

# Liability in Subcontracting Chains: National Rules and the Need for a European Framework

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# **Liability in Subcontracting Chains: National Rules and the Need for a European Framework**

**STUDY**

## **Abstract**

This study was commissioned upon request by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, upon request of the Committee on Legal Affairs. It provides a comprehensive update on recent developments on a European and national level concerning liability in subcontracting chains and the protection of workers involved in subcontracting chains. A strong focus lies on the existing European legal framework and recent developments in that regard. By assessing the country reports and the findings on a European level, the study closes with "Policy Recommendations" and answers the question from its authors view, if the European Legislator should adopt (further) legislation.

## **ABOUT THE PUBLICATION**

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## LIST OF ABBREVIATIONS

<b>Administrative Commission</b>	Administrative Commission for the Coordination of Social Security Systems
<b>AEntG</b>	German Posting of Workers Act (Arbeitnehmerentsendegesetz)
<b>CJEU</b>	Court of Justice of the European Union
<b>CLA</b>	Collective Labour Agreement
<b>DURC</b>	Italian Attest of occurred payment of social security contributions
<b>Enforcement Directive</b>	Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ( 'the IMI Regulation' )
<b>EU</b>	European Union
<b>ICC</b>	Italian Civil Code (Codice Civile Italiano)
<b>IMI-Regulation</b>	Regulation (EU) no 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ( 'the IMI Regulation' )
<b>Implementing Regulation</b>	Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems
<b>INAL/INPS</b>	Italian social security institutions (Istituto Nazionale per l'assicurazione contro gli infortuni sul lavoro)
<b>LMI</b>	Labour Market Intermediary
<b>Member states</b>	Member states of the European Union
<b>MiLoG</b>	German Minimum Wage Act (Mindestlohngesetz)
<b>OHS</b>	Occupational health and safety

<b>PWD</b>	Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services
<b>Rome Convention</b>	Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980
<b>Rome I Regulation</b>	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
<b>Services Directive</b>	Directive 2006/123/EC of 12 December 2006 on services in the internal market
<b>SMEs</b>	Small and medium sized enterprises
<b>Social Security Regulation</b>	Regulation EG Nr. 883/2004 on the Coordination of Social Security Systems
<b>TAW</b>	Temporary Agency Work
<b>TAW-Agency</b>	Temporary Work Agency/Labour Leasing Agency
<b>TAW-Directive</b>	The Temporary Agency Work Directive 2008/104/EC
<b>TFEU</b>	Treaty of the functioning of the European Union.
<b>The Union</b>	European Union

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## DEFINITIONS OF KEY TERMINOLOGY

**A-1 Certificate/Certificate of Coverage** = With regard to social security, an employee is subject to the legal regulations of one country only. In the case of a temporary (self - ) posting of up to 24 months, the worker/self-employed will remain insured under his/her home country's social security system. The A1-Certificate shows that he/she pays compulsory social security in his/her country of residence. Foreign authorities, event organizers and employers may request proof of social security obligations in the home country

**Bogus/pseudo self- employment:** worker who meets the criteria of an employee but is (falsely) declared self-employed in order to save social security cost and minimum rates of pay

**Chain Leasing:** occurs, when a contractor (borrower/ user enterprise) of a TAW-Agency (lender) transfers the workers to another (sub-) contractor and therefore acts as a second lender.

**Client:** Start of the subcontracting chain, who is often called "Investor". The investor commences a project (for example a building project) by hiring a principal contractor, who is hiring different subcontractors to carry out specialized task.

**Construction Sector:** all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work: excavation, earthmoving, actual building work, assembly and dismantling of prefabricated elements, fitting out or installation, alterations, renovation, repairs, dismantling, demolition, maintenance, upkeep, painting and cleaning work and improvements

**Direct liability:** extends liability in one link up in the chain, only. It does not entitle the posted worker to hold the principal or other subcontractors further up in the chain liable, but only the one subcontractor directly contracting the employer of the posted worker

**Disappearing Subcontractors:** undertakings, who are quickly founded in a member state, hiring workers in order to post them abroad. The workers begin working, the subcontractor is being paid, but refuses to pay his workers. If the workers claim their wages, the subcontractor disappears or goes bankrupt.

**European Labour Law:** European Union Law developed by the under Art. 153 TFEU

**European Labour Law:** Legal acts deriving from Art 153 (1) in connection with Art 45 TFEU may be summarized "European Labour Law" for issues easy understanding. European labour law regulates basic transnational standards of employment and partnership at work in the European Union.

**Host State:** State, where a worker is temporarily posted to

**Letter-Box-Company:** Undertaking that is set up with the intention of circumventing legal and conventional obligations. Examples of these are taxation, social security, VAT and wages. These companies do not actually perform any real economic activities although claiming to do so

**National of a third country:** A national of a third country is a person who is not a citizen of the European Union and is not a person enjoying the Unions's right of free movement as defined in Article 2(5) of the Schengen Borders Code

**Occupational Health and Safety (OHS):** Multidisciplinary field concerned with the safety, health, and welfare of people at work.

**Parasubordinate Worker:** economically dependent workers that are considered self-employed. The basic and common characteristic of these workers is that they are similar to self-employed in so far as they work at their own risk and are not subordinate to an employer. At the same time, they are 'economically dependent' in the sense that they are more or less exclusively reliant on just one client enterprise.

**Posted worker:** employee who is sent by his employer to carry out a service in another EU Member State on a temporary basis.

**Posting of Workers:** providing services by sending own workers/employees abroad on a temporary basis.

**Race to the Bottom:** Situation in which companies or countries compete with each other to reduce costs by paying the lowest wages or giving workers the worst conditions

**Receiving State:** Member state to which workers from another member state are posted to temporarily

**Regime Shopping:** looking for the member state with a legal framework which provides the lowest overall labour cost

**Reveiving state:** State, to which a worker is posted to by a foreign employer

**Sending State:** Member state which sends workers to another member state

**Sequential liability:** all links in the subcontracting chain may be held liable for unpaid wages, until the main client is liable. Certain conditions have to be met before the employee is entitled to move on to the next link in the chain.

**Social Dumping:** practice of employers to use cheaper labour, than is usually available at their site of production. In the second case, migrant workers are employed; in the first, production is moved to a low-wage country or area. The entrepreneur will thus save money and potentially increase his profit. Systemic criticism suggests that, as a result, governments are tempted to enter a so-called social policy regime competition whereby they would reduce their labour and social standards in order to ease labour costs on enterprises and, eventually, to retain business activity within their jurisdiction.

**Subcontractor:** any natural person or any legal entity, to whom the execution of all or part of the obligations of a prior contract is assigned

**Staff Leasing Agreement:** Contractual agreement between a TAW-agency and an user undertaking about the supply of TAW-workers

**Temporary agency posted workers:** workers, who have been posted under the rules of the PWD and TAW-Directive by a temporary work agency

**Temporary Agency Worker:** worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction

**Temporary Work Agency:** any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction

**Undertaking:** self-employed individuals as well as companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law

**User undertaking:** any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily

## EXECUTIVE SUMMARY

### Background

Due to the rapidly developing globalisation of the economy, the ongoing European integration and intensification of the European Single Market as well as the continued specialization and rationalization of business processes, subcontracting has been witnessed rapidly growing since the beginning of the 1990s particularly in the construction sector.

Nowadays companies and organizations tend to assign specialized or labour-intensive tasks to subcontractors to operate more economically. In that regard, chains emerged consisting of many different undertakings, concerned with a single and specialised task of one bigger (building) project.

The construction sector was one of the first economic sectors in which subcontracting became a widespread phenomenon, raising concern of possible erosion of workers' rights at the lower end of a subcontracting chain. Furthermore, it became easier for clients and principal contractors to dispose of a possible liability for wages, taxes and social security contributions for an otherwise inevitable own workforce.

Simultaneously labour market intermediaries in form of temporary work agencies have started to grow rapidly, acting as links in subcontracting-chains and providing workforce to their contractors.

In such a web of different contractors, workers might find it difficult to identify the legally responsible counterpart for their claims. In addition, there are fluid boundaries between legal and illegal practices both aiming on saving costs on human resources such as social contributions and taxes, where a clear differentiation proves difficult.

Therefore, the European Union has enacted several directives and regulations concerning cross border worker and service mobility as well as regulation of labour market intermediaries.<sup>1</sup> Lately the Enforcement Directive 2014/67/EU<sup>2</sup> has been approved with the aim of strengthening the practical application of the Posting of Workers Directive 1996/71/EC<sup>3</sup> by addressing issues related to fraud, circumvention of

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<sup>1</sup> For instance, see the Employers Sanctions Directive 2009/52/EC, the Temporary Agency Work Directive 2008/104/EC, the Regulation EG No. 883/2004 on the Coordination of Social Security Systems

<sup>2</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ( 'the IMI Regulation' )

<sup>3</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

rules as well as a better enforcement, cooperation and exchange of information between the member states.

Different studies have been conducted starting with “the Dublin study” in 2008<sup>4</sup> analysing the impact of European legislation on the legal systems in the member states, revealing loopholes as well as fraudulent practices.

With all examined member states adopting the Enforcement Directive and Poland introducing new measures on joint- and several liability in public procurement and temporary agency work as well as new legislation being enacted in Germany and Italy, this study shall provide a comprehensive introduction to the diverse variety of legal systems on liability in subcontracting chains in place as well as an update on recent developments.

It shall further give the reader a detailed overview on the European legal situation as well as finally give a recommendation whether the European Legislator should adopt legislation. In that regard, the upcoming reform of the PWD and the respective proposal by the European Commission issued in March 2016 will be taken into consideration as well.

## **1. Chapter 1: Introduction**

Chapter 1 of the study functions as a “setting of the scene”. It shall enable readers to gain the basic knowledge necessary to understand the concept of subcontracting, the different liability schemes and how subcontracting chains come into existence.

As the work of labour market intermediaries is strongly connected to subcontracting chains due to temporary work agencies providing workers to principal contractors or (sub) contractors, the concept of temporary work will be shortly outlined as well.

Figures will support visually.

Lastly, a definition section of key terminology will be attached. It shall enable the reader to quickly understand the key facts of the terms of art. In addition, it shall function as a glossary.

