CZ, HU, PL, SK). Several patterns can be found. The application of general rules of reimbursement of costs can be subsidiary<sup>54</sup> and will rely on the existence of a "business trip" such as is defined by national law (PL).

Rules on reimbursement of business travel expenses can otherwise be established in a collective agreement, in company's internal regulation or in the employment contract (CZ, PL, SK).

Some countries make a distinction for posted workers between what corresponds to remuneration and what is reimbursement of costs (HU).

**Table 13: Type of legal instrument used to reimburse expenses incurred on posting to another Member State**

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<sup>54</sup> These general rules apply when no specific company's regulation covers posting (PL).

	Specific rules for posting abroad	General provisions on reimbursement of costs	Collective agreement in the construction sector	Company's internal regulation
CZ		X		X
HU		X <sup>55</sup>		X
HR			X <sup>56</sup>	
PL		X		X
RO	X			
SK		X		X

### 3.5. What form does the reimbursement of posting-related expenses take?

**Whether provided for by law, collective agreement, company's internal regulation or employment contract, the form taken by the reimbursement of expenses granted to workers posted abroad varies.** It can take several forms, for instance lump sum payments, daily allowance or reimbursement based on real costs (HR, HU, PL, SK). A dual system, made of lump sum payments and reimbursement based on real costs, is usually applied.

The amount of these expenses and the method of granting or reimbursing them by the employer must be specified in the addendum to the employment contract. Tax rules help define the amount of reimbursement (CZ, HU, RO).

Table 14: Form taken by the reimbursement of posting-related expenses to workers posted abroad

	Lump sum	Real costs	Dual system <sup>57</sup>
CZ			X
HU			X
HR			X
PL			X

<sup>55</sup> However, there is no specific legal provision clarifying the type of costs and the exact form in which posted workers must be reimbursed.

<sup>56</sup> Reimbursement rules are specific to posting.

<sup>57</sup> Dual system means that workers receive both a lump sum payment and reimbursements based on real costs.

	Lump sum	Real costs	Dual system <sup>57</sup>
RO	X <sup>58</sup>		
SK			X

### 3.6. Enforcement procedures and practical implementation of article 3(7) by sending countries for out-going postings

In most Member States, there is **no specific enforcement procedure aimed at guaranteeing the application of Article 3(7) by the sending employer for out-going postings** (CZ, HR, HU, PL, SK).

In Romania though, labour inspectors are entitled to verify the actual payment of the posting allowance for out-going posted workers (RO). There is no indication as to whether such inspections are effectively carried out in practice.

**Despite the absence of specific enforcement measures, standard domestic measures of compliance with the labour rules and practices of the sending countries can apply to protect out-going posted workers.** For instance, the competent labour institutions can provide advice at the employer's request (SK). Labour inspection authorities can carry out inspections and posted workers abroad can file a complaint in their home country (CZ, PL). However, there is no indication whether these protective measures are also (effectively) implemented and enforced in practice.

Table 15: Enforcement procedures for the compliance of Article 3(7) by the sending employer

	Enforcement procedure	No enforcement procedure	Standard domestic measures of compliance with labour rules
CZ		X	X
HU		X	X
HR		X	X
PL		X	X
RO	X		X
SK		X	X

<sup>58</sup> Per diem.

## 3.7. Information duties

### 3.7.1 Obligation for the sending employer to inform the posted worker on the remuneration and the posting allowance

Directive 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union<sup>59</sup> can be helpful for receiving countries. According to this directive, specific information must be provided to the workers who are sent to another Member State by their employer. Member States must ensure that "*a posted worker covered by Directive 96/71/EC shall in addition be notified of: (a) the remuneration to which the worker is entitled in accordance with the applicable law of the host Member State; (b) where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging*" (Art. 7(2)).

**In compliance with Directive 2019/1152, sending countries impose a general information obligation on sending employers who post workers concerning the posting allowance or reimbursement of business travel expenses** (HR, HU, PL, CZ, RO, SK).

More precisely, an addendum to the employment contract details the remuneration, with a distinct breakdown for the posting allowance while the employee must also be informed of the method of granting or reimbursing the expenses for transport, accommodation, and meals (RO).