## **2. Chapter 2: Subcontracting in the European Union - legal basics and legislation at EU-level**

Chapter 2 will give an overview on the European legislation in place.

Many of the national rules examined in this study are a result from implementation and adaption of European Directives and Regulations into the national legal systems. Thus, a general understanding of the issue of liability in subcontracting chains is not possible without prior introduction to the major measures on a European level concerning subcontracting or working conditions at a wider picture.

Main findings were as follows:

First steps to improve the protection of (posted) workers in subcontracting chains have been taken.

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<sup>4</sup> Houwerzijl, Mijke, Peters, S.S.M. (2008). Liability in subcontracting processes in the European construction sector (comparative report). Dublin: European Foundation for the Improvement of Living and Working Conditions

The reform of the PWD must be closely monitored in the upcoming month as its scope might change in the legislative process. It could solve many urgent issues addressed in this study.

However, the authors have serious doubt, if the Commission's favoured proposal can be generally accepted among the eastern member states. The Enforcement Directive is a prominent example for this. As shown, the first draft provided for more extensive measures but was watered down during the legislative process. The same fate could be faced by the reformed PWD.

As a reform of the PWD is still in progress at the time finishing this study, assessment of the status quo will be focused on.

The newly introduced direct subcontracting liability of Art 12 of the Enforcement Directive is relatively easy to circumvent by inserting a letter box company.

The effectiveness is further hampered by an escape clause lacking any definition of due diligence, which results in a wide margin of interpretation and therefore legal uncertainty. The Regulation on social security would have provided for excellent examples of definition and enforcement. Also, paragraph (2) of the first draft of Art. 12 provided a prestructured due diligence proposing how a reasonable due diligence could be performed and implemented into national legislation.

Furthermore, liability is still limited to the construction sector although there is evidence of the practice of subcontracting spreading on to other sectors like transportation, meat processing, agriculture and other labour-intensive sectors.

Until this point it is uncertain, if the liability regime can develop preventive effects on contractors and subcontractors.

Apart from the newly introduced liability scheme, the Enforcement directive on its own has only addressed the problems and shortcomings of the PWD that are related to the implementation and enforcement of existing rules, which means better implementation rules, intensified coordination and information exchange and other measures.

The Enforcement Directive has also failed to address emerging practices, such as 'Regime Shopping' in the context of posting of workers.

However, due to the recent implementation in mid-2016, there is no reliable data or practical experience with the flanking measures of Art. 4 and 11 of the Enforcement Directive, which could have a very positive influence on the protection of workers and could prove as an alternative to a stricter liability in subcontracting chains.

### **3. Chapter 3: Liability in subcontracting chains - national rules**

Chapter 3 will commence highlighting common patterns of abuse, fraud and circumvention of rules followed by detailed overviews of the different legal frameworks concerning subcontracting chains in Germany, Hungary, Italy, The Netherlands, Poland and the UK.

All member states examined are displayed in an alphabetical order.

The national legal systems will be treated separately and will later be summarized identifying similarities and differences. This shall enable the reader to get a clearer image of the rules in place.

Examination of the rules will cover the liability for taxes, wages as well as social fund payments, if those are covered by the legal framework of the respective member state.

After presenting the national legislation, focus will shift to the application and enforcement of the measures in place in order to identify possible loopholes, fraudulent forms as well miscellaneous problems. Miscellaneous problems may be stakes for workers like slow working national institution or high costs of law enforcement, which hinder workers of making a claim.

Part of the information derives from interviews and catalogues of specifically questions send to experts of the different stakeholders like social partners, national authorities and employers' associations. The authors were keen on keeping a balance between employers' and employees' contribution in order to present the interests of both sides in a neutral manner.

Main findings were as follows:

There are still differences in terms of scope between the member states examined.

While Germany, Italy and the Netherlands have very far reaching and elaborated systems of chain liability, sometimes even covering all wage components, Poland, the UK and in part Hungary are pursuing a part strictly according to the minimum requirements of the Enforcement Directive by introducing a direct liability with a due diligence escape clause and by limiting liability on the construction sector.

It is positive in regard of worker protection that Hungary has extended the scope of liability in subcontracting chains on all economic sectors. However, the government is of the opinion that the transport sector, where subcontracting chains are a widespread phenomenon, does not fall within the scope of the PWD. This should be addressed by the commission.

Italy is unique as it has very strict liability rules, but has lesser activities of foreign subcontractors. Even posting is less relevant than in other member states. This might hint to a preventive nature of strict and far reaching liability rules. However, Italy is traditionally facing issues with the enforcement of rules.

Unlike other EU member states examined, the UK will not be putting a notification system in place for posted workers. Equally, it is expected that enforcement inspections envisaged in the directive will be carried out under HMRC's existing powers.

This 'light touch' approach to implementing the new rules might be a mistake.

At least the notification obligation in the Enforcement Directive could prove invaluable in preventing letter box companies or bogus subcontractors to post their employees to the UK. It is therefore a step in the right direction that every other member states request a notification prior to posting.

These measures could prove to be very effective in fighting letter box companies and other fraudulent forms of subcontracting.

Both the reports from Germany and the Netherlands showed evidence of a practice of circumvention of the minimum wages by imposing excessive charges on employees for housing during their stay for work clothing and tools as well as transport to the place of work. This practice is being tackled by both member states. Time will show if effective.

In all member states (with a slight exception for the Netherlands) pseudo self-employment was considered an issue. Although the Enforcement Directive addresses that issue, there is still a lack of a reliable European definition, which could provide guidance to the member states in fighting pseudo self-employment.

In an overall assessment, the situation in terms of liability in subcontracting chains has changed in a positive way. However, implementing an effective Union-wide liability system will involve further development and assessment that is likely to require an extended period of monitoring, evaluation and modification of the measures already in place. It is too early to finally assess the effectiveness of the measures of the Enforcement Directive adopted by the member states in mid-2016 at this point.

The study recommends reviewing the situation in 2019.

#### **4. Chapter 4: Regulation of labour market intermediaries in connection with subcontracting chains**

Temporary agency work as well as labour leasing resemble a specific form of subcontracting. Labour market intermediaries like a labour leasing agency or temporary work agency might be acting as one link of a subcontracting chain, which makes them subject to liability. Chapter 4 will therefore focus on labour market intermediaries and the regulation applied to them.

Special attention is given to the national registration and licensing schemes applied to TAW-agencies engaged in the providing of temporary workforce. Provision are reviewed concerning licensing, registration and certification of labour market intermediaries. An effective licensing or registration prevent fraud and abuse of letter box companies.

After reviewing the legal frameworks, the study will conduct a critical assessment of the rules in place in terms of scope and efficiency.

Main findings were as follows:

All the countries examined (now) possess a more or less elaborated registration or licensing scheme for TAW-Agencies. This shows the need for regulation in this sector.

TAW is of major importance in Germany and the Netherlands, but less important in Hungary and Italy with Poland in between.

While far reaching restrictions are imposed in Italy and Germany, Hungary imposes way less restrictions to the employment of TAW-workers. Poland has begun to regulate restrictions more strictly from April 2017.

More than in the field of liability in subcontracting chains there are some similarities in the registration or licensing schemes between the examined member states, while restrictions to the use of TAW vary remarkably.

The Netherlands with their long history of TAW have a very elaborated system, which is influenced by collective bargaining and private certification schemes. On the opposite collective bargaining has almost no meaning in Hungary.

The Dutch NEN 4400-2 Certificate has been especially developed for TAW-agencies, who have their registered office outside the Netherlands. It includes requirements for checking and assessing any foreign undertaking that provides workers for the purpose of working under the supervision or direction of a third party and for testing and

assessing any foreign contractor or subcontractor in order to determine, if they are organised in such a way that it may be safely assumed that obligations from employment are complied with.

This certification process is an excellent example of stakeholders and social partners working together in order to provide for reliable contractors. This is due to the very far reaching, strictly enforced and elaborates liability schemes in subcontracting chains established in the Dutch legal framework also in terms of TAW.

Form the far reaching Dutch liability system derives a high pressure on the parties involved in subcontracting chains to obey the rules and to contract reliable undertakings.

The same applies for Germany and Italy, where liability schemes in subcontracting chains for TAW have also been established.

Germany has reformed regulations in 2017 closing the circumventive practices of "hidden supply of workers" as well "chain leasing". Furthermore, the rights of TAW-workers have been enhanced and more restrictions for the use of TAW have been imposed.

In Poland, the regulation of foreign TAW-Agencies was basically not in place until a reform in April 2017, which opened the door for abusive practices before.

In order to effectively tackle fraud and abuse, licensing or registration schemes must be applicable to foreign TAW-agencies as well. Until April 2017, foreign TAW-Agencies from other member states were not subject to registration in Poland. Those entities were only required to notify the Polish authorities about commencing activities in Poland by providing information about their country of origin, the name and seat of the foreign employer, the approximate area and the types of activities to be carried out. There was no assessment, if the undertaking did develop substantial economic activities, which opened the door for letterbox companies.

In Italy, the financial requirements are vast, while in Poland they are very little and do not pose any obstacle for the foundation of letter box companies.

The same physical person can establish and close the temporary agency many times. This way each time the agency has a different name and can start anew.

In Poland, the description of status as worker or self-employed is subject to the will of the parties. It should be highlighted that it is very easy to take recourse to temporary agency work and civil law contractors enjoy very limited protection. Pseudo self-employment has been reported a widespread problem in connection with TAW.

Workers were posted indefinitely to the same user undertaking by different TAW-agencies.

With recent reform of TAW, Poland is making reasonable progress in tackling these issues. Potentially these loopholes in the national legislation will be closed by the recent reform of the TAW provisions.

In summary, the situation of TAW-workers has been further improved in 2017 with reformed rules in Germany and more importantly in Poland.

## **5. Chapter 5: Policy Recommendations, answers and conclusion**

Finally, chapter 5 aims to give recommendations for further EU action.

Considering the recent deadline for implementation of the Enforcement Directive and the upcoming reform of the PWD, which could further improve workers' protection in subcontracting chains, the study recommends to wait and closely monitor and assess, if the recent provisions are effectively enforced by the member states.

As a soft law measure, the study proposes to establish a Union wide traffic light system for TAW-agencies and subcontractors.

Main findings in terms of policy recommendations were as follows:

During the course of the study some practical issues were discovered, which may be addressed by future legislation:

- 1) Pseudo-self-employment remains an issue addressed by almost all country experts. The European Legislator should provide for a definition in order to provide legal certainty.
- 2) Although a direct liability in subcontracting chains has been established with the Enforcement Directive, the limited scope "one up in the chain" as well as the undefined requirements for a due diligence could seriously hamper the effectiveness
- 3) In that regard, we suggest to closely monitor if the flanking measures of the Enforcement Directive, which provide for notification, better cooperation and enforcement of rules, prove to back the direct liability in its effectiveness
- 4) If not and further action is required, we propose to establish for a "Sequential Liability" as practiced in the Netherlands, which could provide for a compromise for those member states, who are sceptic.
- 5) Beneath the construction sector other labour - intensive economic sectors are affected by subcontracting chains. Liability should apply regardless the economic sector. Extending it sector by sector takes too long
- 6) There are still inconsistencies between the different directives and regulations, which should be addressed
- 7) The European Legislator should try to define loose legal terms in order to provide for a level playing field in terms of interpretation of European Law
- 8) The European Legislator should figure out concrete numbers on posted workers
- 9) The level of Regulation on Labour market intermediaries differs among the examined countries. However, measures have been taken in those member states<sup>5</sup>, where a sufficient and efficient registration scheme for TAW did not exist. The effectiveness should be closely monitored.
- 10) Cross-border enforcement of rights and obtained titles is still an issue considered inefficient. This has been addressed by the Enforcement Directive and should be closely monitored.

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<sup>5</sup> For instance Poland

## 1. CHAPTER

### INTRODUCTION

#### 1.1. Background

The right to free movement of workers within the European Union is a fundamental principle enshrined in Art. 45 of the Treaty on the Functioning of the European Union (TFEU).

Introduced in 1957 within Art. 48 of the ECC-Treaty, it shall facilitate worker mobility within the European Union. Ever since the European Union has been keen on implementing means of worker protection within the European Single Market.

The aspect of worker protection in connection with subcontracting has been discussed for more than a quarter of a century and has been addressed by several Union Directives starting with measures for occupational health and safety by issuing Directives 89/391/EG of 1989<sup>6</sup> and 92/57/EEC of 1992<sup>7</sup>.

Due to the rapidly developing globalization of the economy, the ongoing European integration and intensification of the European Single Market as well as the continued specialization and rationalization of business processes, subcontracting has been witnessed rapidly growing since the beginning of the 1990s, particularly in the construction sector.

Nowadays companies and organizations tend to assign specialized or labour-intensive tasks to subcontractors to operate more economically. In that regard, chains emerged consisting of many different undertakings, concerned with a single specialised task of one bigger project.

The construction sector was one of the first economic sectors in which subcontracting became a widespread phenomenon, raising concern of possible erosion of workers' rights at the lower end of a subcontracting chain. Furthermore, it became easier for clients and principal contractors to dispose of a possible liability for wages, taxes and social security contributions for an otherwise inevitable own workforce.

Simultaneously labour market intermediaries in form of labour leasing - as well as temporary work agencies have started to grow rapidly, acting as links in subcontracting-chains.

Labour mobility and cross-border subcontracting processes intensified with the European Union's expansion towards the East in 2004, 2007 and 2013.

In such a web of different contractors, workers might find it difficult to identify the legally responsible counterpart for their claims. In addition, there are fluid boundaries between legal and illegal practices both aiming on saving costs on human resources such as social contributions and taxes, where a clear differentiation proves difficult.

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<sup>6</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work

<sup>7</sup> Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Therefore, the European Union has enacted several directives and regulations concerning cross border worker and service mobility as well as regulation of labour market intermediaries.<sup>8</sup> Lately Directive 2014/67/EU has been approved with the aim of strengthening the practical application of the Posting of Workers Directive 1996/71/EC by addressing issues related to fraud, circumvention of rules, and exchange of information between the member states.

Different studies have been conducted starting with “the Dublin study” in 2008<sup>9</sup> analyzing the impact of European legislation on the legal systems in the member states, revealing loopholes as well as fraudulent practices.

Within the extensive study of Jorens/Peters/Howerzijl conducted in June 2012 there was summarized that only seven member states of the Union and Norway had implemented a “more or less elaborated system of joint and several liability” related to wages and/or labour conditions. At the time, the authors therefore concluded that joint and several liability systems concerning subcontracting chains are not widespread around the European Union.<sup>10</sup>

With Hungary, Poland and the UK adopting the Enforcement Directive 2014/67/EU and Poland introducing new measures on joint- and several liability in public procurement and temporary agency work as well as new legislation being enacted in Germany, Italy this study shall provide a comprehensive introduction to the diverse variety of legal systems on liability in subcontracting chains in place as well as an update on recent developments.

It shall further give the reader a detailed overview on the European legal situation as well as finally give a recommendation whether the European Legislator should adopt legislation. In that regard, the upcoming reform of the PWD and the respective proposal by the European Commission issued in March 2016 will be discussed also.

## **1.2. Aims, method and scope of the study**

The study aims to review responsibility and liability arrangements in subcontracting chains relating to employment law.

As the legal frameworks on subcontracting chains and labour market intermediaries have been subject to ongoing change, the study further aims to provide an update on the current situation in the European Union.

Keeping in mind that the Legal Affairs Committee of the European Parliament has requested this study, it will put an emphasis on presenting the actual legal frameworks. In this regard, the study will follow the approach of displaying the legal frameworks of the examined member states country by country instead of a single continuous text.

The Committee for Legal Affairs has expressed particular interest in fraudulent forms of subcontracting. The study will therefore focus on wage and social contribution fraud,

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<sup>8</sup> For instance, see the Employers Sanctions Directive 2009/52/EC, the Temporary Agency Work Directive 2008/104/EC, the Regulation EG Nr. 883/2004 on the Coordination of Social Security Systems

<sup>9</sup> Houwerzijl, Mijke, Peters, S.S.M. (2008). Liability in subcontracting processes in the European construction sector (comparative report). Dublin: European Foundation for the Improvement of Living and Working Conditions.

<sup>10</sup> Jorens/Peters/Howerzijl, Study on the protection of workers' rights in subcontracting processes in the European Union. Project DG EMPL/B2-VC/2011/0015, page 144/192

forms of pseudo-self-employment, the use of dubious firm structures and general practices of circumventing liability measures in subcontracting chains.

In addition to a presentation and analysis to the different legal systems, we reached out to different players on the European labour market.

Different trade unions as well as employers' associations have been interviewed on their practical experience and impact of the provisions on subcontracting as well labour market intermediaries with a special focus on loopholes in the existing rules as well as fraudulent forms of subcontracting carried out in the concerning member states.

Lastly, we reached out to local mid-sized Law Firms from our Network, requesting information on practical issues encountered, too.

All the aforementioned entities have been issued with a catalogue of questions concerning their national legal framework and the practical impact of the rules existing. Furthermore, they were asked to identify loopholes, inefficiencies and cases of fraud on workers in connection with subcontracting processes.

The overall aim shall be to contribute to the development of a "best practice guide" for public authorities to encourage better monitoring and enforcement of regulations as well as a recommendation on the question, if the European Union shall adopt legislation.

As to this limited scope, we did not attend miscellaneous liability in subcontracting chains without direct a connection to labour law, mostly concerning cases of warranty rights and compensation for damages.

In addition, this study will not extensively provide research on health and safety obligations, (hereinafter OHS).

The study will focus on direct legal acts providing for a liability in subcontracting chains. Indirect measures will be discussed on a European level and if there is evidence of an actual impact on issues such as fraudulent abusive and circumventive practices.

Lastly, due to limitations in terms of volume and length, the study does examine selected member states, only. It shall not be misunderstood as a comparative study, which would have provided a more complete overview over all member states of the Union.

### **1.3. General outline on Liability in subcontracting-chains**

#### **1.3.1. What is subcontracting ?**

Subcontracting is a business practice, where a main or principal contractor of an investor or client hires additional individuals or companies called subcontractors to help complete a project. The main or principal contractor is still in charge and must oversee hires to ensure project is executed and completed as specified in contract. Companies or individuals may also be foreign companies or workers.

The actors involved in subcontracting processes usually consist of a client or investor, a main or principal contractor as well as one or more subcontractors.

Subcontracting may be useful in situations where the range of required capabilities for a project is too diverse to be possessed by a single general contractor. In such cases, subcontracting parts of the project that do not form the general contractor's core

competencies may assist in keeping costs under control and mitigate overall project risk.

Subcontracting is often done to reduce costs, as subcontractors can often utilize specialized knowledge or resources and achieve cost advantages by producing in large numbers. For example, a smaller business might use an outside firm to prepare its payroll, an accountant to help with its record keeping and tax compliance, or a freelance worker to handle a special project.

Subcontracting is therefore especially prevalent in areas where complex projects are the norm, such as construction and information technology.