**Table 16: Obligation for the employer to inform the posted worker sent abroad on remuneration, posting allowance and reimbursement of costs**

	Information on remuneration	Information on posting allowance	Information of reimbursement of costs
CZ	X	X	X
HU	X	X	X
HR		X	X
PL	X	X	X
RO	X	X	X
SK	X	X	X

### 3.7.2 Practical information to ensure correct application of Article 3(7) by sending employer

Most countries provide information only to workers (and their employers) who are posted from another Member State to their own territory. Reversely, practical information to

<sup>59</sup> [Directive \(EU\) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.](#)

ensure correct application of Article 3(7) by the sending employer for out-going postings is provided **only by a few countries for out-going postings** (RO).

However, **in some sending countries, general information is also provided for out-going postings**. A website provides detailed information for sending employers who post workers to another Member State, even if information does not include the posting allowance as this form of remuneration is not regulated (CZ, PL).

In Romania, where posting abroad is regulated as such, information remains limited to the text of law and to some answers in a "FAQ" made available by the labour inspection (RO).

In Slovakia, the official website provides that "*the employee posted to other Member State to perform services shall be entitled to travel allowances according to Act 283/2002: reimbursement of proven travel expenses, reimbursement of proven lodging expenses, reimbursement of necessary associated expenses, insurance of medical expenses abroad, compulsory or recommended vaccination, reimbursement of family-related trips, meal*" (SK).

**Table 17: Information on Article 3(7) provided for out-going postings**

	<b>Information not provided</b>	<b>Information provided, but not dealing with Art. 3(7)</b>	<b>Information provided, including on Art. 3(7)</b>
<b>CZ</b>		<b>X</b>	
<b>HU</b>	<b>X</b>		
<b>HR</b>	<b>X</b>		
<b>PL</b>		<b>X</b>	
<b>RO</b>			<b>X</b>
<b>SK</b>		<b>X</b>	

## 4 Final conclusions

### 4.1 Observations based on the eight receiving countries examined

**The answers provided by receiving countries show gaps by the eight examined countries in the application of Article 3(7) of the Posting Directive.** This situation is essentially due to the fact that the rules of the home country are applicable to such reimbursements, and not the rules of the receiving country, making it complicated from a practical point of view to provide enforcement measures.

Firstly, **only few receiving countries incorporate enforcement measures of Article 3 (7).** When they do so, the measures are fairly general and do not target the reimbursement of costs.

Secondly, it is likely that the **terms of “posting allowance”, “daily allowance” and “lump sum payments” are in most cases taken at face value in receiving Member States**, meaning that the payments made through these terms are included in the scope of remuneration, although they may in fact correspond to actual reimbursement of expenses. Control bodies can usually question the exact purpose of the amounts paid by the sending employer, and whether they conceal the reimbursement of actual costs, but **there is no indication as regards the reality, the depth and intensity of such controls**. Some Member States seem to be more active in terms of effective controls, but there is no data to confirm this trend (BE, FI).

Thirdly, **most receiving Member States do not attach importance to the presumption of Article 3(7)** that where the terms and conditions of employment applicable to the employment relationship do not determine whether and, if so, which elements of the allowance specific to the posting are paid in reimbursement of expenditure actually incurred on account of the posting or which are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure. The fact that the pay slip mentions as an element of remuneration a posting allowance or a daily allowance (per diem), without referring to expenses, is not sufficient to trigger the presumption. Further analysis is conducted by labour inspections, often at their own initiative, to identify the nature of payments made.

Fourthly, **controls by receiving countries of the reality of reimbursement of costs such as provided by the legislation of the home Member State (or according to the practice applicable to the employment relationship) are apparently low.** When they are done, it is mainly through the posted worker's payslip, and in that case the control process focuses on remuneration rather than on reimbursement of expenses. This looks like a major gap in the implementation of Article 3(7) in a context where the home country rules/practices regarding the posted workers' rights in terms of remuneration/reimbursement of costs can be hard to identify and to understand, their conformity with the Posting Directive being questionable. In the same vein, there is little awareness of, and action on, the issue of the sending employer having to prove that he does not have to reimburse expenses according to the home Member State rules.