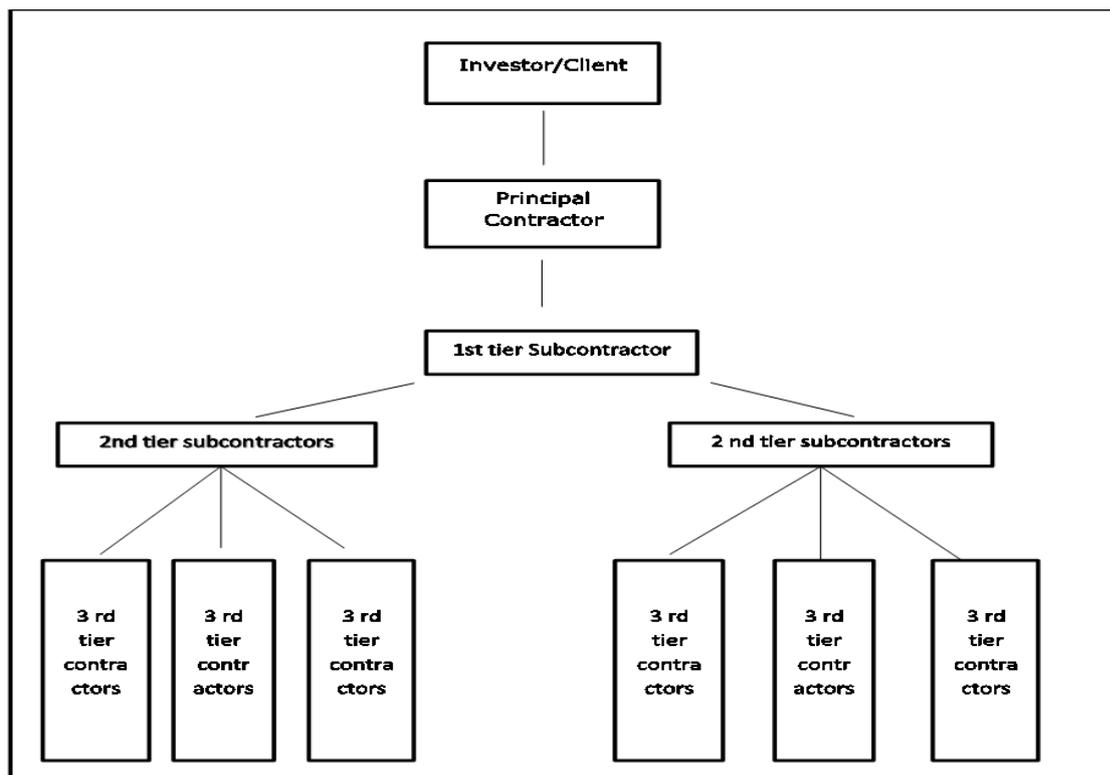
Over the years, subcontracting has also become widely used in labour intensive industries such as construction, food processing and agriculture, where sustaining an own workforce has proven uneconomical or where subcontractors from foreign countries can provide cheaper services due to lower labour costs. European workers working abroad in another member state, even for a short period, has become a widespread phenomenon.

In addition, labour market intermediaries might act as subcontractors, providing workforce to the principal contractor or even another subcontractor.

### **1.3.2. What is a subcontracting chain?**

A subcontracting chain emerges, if a principal contractor, contracted by an investor, or the investor himself hires one or more subcontractors, who either contribute by bringing their own employees or by subcontracting another legal entity like a temporary work agency. This in theory endless chain resembles a logistical as well as value chain of economic nature. Every link has its own contract commitment to one of the other links.

**Figure 1 : Subcontracting Chain**



Source: Authors

As you can see, the general/main contractor is often the only actor within the chain, who has a complete overview of the subcontractors being involved.

### **1.3.3. Which concepts of liability are to be distinguished?**

There are two different natures of liability:

#### **Joint and several liability:**

If a subcontractor does not fulfil his obligations regarding wages, taxes or social funds payments to its employees or the Inland Revenue, the contractor of the subcontractor can be held liable for the entire debt of the subcontractor.

Therefore, employee and the Inland Revenue have an additional guarantor/debtor to rely on, regardless of responsibility or fault.

The contractor and subcontractor are left to sort out their respective proportions of liability and payment between themselves.

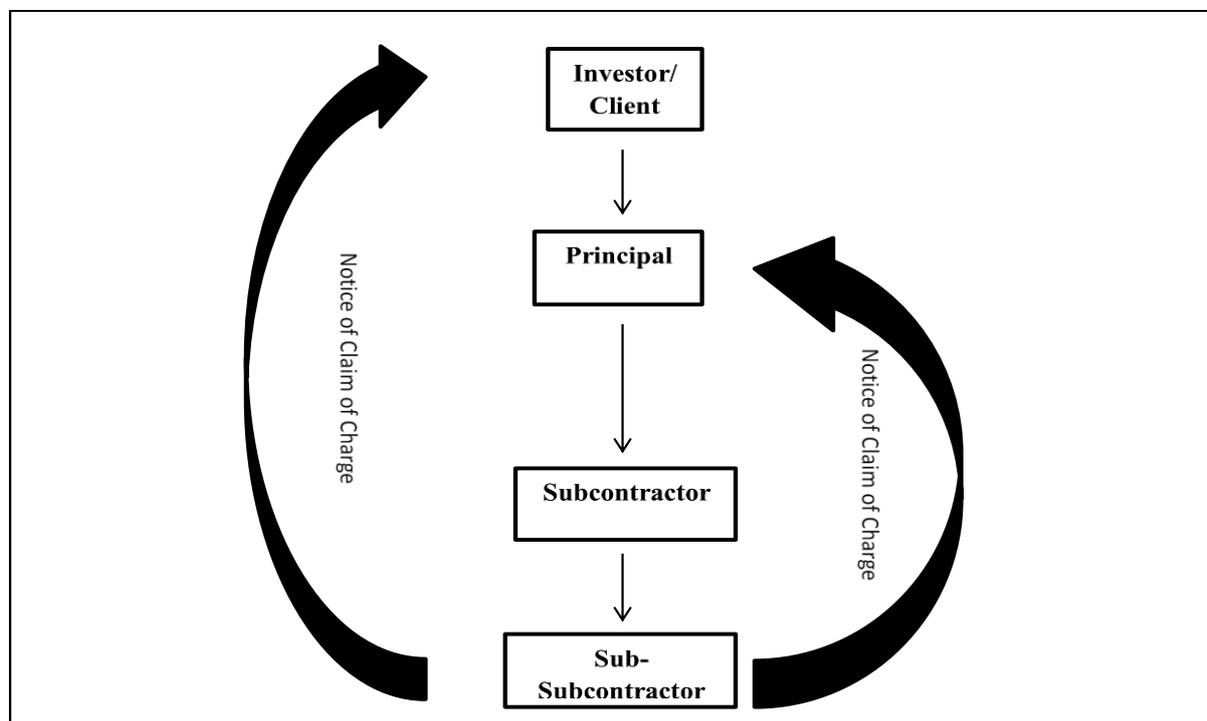
This liability regime is also called direct joint and several liability.

#### **Chain - Liability:**

Chain liability spreads the joint and several liability throughout the chain or a large part of it. As result, liability applies to the principal contractor.

It has to be kept in mind however, that the principal contractor is not necessarily also the investor or client. If a national legal system does apply liability to an investor/client as well, the study therefore uses the term **“full chain liability”**, in order to make clear, that all links of the subcontracting chain may be held liable.

**Figure 2: Full Chain Liability**



Source: Authors

Liability in subcontracting chains is considered an effective measure in order to protect workers<sup>11</sup>.

In general liability for the subcontractor might make contractors more diligent and careful in choosing their subcontractors. It might prevent a principal or investor or other contractors from hiring subcontractors they are not 100 % sure of. Subcontracting liability has a preventive and deterrent effect by giving a strong incentive to contractors to choose subcontractors more carefully and to verify that subcontractors comply in full with their obligations under the host country's rules. <sup>12</sup>

A (full) chain liability has a more preventive effect than a direct joint and several liability. Whereas the preventive effect of a direct liability is limited only to the (sub) contractor of which the employer is a direct subcontractor, the preventive effect of a

<sup>11</sup> See for instance the following studies: Jorens/Peters/Howerzijl, Study on the protection of workers' rights in subcontracting processes in the European Union. Project DG EMPL/B2-VC/2011/0015; Theresia Johanna Bakermans, ILIABILITY WITHIN THE EUIN THE DRAFT ENFORCEMENT DIRECTIVE ON POSTED WORKERS IN THECONSTRUCTION INDUSTRY, April 2014; Bettina Haidinger - Liability and co-responsibility in subcontracting chains, Vienna 2016 as well as the diversity of EuroFound Studies concerning liability in subcontracting processes

<sup>12</sup> MEMO/14/344 of the European Commission, May 2013, page 4

chain liability is extended to the entire subcontracting chain, including the main contractor and sometimes even the investor. It is expected that the main contractor and his (sub) contractors will become more careful in the selection of potential subcontractors.<sup>13</sup>

Subcontracting liability has two target directions: One is to protect the workers engaged in a subcontracting chain. The second is to protect the state income by a possible extension joint and several liability on taxes.

The protection of posted workers' rights in situations of subcontracting is a matter of particular concern for this study and one of the core topics. There is evidence that, in many cases, posted workers have been exploited and left without payment of wages or part of the wages they are entitled. There have also been situations where posted workers were unable to enforce their wage claims against their employer, because the company had disappeared or never really existed (so called letter box company).

Finally, a system of liability in subcontracting chains poses a mechanism of self-regulation between private actors and is considered far less restrictive and more proportionate than alternative systems such as pure state intervention by inspections and sanctions.<sup>14</sup>

#### **1.4. General outline on temporary agency work**

TAW has seen a significant growth in both numbers of TAW-agencies as well as workers employed with them.

TAW-agencies (Temporary Work Agencies or Labour Leasing Agencies) often act as subcontractors, providing workforce while the user undertaking provides for work equipment and materials. If an user undertaking hires workers from a TAW-agency established in another member state of the EU, the workers posted to the member state of the user undertaking are not only posted workers but also TAW-workers at the same time.

It is therefore mandatory, to get familiar with the basic patterns of TAW in order to prepare for specific issues arising with it.

Temporary work always involves three parties and constitutes trilateral relationship:

- The TAW-agency (supplier/lender of workers' services) makes his employees available to a third party to work for him
- The user undertaking (user of workers' services/borrower) deploys the workers hired from the Agency and is entitled to give them instructions.
- The TAW workers, although performing work for the user undertaking, remain employed with the TAW-agency<sup>15</sup>

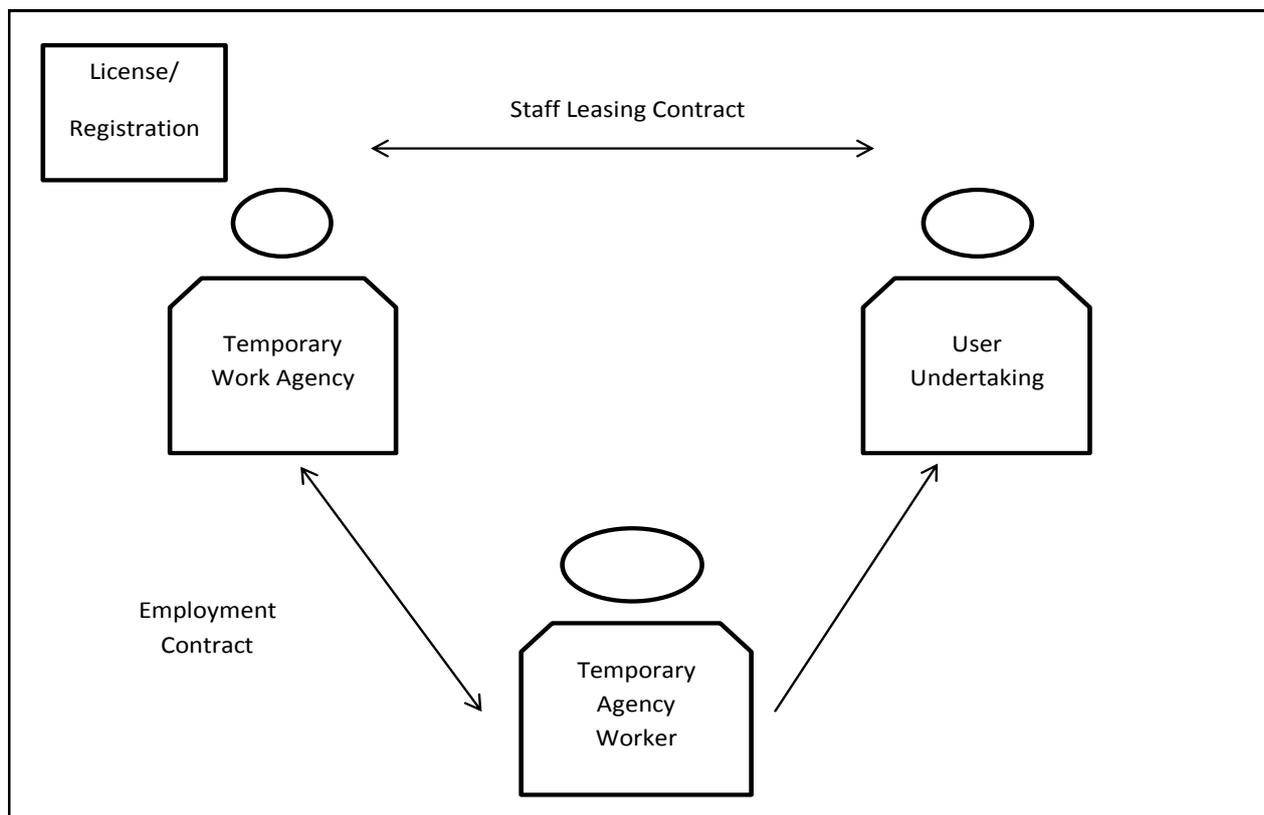
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<sup>13</sup> Jorens/Peters/Howerzijl, Study on the protection of workers' rights in subcontracting processes in the European Union. Project DG EMPL/B2-VC/2011/0015, page 158

<sup>14</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services COM/2012/0131 final, page 22.

<sup>15</sup> [http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Temporary-work-temporary-worker-assignment/Requirements/requirements\\_node.html](http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Temporary-work-temporary-worker-assignment/Requirements/requirements_node.html)

The TAW-agency and the user undertaking sustain a contractual relationship called staff leasing agreement.



**Figure 3: Temporary Agency Work**

Source: Authors

Staff leasing agreements establish a trilateral relationship, based on two different (and independent) contracts: one contract is concluded between the TAW-agency and the employee of that agency, which resembles a regular employment contract and a second one between the agency and the user undertaking concerning the supply of workforce. The user undertaking will not enter an employment contract with the TAW-workers, even if he works under the supervision and in the interest of the user undertaking and not of the agency. Therefore, the TAW-agency will remain the formal employer of the outsourced worker and will pay his wages, social contributions and deduct taxes.

While the employee is working for the user undertaking he is still an employee of the agency, which will retain the disciplinary power on him, notwithstanding working under the management and control of the user undertaking and for the benefit the latter. Moreover, although the disciplinary power remains to the agency, the supplier will be responsible for damages suffered by third people inflicted by the worker during his performance.

The staff leasing contract between the agency and user undertaking might be temporary (for a special project) or of indefinite (in case of supplementing) in duration and will define, which price is to be paid to the agency for providing employees.

TAW is considered a very flexible form of work. Use of TAW has been reported in many labour intensive sectors such as construction, hotel and restaurants, health and manufacturing.

In these and other sectors, a systematic use of TAW might permit reductions in the permanent workforce by reacting more flexible in production peaks. Such use of TAW can be a measure of achieving lower wage cost and more labour flexibility and is mostly used for lower-skill employment.<sup>16</sup>

In addition, TAW provided a flexible alternative to replace temporarily absent employees (for example on maternity leave), for seasonal work and to encourage the integration of unemployed people.

On the downside TAW poses some dangers for both user undertaking and TAW-worker.

The terms of employment often differ from those permanently employed with the user undertaking. TAW-workers are often paid less and do not receive the same benefits as permanent employees.

Furthermore, TAW poses the thread of substituting the whole workforce with TAW workers, only keeping the smallest possible number of permanent workers in order to safe cost.

Therefore, in most countries and all the member states examined licensing or registration schemes as well as limitations and restrictions are imposed on TAW-agencies. Details will be provided in chapter 4.

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<sup>16</sup> <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/temporary-agency-work-and-collective-bargaining-in-the-eu>

## **2. CHAPTER 2: SUBCONTRACTING IN THE EUROPEAN UNION - LEGAL BASICS AND LEGISLATION AT EU-LEVEL**

### **2.1. Preliminary Remarks**

In order to establish and further deepen the Internal Market, the TFEU contains several fundamental freedoms, which resemble basic and founding principles of the European Union. In respect of the topic of this study, the freedom of free movement of workers, the freedom to provide services as well as the freedom of establishment have to be discussed more narrowly. The aforementioned freedoms are guaranteed to every European citizen or undertaking based in a member state.

On the one hand, the Freedom of Movement of workers according to Art. 45 TFEU enables and legally entitles EU-Citizens to search for a job in any member states of the European Union as well as to pick up an employment without the need for a work permit<sup>17</sup>, to take residence and stay there even if the employment ends<sup>18</sup> and to be equally treated in comparison to domestic workers in terms of access to employment, working conditions and other social and tax advantages.<sup>19</sup>

On the other hand, the freedom to provide services (Art. 56 TFEU) gives undertakings within the meaning of Art. 54 TFEU<sup>20</sup>, which have a registered office, central administration or principal place of business within the Union, the right to offer and provide their services in another Member State on a temporary basis while remaining in their member states of origin. In order to provide services cross border, undertakings are entitled to temporarily post their own workers to the member states, where the service is provided according to contract.<sup>21</sup>

The freedom of Art. 56, TFEU is being flanked by the freedom of establishment according to Art. 49 TFEU, which entitles European based undertakings to permanently take up and pursue economic activities and to set up and manage undertakings under the same conditions as domestic undertakings are entitled to regarding establishment by the law of the Member State.<sup>22</sup>

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<sup>17</sup> Requirements and restrictions are governed by Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers

<sup>18</sup> Rights, requirements and restrictions are governed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

<sup>19</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Reaffirming the free movement of workers: rights and major developments, COM (2010) 373 final, Brussels, 13 July 2010. page 4.

<sup>20</sup> Article 54 TFEU states:

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

<sup>21</sup> [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_3.1.3.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.3.html)

<sup>22</sup> [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_3.1.4.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.4.html)

The very idea of these fundamental freedoms is to eliminate any form of discrimination on the grounds of nationality and, if these freedoms are to be used effectively, the adoption of measures to make it easier to exercise them, including the harmonization of national access rules or their mutual recognition. In that regard, the Services Directive<sup>23</sup> was enacted in 2006 to strengthen the freedom to provide services within the EU. This directive is considered a crucial instrument for developing and finally completing the internal market by introducing measures of administrative and regulatory simplification and modernization, by fostering cooperation among member states as well as enhancing and enforcing the rights of consumers and businesses.<sup>24</sup>

However, the freedom of movement of workers **does not apply** to posted workers as they are not availing themselves of their free movement rights. Instead, the employer is making use of the freedom to provide services by sending own workers abroad on a temporary basis.<sup>25</sup> Especially in regard of transnational employee assignment arises an area of conflict between the interests of (posted) workers and employers/undertakings. The employer, who is providing services unionwide is keen on reducing labour costs to be most cost effective. This may lead to the practice of so called "Social Dumping".

In need of protection, posted workers are being protected only by the PWD, which provides for certain minimum terms and conditions of employment in the host state, as well as the Enforcement Directive, which are aimed to prevent the undercutting of local service providers and a "Race to the Bottom" between the member states. In view of the considerable discrepancies between member states regarding the posting of workers, the Commission proposed a revision of the Posting of Workers Directive in March 2016. The proposal is currently being discussed in Parliament. The study picks that up later on.<sup>26</sup>

All Directives, Regulations and other legal acts mentioned above and referred to in this study are based on Art 153 (1) TFEU, which enables the European legislator to enact legal measures in a list of labour law fields, notably excluding wage regulation, taxation and collective bargaining.

The following main fields of EU regulation of labour rights are included in the scope:

- individual labour rights,
- anti-discrimination regulations,
- rights to information, consultation, and participation at work, and
- rights to job security
- working & employment conditions
- information & consulting of workers.

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<sup>23</sup> Directive 2006/123/EC of 12 December 2006 on services in the internal market

<sup>24</sup> For a short summary see <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1496912869596&uri=LEGISSUM:133237>; for further and more detailed information see the study of Josefa Monteagudo, Aleksander Rutkowski and Dimitri Lorenzan, The economic impact of the Services Directive: A first assessment following implementation, 2012, accessible via [http://ec.europa.eu/economy\\_finance/publications/economic\\_paper/2012/pdf/ecp\\_456\\_en.pdf](http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf)

<sup>25</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Reaffirming the free movement of workers: rights and major developments, COM (2010) 373 final, Brussels, 13 July 2010. page 4

<sup>26</sup> See VIII. Outlook: Reform of PWD

Legal acts (directives, regulations etc.) deriving from Art 153 (1) in connection with Art 45 TFEU may be summarized "European Labour Law" for issues of easier understanding.