This said, **one country seems more advanced in the application of Article 3(7) and indicates the existence of a consistent case law<sup>60</sup> where, in each case, the nature of the payment is assessed, and the presumption is that posting allowances are not part of the remuneration. The employers must prove otherwise if they want to be able to count the payments toward the total gross-payment (DK).**

<sup>60</sup> Which can be found in the Danish fiche completed for this report.

Nevertheless, it is not yet possible to draw any definite conclusions about the specific enforcement or implementation models of all countries (such as, for instance, Belgium, Denmark, Finland or France). The country of origin-principle regarding the reimbursement of posting related expenses as well as the legal presumption are new and require from national authorities implementing measures at national and local level. In particular, the application of detailed guidance for labour inspectors on the conditions to be met to trigger the presumption and clear processes for inspections must be devised. At this stage, it is unclear whether the Commission evaluates Member States' implementation of these elements (country of origin principle and legal presumption) as in conformity with EU law or if and when it would launch infringement procedures. On its side, the Court of Justice has not yet ruled on the revised Directive 2018.

## 4.2 Observations based on the six sending countries examined

**Only one Member State (Romania) expressly regulates by law postings to another Member State (out-going postings).** In this respect, Romanian law makes a distinction between the posting allowance and the reimbursement of costs, both expressions being defined in line with Article 3(7) of the Posting Directive. Another Member State (Croatia) provides for specific out-going postings rules in the construction sector through a collective agreement.

While the low rate of application of Article 3(7) by sending Member States for out-going postings can be explained by the fact that the Posting Directive covers only in-coming postings, this situation puts pressure on the **receiving Member States to ensure correct application of the Posting Directive rules** aimed at distinguishing between remuneration, the posting allowance and the reimbursement of expenses.

Sending Member States are not obliged to set up a system of posting allowance for out-going postings. However, sending employers (from countries where wages are low) must use a system of allowance to reach the remuneration amount due in the receiving Member State. In this context, half of the sending countries apply specific rules on posting allowance for workers sent to other Member States. In the construction sector, except in Croatia, the matter of the posting allowance is not regulated specifically. In sum, the allowance paid to the workers posted in another Member State can find its origin in the law (HU, RO), in a collective agreement (HR) or in most cases in companies' internal rules or employment relationships.

In addition, except for Romania and Croatia, sending **Member States do not have any specific rule for the reimbursement of costs by employers for workers posted abroad.**

This situation reinforces the impression that the risk of **confusion between the various payments made by the sending employer (with potential inclusion of expense reimbursement into the remuneration / posting allowance), is not well monitored by examined sending Member States.**

**The lack of information on the websites of many sending countries on the meaning of Article 3(7)** in the context of out-going posting increases the risk of non-compliance with this provision by companies who post workers abroad.

Other elements **temper this analysis.**

Firstly, if with a couple of exceptions, there is no specific rule for the reimbursement of expenses incurred by workers posted abroad, **sending Member States consider a general duty to reimburse expenses for all workers either by law or by collective agreement.** The formalisation of reimbursement of costs, which should extend to workers posted abroad, is potentially conducive to a better distinction between reimbursement of costs and remuneration.

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In addition, even if they are hard to access and not necessarily compatible with EU rules, **companies' internal regulations and/or employment contracts alternately provide for equivalent rules dealing with the reimbursement of work-related expenses** incurred by workers posted abroad.

**Secondly, the "information Directive" 2019/1152 has been duly transposed by all sending Member States.** Posted workers must be informed by their employer on the remuneration to which they are entitled to in accordance with the applicable law of the host Member State and, where applicable, to any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging. This information duty does not create substantial rights for workers posted abroad, but it increases chances that the rules/practice applicable in the sending Member State (about the expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging) and the rules applicable in the receiving one (compliance with local remuneration, distinction between posting allowance and reimbursement of actual expenses) are complied with. The above individual information is supplemented in some countries by institutional information provided on an official website for out-going postings.

**The analysis of the rules applicable to out-going postings in six sending Member States demonstrates that compliance with Article 3(7) should remain primarily the responsibility of the host Member States.**