European labour law (as understood in this study) regulates basic transnational standards of employment and partnership at work in the European Union. In virtually all cases the European Legislator follows the principle of defining a mandatory minimum level of protection, which mainly covers core rights. However, the individual member states are free to provide higher levels of protection and create rights more beneficial for workers.<sup>27</sup> The intention is to provide for a level playing field within the European Single Market concerning minimum labour conditions in order to prevent "**Social Dumping**" and a competitive "**Race to the Bottom**" between the member states concerning social standards.

Besides the Enforcement Directive for the construction sector, all directives and regulations deriving from European Labour Law are not directly imposing rules on liability in subcontracting chains. Except for the Enforcement Directive, those legal acts are not meant to specifically protect workers involved in a subcontracting chain, but to generally protect all posted workers.

**However, the practice of posting of workers is directly linked to the practice of subcontracting.** Therefore, European Labour Law has a direct influence on the parties involved in subcontracting chains as it regulates the posting of workers by foreign subcontractors (who may be LMI's at the same time) and imposes rules on how foreign workers shall be treated in comparison to the domestic workforce, which social system is applicable and who is overall liable for remuneration, taxes and social contribution. Also, European Labour Law resembles minimum working conditions within the European Single Market.

The following will firstly show which law is applicable in cross border subcontracting scenarios, will then present an overview on the PWD and respective rulings by the CJEU concerning subcontracting chains as well as an overview of the Enforcement Directive with special emphasis on Art. 12. The study will then continue to display the Employers Sanctions Directive as this Directive contains a strict liability regime for subcontracting scenarios, which will be followed by a part on the Temporary Agency Work Directive as TAW is often involved in subcontracting chains. Lastly, the Regulation on the Coordination of Social Security Systems will be introduced, shortly. As the European legislative process is constantly in motion, a reform of the PWD is currently vividly pursued by the Union. The study will give some summarizing information on the process and in detail on proposed rules concerning liability in subcontracting chains.

## **2.2. Transnational employee assignment in the European Union - applicable law**

In the European Union and its internal market backed by the fundamental freedom of free movement of workers and the freedom to provide services, cross border cases of economic activity by workers as well as undertaking are daily fair.

In a community with 28 individual legal systems, there is a need to determine, which law is applicable to the respective contractual relationship between entities of different member states.

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<sup>27</sup> <http://ec.europa.eu/social/main.jsp?catId=706>

European private international law follows the basic principle, that priority is given to a choice of law by the contractual parties.

Concerning the labour law focus of this study, it must be determined, which law is applicable in posting scenarios as well as similar contractual relationships. In this early stage minimum standards and core rights of workers must be already protected as a worker might be posted from a member state with lesser standards than the receiving one. Therefore, a choice of law could result in a denial of minimum working conditions and core rights.

Therefore, Art 6 of the 1980 Convention on the Law Applicable to Contractual Obligations 1980 (hereinafter the Rome Convention)<sup>28</sup> ruled that no choice of law clause contained in an employment contract could deprive the employee of the protection afforded to him by the mandatory laws which would be applicable in the absence of a choice of law. Mandatory law are such provisions which are regarded as crucial by a member state for safeguarding its public interests in respect of political, social or economic organization of society.<sup>29</sup> Such mandatory laws may only apply for the benefit of the employee. Therefore, authority of the parties is limited to protect the employee as the weaker party of the contract.<sup>30</sup>

In absence if a choice of law by the contractual parties, an employment contract is governed:

- by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
- if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated<sup>31</sup>;

unless it appears from the circumstances of the individual case that a contract is more closely connected to another country, in which case the contract shall be governed by the law of the one more closely connected.

Thus, in case of a foreign worker employed with a foreign employer and temporarily posted to another member state, the law of the sending state remains applicable and not that of the receiving member state.

The provisions of the Rome Convention have been replaced by the Rome I Regulation<sup>32</sup>.

The significant change is that according to Art. 8 (2) Rome I Regulation, the applicable law determined as that of the member state "from which the employee habitually

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<sup>28</sup> Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980

<sup>29</sup> See Art. 9 (1) of the Rome I Regulation, which reads as follows: Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

<sup>30</sup> European Commission, Practice Guide, Jurisdiction and applicable law in international disputes between the employee and the employer, 2016, page 8

<sup>31</sup> See also Recital (6) of the PWD: Whereas, according to Article 6 (1) of the Rome Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice

<sup>32</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

carries out" his or her work.<sup>33</sup> It covers scenarios, in which employees, for instance airline pilots or professional drivers, traverse through different member states within a day's time. These employees do not work "in" a particular member state, but "from" a particular member state, where the employer has its base of operations.<sup>34</sup>

The principle of precedence of mandatory law over party's authority was maintained.<sup>35</sup>

If the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated, Art. 8 (3) Rome I Regulation.<sup>36</sup>

However, where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.<sup>37</sup> This paragraph functions as a so-called "Escape Clause", if the circumstances of the case indicate a more closely connection to the law of the other member state.<sup>38</sup>

An example for a "more closely connection" are cases of project-based posting, where the foreign employer has hired workers from his home state to carry out a certain project situated in another member state. Although the ordinary place of work is the receiving state, the law of the sending state is still applicable, because there is a more closely connection to the law of the sending state.<sup>39</sup>

In summary, Art. 8 Rome I Regulation establishes a hierarchy of different connecting factors leading to the law applicable.

From the above follows that in most posting scenarios, the (labour) law of the sending state is applicable, not the one of the receiving state, irrespective of mandatory provisions. However, the PWD does not derogate from the Rome I Regulation, but offers additional protection to the employee, who can invoke the law of the host Member State if it is more generous to the employee than the law of his/her habitual place of work.<sup>40</sup>

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<sup>33</sup> In that regard, the Rome I Regulation adapted to the case law of the CJEU "Koelzsch vs. Grossherzogtum" Luxembourg (C-29/10)

<sup>34</sup> Art. 8 (2) Rome I Regulation reads as follows: To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

<sup>35</sup> See Recital (34): The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

<sup>36</sup> See Art. 9 (3) of the Rome I Regulation, which reads as follows: Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated; Concerning the criteria to determine the place of business through which the employee was engaged, see the case of CJEU Voogsgeerd vs. Navimer SA (C-384/10)

<sup>37</sup> See Art. 9 (4) of the Rome I Regulation, which reads as follows: Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply

<sup>38</sup> Concerning the criteria of a more closely connection see the case of CJEU Schlecker vs. Boedecker (C-64/12)

<sup>39</sup> Schlachter in Erfurter Kommentar zum Arbeitsrecht, § 1 AEntG, Rn. 4;

<sup>40</sup> European Commission, Practice Guide, Jurisdiction and applicable law in international disputes between the employee and the employer, 2016, page 9

Therefore, the PWD extends the minimum protection guaranteed by provisions of mandatory law and overrides this protection.<sup>41</sup>

Finally, attention must be drawn to the special case of **bogus/pseudo self-employment**, a topic of particular concern for this study. A bogus self-employed person is a worker who meets the criteria of an employee but is falsely declared self-employed by the (sub-)contractor posting individual self-employed workers to a project. The question arises whether these pseudo self-employed workers fall under the scope and benefit from the protective rules of the Rome I Regulation. Based on the CJEU case law<sup>42</sup>, an assessment has to be made on a case-by-case basis to determine whether such workers, who have been declared as self-employed, are integrated into the organization and framework of the company's business for which they work and what is the legal and actual nature of their relationship, subordination being the most important criterium.<sup>43</sup>

If a self-employed individual is after diligent assessment of the case in fact and employee of the de facto employer and therefore a case of bogus or pseudo self-employment is given, the application of the regulations will be triggered, irrespective of the expressions used by the parties in the contract.

### 2.3. The Posting of Workers Directive

As previously stated in the preliminary remarks, the PWD itself did not introduce any provisions concerning the liability in subcontracting chains, in which foreign or domestic subcontractors make use of posted workers from another member state.<sup>44</sup> However, it is important to gain a basic understanding of the background and history of the PWD in order to identify and address practices of subcontracting deemed illegal or abusive. Nevertheless, posting of workers is closely connected to the practice of subcontracting as subcontracting chains often emerge from posting scenarios. Finally, one must keep in mind, that any acts of worker protection do protect every worker, which includes the ones involved in a subcontracting chain.

Before the PWD was adopted in 1996, the higher working conditions of the receiving state applied to all domestic employees, but not to those posted by a foreign employer. This was considered to encourage **"Social Dumping"** and a **"Race to the Bottom"** in terms of working conditions as well malignant competition between the member states.<sup>45</sup>

A first proposal for the Directive was published by the Commission in 1991 after social partners in the construction industry started demanding legislative action at a EU-level.<sup>46</sup> In March 1990 the CJEU ruled in the case of *Rush Portuguesa Lda v Office national d'immigration* (C-113/89) that a European undertaking, who has been contracted to provide services in another member state, has the right based on freedom

<sup>41</sup> In that regard see also recital 34 of the Rome I Regulation, which reads: The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

<sup>42</sup> See cases of *Asscher vs. Staatssecretaris van Financiën* (C-107/94); *Jany and Others vs. Staatssecretaris van Justitie* (C-268/99); *Nadin, Nadin-Lux SA vs. Durré* (C-151/04) and (C-152/04)

<sup>43</sup> European Commission, Practice Guide, Jurisdiction and applicable law in international disputes between the employee and the employer, 2016, page 6

<sup>44</sup> The issue of subcontracting liability was later picked up with the Enforcement Directive, see IV.

<sup>45</sup> Schlachter in *Erfurter Kommentar zum Arbeitsrecht*, § 1 AEntG, Rn. 3

<sup>46</sup> Theresia Johanna Bakermans, Liability within the EU in the draft Enforcement Directive on posted workers in the construction industry, April 2014, page 16

to provide services to carry out the contract using its own workers. However, the Court also ruled that the receiving state has the right to force the company to comply with the social and labour legislation during the period of the contract.

The imposing of the minimum working condition of the host state has been very controversial among the different parties<sup>47</sup>, which is why adoption took until 1996.<sup>48</sup> It is in force since December 1999.

The aim is to set minimum working conditions and core rights set up by the receiving state, which may not be undershot.<sup>49</sup> It imposes several safeguards to protect the social rights of posted workers and to prevent social dumping when European undertakings use their freedom to provide services throughout the Union.<sup>50</sup>

In order to protect posted workers and prevent "Social Dumping" the Directive requires Member States to ensure that posted workers are subject to the host country's laws, regulations or administrative provisions concerning:

- maximum work periods and minimum rest periods
- minimum paid annual holidays
- minimum rates of pay, including overtime rates
- conditions of hiring out workers, in particular supply of workers by temporary employment undertakings
- health, safety and hygiene at work
- protective measures in the terms and conditions of employment of pregnant women or those who have recently given birth, of children and of young people
- equal treatment between men and women and other provisions on non-discrimination<sup>51</sup>

The PWD was limited to the construction sector<sup>52</sup>, in which the assignment of workers from member states with a lesser level of worker protection to other member states with higher standards became widespread. However, the directive enables the member

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<sup>47</sup> Among the member states, the UK and Portugal were against it; Opinions among employers' organizations were divided, while trade unions were generally in favour of the PWD

<sup>48</sup> Alexandre Bilous, Posted workers and the implementation of the Directive, EurWORK 1999, accessible via <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/posted-workers-and-the-implementation-of-the-directive>

<sup>49</sup> Also see Recitals (13) and (14) of the PWD: Whereas the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; whereas such coordination can be achieved only by means of EU law; Whereas a 'hard core' of clearly defined protective rules should be observed by the provider of the services notwithstanding the duration of the worker's posting

<sup>50</sup> Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, Page 8

<sup>51</sup> See Art. 12 PWD Terms and conditions of employment

<sup>52</sup> Which includes according to the Annex to the PWD, which reads: The activities mentioned in Article 3 (1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work: excavation, earthmoving, actual building work, assembly and dismantling of prefabricated elements, fitting out or installation, alterations, renovation, repairs, dismantling, demolition, maintenance, upkeep, painting and cleaning work and improvements

states to extend their national framework on other economic sectors as well, if terms and conditions of employment are laid down by CLAs declared universally applicable.<sup>53</sup>

In the construction sector, where the core conditions of employment listed above are laid down by CLA's declared universally applicable, member states are obliged to ensure the application of these conditions to posted workers.<sup>54</sup>

The PWD covers three cross border situations:

1. posting under a contract concluded between the undertaking posting own employees and the party for whom the services are intended
2. posting to an establishment or business owned by the same business group in the territory of another Member State (intra-corporate posting)
3. hiring out by a temporary work agency to a business established in another Member State<sup>55</sup>

However, the PWD does not establish a level playing field of working conditions throughout the European Single Market in respect of wages and social cost. This is not intended and not covered by Art. 153 TFEU. Therefore, the economic use of wage and social costs differentials as competitive advantage is not made impossible by the PWD, but restricted.

As previously stated, the Directive itself neither contained any provisions concerning the liability in subcontracting chains, nor did it explicitly enable the member states to implement such rules when transposing the Directive into their national legal system.

However, some member states examined in this study (e.g. Germany ,the Netherlands and Italy ) introduced such rules of joint and several liability or even chain liability in subcontracting chains upon transposition of the PWD or even prior to that into their respective national law.

In the special case of Germany action was even taken even prior to the adoption of the PWD in early 1996 by enacting the Act on the Posting of Workers (Arbeitnehmerentendegesetz, hereinafter AEntG). While also protecting the rights of workers posted from abroad, the new rules were mainly intended to protect domestic employers/undertakings and seal off the national labour market against competition from a globalized economy (at the time from Portugal and Spain) by imposing a joint

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<sup>53</sup> MEMO/14/344 of the European Commission, Posting of workers: EU safeguards against social dumping, May 2013, page 2; See also Art 3 Nr. 8 of the PWD, which reads as follows: 8. Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

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

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

<sup>54</sup> See Art. 12 PWD Terms and conditions of employment

<sup>55</sup> MEMO/14/344 of the European Commission, Posting of workers: EU safeguards against social dumping, May 2013, page 2

and several liability<sup>56</sup>. Since then, focus has shifted to maintain minimum working conditions for domestic workers as well.<sup>57</sup>

As in the case of Germany, member states might impose too far reaching liability schemes for (foreign) subcontractors to seal of their market against competition from abroad. Therefore, such provisions could be considered as hindering the freedom to provide services up to the point violating European Law.

In that regard, the CJEU issued three fundamental decisions, of which two must be displayed more detailed in the following boxes:

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<sup>56</sup> BT-Drs. 13/2414, page 7; See also Box 1 on the respective ruling of the CJEU

<sup>57</sup> Schlachter, Erfurter Kommentar zum Arbeitsrecht, § 1 AEntG, Rn. 1

### Box 1: Wolff & Müller (C-60/03)

#### **Facts of the Case:**

A Portuguese citizen had been hired by a Portuguese building company for bricklaying at a construction site in Berlin, Germany. The Portuguese building company had been contracted by a German undertaking named Wolff & Müller to perform concrete and steel works.

The Portuguese citizen instituted proceedings against his employer as well as Wolff & Müller as joint debtors at the Labour Court of Berlin claiming outstanding remuneration to the amount of 4,019.23 DM.

The worker was of the legal opinion that Wolff & Müller would be joint and several liable for outstanding wages according to § 1a AEntG (which is now § 14 AEntG).

The Labour Court of Berlin as well as the regional labour court partly granted the claim.

The Federal Labour Court of Germany asked the CJEU for a preliminary ruling whether the provisions of § 1 a AEntG<sup>1</sup> hinder the freedom to provide services according to Art. 54 TFEU.

In the opinion of the German court, the joint and several liability imposed by § 1a of the AEntG would lead to intensive inspections and obligation to provide proof, which would result in additional costs for (foreign) subcontractors and high administrative burdens. The advantage of the joint and several liability would be limited because the posted workers would be unaware of the German law and enforcement would be in court.

Furthermore, the explanatory memorandum to the legislation would state that the objective of liability is to make it more difficult to award contracts to subcontractors from so-called cheap-wage countries so as thereby to revive the German labour market in the construction sector, protect the economic existence of small and medium-sized establishments in Germany and combat unemployment in Germany.

The question of the referring court was the following:

*"Does Article 49 EC (formerly Article 59 of the EC Treaty) preclude a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived the defence of prior recourse, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective?"<sup>1</sup>*

### **Ruling of the CJEU:**

The CJEU did not share the German court's view and ruled as follows:

Pursuant to Art. 5 of the PWD member states are required to apply appropriate measures to guarantee the payment of the statutory minimum wages applicable in the host country. Appropriate procedures must be available to posted workers in order to claim the minimum wage.

The measures for securing the minimum wages must respect the fundamental freedoms. If additional administrative and economic costs and burdens are caused by national regulations, the national regulation affects the freedom to provide services in a negative manner. National rules can, however, be justified, if they are based on overriding requirements relating to the public interest.<sup>58</sup> One of the general interests is the protection of workers.<sup>59</sup>

§ 1a AEntG offers the posted worker the advantage of being able to hold a second debtor liable, who is connected with the employer and is able to pay. On objective grounds, the provision is appropriate to ensure the protection of posted workers.

If a provision has the objective of preventing unfair competition, this may justify a restriction on the freedom to provide services provided that there are overriding requirements based on public interest. This objective can be pursued, in accordance with the fifth recital of the PWD, in addition to the objective of worker protection.

While the CJEU accepted a concept of joint and several liability in subcontracting chains, where the contractor could be held liable as a guarantor for any depth concerning (minimum-) wages as well as social fund payments irrespective of any fault or responsibility in Germany, rules in Belgium concerning taxes were deemed as hindering the freedom to provide services in the following decision:

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<sup>58</sup> See recital 34

<sup>59</sup> See recital 35

## Box 2: Commission vs. Belgium (C-433/04)

### **Facts of the case:**

Belgium tried to seal its national labour market in the construction sector by imposing the following tax rule:

*"1. A principal who pays a contractor who is not registered [in Belgium]<sup>1</sup> at the time of payment for all or part of the cost of the works covered by Article 400(1) must, at the time of payment, withhold 15% of the sum invoiced, excluding value added tax, and pay that amount to the official appointed by the King, in accordance with the detailed rules laid down by the latter.*

*2. A contractor who pays a subcontractor for all or part of the cost of the works covered by Article 400(1) must, at the time of payment, withhold 15% of the sum invoiced, excluding value added tax, and pay that amount to the official appointed by the King, in accordance with the detailed rules laid down by the latter*

*A principal who, for work covered by Article 400(1), has recourse to a contractor who is not registered at the time the contract is concluded, shall be jointly and severally liable for the payment of that contractor's tax debts.*

*2. A contractor who, for work covered by Article 400(1), has recourse to a subcontractor who is not registered at the time the contract is concluded, shall be jointly and severally liable for the payment of that subcontractor's tax debts.*

...

*5. Joint and several liability shall be limited to 35% of the total price, excluding value added tax, of the work commissioned from an unregistered contractor or subcontractor."<sup>1</sup>*

The Commission notified Belgium that it considered the national legislation on the withholding obligation and joint liability to be incompatible with Art. 54 TFEU.

Belgium was of the opinion that the obligation to withhold and the joint and several liability was part of a far-reaching system combating tax fraud and serving as a deterrent. Moreover, the contested measures were asserted to be justified by overriding reasons of general interest in combating tax fraud.

The Commission was of the opinion that undertaking would be prevented from resorting to contractors who are not resident or not registered in Belgium. In addition, joint and several liability would also cover tax debts relating to work carried out for other persons. It would be applied automatically even if there is no fault by any party.

### **Ruling of the CJEU:**

The Belgian provisions were deemed to be disproportionate and thus incompatible with the Treaty provisions on the freedom to provide services by the CJEU.

The following reasoning was given:

The freedom to provide services requires the abolition of all restrictions, provided that they are capable of preventing, hindering or rendering less attractive the activities of those who are resident in another member state.

The unregistered service provider cannot dispose of part of its assets immediately due to the obligation of the client under Art. 403 CIR 92. This disadvantage prevents service providers from gaining access to the Belgian market.

Furthermore, companies are prevented from contracting service providers not registered in Belgium as they are jointly and severally liable in accordance with Article 402 CIR 92 for 35% of the foreign service provider's tax liabilities for all previous periods of taxation. Access to the Belgian market is therefore made more difficult.

The general assumption that tax evasion or circumvention may occur does not justify the impairment of the objectives of the EC Treaty.

The general and preventive application of the obligation to withhold and the joint and several liability to all service providers not established or registered in Belgium, although a part of them is in principle not taxable or otherwise liable to pay taxes, cannot be justified by the general assumption of tax evasion are justified. The individual situation of the service providers is not taken into account by the automatic measure.

Milder means would be the introduction of a system, which requires to provide information to Belgian financial authorities on any contract entered by non-registered contracting part.

In the context of joint and several liability, it would have been more lenient to provide service providers with a means of proving the correctness of their tax situation or to require compliance with certain formalities in order to ensure that the tax situation of the service providers is in order.

From the two rulings of the court the following conclusion can be drawn:

A system of liability in subcontracting chains is justified if the protection of workers and the prevention of unfair competition is intended and measures are required by overriding requirements relating to the public interest.

If measures are aimed at foreign undertakings only in order to prevent or hinder access to the domestic market of a member state cannot be justified by the general assumption of tax evasion.

In regard to access to court, the PWD lays down an additional forum where the employee can sue his/her employer, most importantly in the country where the employee is posted to, Art.6 of the PWD.<sup>60</sup> However, an additional forum can only be

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<sup>60</sup> Art. 6 of the PWD reads as follows: In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.

used to enforce the terms and conditions of employment pursuant to Art. 3 of the PWD.<sup>61</sup> This is further emphasized in Directive 2014/67/EU on the enforcement of the Posted Workers Directive, Article 11(1).<sup>62</sup> Nevertheless, the allowance of legal proceedings in the host state the worker is posted to is a very important instrument of protection as it makes the enforcement of a possible joint and several or even chain liability more accessible for the (posted) worker.

Although the PWD was considered a step forward in terms of (foreign) worker protection, the directive suffered from some flaws. Furthermore, keeping in mind the advanced age of the PWD, various forms of fraud, abuse and circumvention have occurred relating to the highly increased number of posted workers throughout the Union, mainly focusing on labour intensive sectors in member states with high wage levels.

The legal term of "limited period of time" was not defined. In contrast, Regulation EG Nr. 883/2004 on the Coordination of Social Security Systems expressively states that the duration of posting may last 24 months at the longest and that repeated posting for the same job is not possible.<sup>63</sup> However, the Regulation does not prohibit longer periods of postings, but subjugates the posted employee to the social security system of the host country.

From this inconsistency developed two forms of abusive posting:

**"Permanent posting"**, which mean that domestic workers were permanently replaced by posted ones.<sup>64</sup> There are examples of the whole domestic workforce being dismissed and replaced by posted workers of a foreign temporary work agency in order to save cost.<sup>65</sup>

Also, the **practice of rotational** posting was often used, where workers are solely recruited to be repeatedly posted to different member states, but never perform any work in the home state, where the worker should have been working given ordinary circumstances.<sup>66</sup> There are examples of workers residing under letter boxes in order to make the posted workers appear as residing in the sending country for two months, providing incorrect A1-Certificates.<sup>67</sup>

According to the scope of the PWD, an undertaking may avail on the freedom to provide services if they are genuinely linked to the sending member state.<sup>68</sup> The directive

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<sup>61</sup> European Commission, Practice Guide, Jurisdiction and applicable law in international disputes between the employee and the employer, 2016, page 9

<sup>62</sup> See under IV.

<sup>63</sup> Art. 12 No. 1 of the Social Security Regulation reads as follows: A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another person.

<sup>64</sup> Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, Page 28 and following

<sup>65</sup> See European Commission, IMPACT ASSESSMENT - Revision of the legislative framework on the posting of workers in the context of provision of services, SWD(2012) 63 final, Brussels 2012, pages 36 "Example 7"

<sup>66</sup> Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, Page 28 and following

<sup>67</sup> European Commission, IMPACT ASSESSMENT - Revision of the legislative framework on the posting of workers in the context of provision of services, SWD(2012) 63 final, Brussels 2012, pages 35 and 36 "Example 8"

<sup>68</sup> Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, Page 29

speaks of an undertaking “established” in a member state without giving any further definition of “established” and which criteria or requirements should be met.<sup>69</sup> Again, the Social Security Regulation provides for more precise insight: According to Art. 13 of the Social Security Regulation one must carry out substantial activity in the member state in which the undertaking is established.

This loophole is of special relevance for subcontracting as it encouraged the phenomenon of “**Letterbox Companies**” acting as (bogus) subcontractors, which also includes temporary work agencies. Undertakings are founded in member states with low taxes and low social security cost, but develop very little economic activity there. Their main objective is to hire workers and send (“post”) them to another member state. Sometimes even the whole workforce of “Letterbox Companies” consist of pseudo self-employed workers, who are paid far less than they would be entitled to according to the PWD.

“Letterbox Companies” often comprise of many local affiliates or a network of different companies in different member states, which seriously hampers an effective control by authorities.

As those “Letterbox Companies” develop very little economic activity, this mounts in the common practice of “**Disappearing Subcontractors**”. This means undertakings, who are quickly founded in a member state with low wages, taxes and social contributions and hire workers in order to post them to a project. The workers begin working, the subcontractor is being paid, but refuses to pay its workers. If the workers claim their wages, the subcontractor disappears or goes bankrupt and cannot be held liable.

Closely connected to this practice is the problem of “**Regime Shopping**” often found in the field of TAW. An Agency looks for the member state with the least requirements for setting up a temporary work agency, which also offers a lesser level of social security. Sometimes agencies are even working without any license asserting all workers to be self-employed. Pseudo self-employment is a phenomenon often linked with employment agency work, where whole workforces of undertaking are being replaced by agency workers.<sup>70</sup>

In cases of **pseudo or bogus self-employment**, contracts are being drafted in order to create a self-employed worker on paper, while from a legal point of view the contractual relationship must be considered as employment. A self-employed worker is not protected by labour law or the PWD, receives no sick pay, has no paid holidays and is often not paid the minimum wages of the receiving country. Social contribution must be paid by the pseudo self-employed workers themselves. Contractors, who (sub-)contract self-employed workers safe of up to 50 % in comparison to employees.

In addition, there is evidence undercutting and circumvention of minimum rates of pay. The posting employee is paying the minimum wages of the receiving country on paper,

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<sup>69</sup> See for instance recital 18 of the PWD, which reads as follows: Whereas the principle that undertakings established outside the Community must not receive more favourable treatment than undertakings established in the territory of a Member State should be upheld; Further, Art. 1 No. 1 of the PWD reads as follows: This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

<sup>70</sup> Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, page 40

but is charging the posted workers excessively on housing, clothing and even working materials such as tools.

These practices resemble the most severe practical problems in connection with subcontracting chains and have been addressed by the social partners<sup>71</sup> as well as the EU Commission<sup>72</sup> as the PWD does not contain any provisions to prevent or sanction such abuses. The missing of liability rules in the context of subcontracting chains has been criticized as posted workers in the context of sub-contracting chains are in a situation of particular vulnerability.<sup>73</sup>

Furthermore, it must be highlighted, that most forms are strongly connected among each other. A "Disappearing Subcontractor" could for instance be a temporary work agency without a license, which is established in a member state with low social contribution by a letter box, falsely declaring its employees as self-employed workers.

Lastly there is evidence of problems regarding the enforcement of the PWD. Coordination and exchange of information between the member states as well as a diligent cooperation between the social inspections of various member states have been deemed as being ineffective. The PWD does not contain any provisions on that issue. Further problems arise in terms of enforcing workers' rights due to a lack of information on the applicable working conditions and their enforcement in court.<sup>74</sup>

Some of those practical problems were partly addressed by the Enforcement Directive, which will be displayed in the following.

## 2.4. The Enforcement Directive

As the number of posted workers continued to increase in the years following the establishment of the PWD, after further enlargement of the European Union in 2004 in particular, the problems addressed under III. became more and more obvious, calling for legislative action by the EU.

If postings continue to grow at the annual growth rate of 11.1% showed between 2010 and 2014, the total number of postings may reach up to 3 million workers by 2018. While the increase in the number of postings represents an indicator of a vigorous Internal Market for cross-border services, its social acceptance among companies and workers may risk being weakened by concerns about the fairness of EU rules.<sup>75</sup>

Firstly, there was evidence of unfair competition and the substitution of domestic workers in labour-intensive sectors. This has occurred mainly in North-Western European countries as a result employers' strategic use of posted workers from lower

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<sup>71</sup> See also ETUC, BUSINESSEUROPE, UEAPME, CEEP: Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases, 19 March 2010

<sup>72</sup> European Commission, impact assessment - Revision of the legislative framework on the posting of workers in the context of provision of services, SWD(2012) 63 final, Brussels 2012, pages 35 and following

<sup>73</sup> European Commission - impact assessment Accompanying the document

Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD (2016) 52 final, page 14 and 15

<sup>74</sup> Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, page 35 and following

<sup>75</sup> European Commission - impact assessment Accompanying the document

Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD (2016) 52 final, page 18

wage countries, also in form of TAW.<sup>76</sup> Secondly, there had been a growth in semi-legal, abusive, circumventive and fraudulent practices such as letter-box companies, bogus self-employment and numerous other forms of unacceptable practice, which involve the exploitation of posted workers.<sup>77</sup>

The Enforcement Directive<sup>78</sup> was adopted on 13<sup>th</sup> of May 2014. It had to be transposed into the national legal systems of the member states by the 18<sup>th</sup> of June 2016.

According to its Art 1 (1), it aims to establish a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of the PWD, including measures to prevent and sanction any abuse and circumvention of the applicable rules and is without prejudice to the scope of the PWD. Furthermore, it aims to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, in particular the enforcement of the terms and conditions of employment that apply in the Member State where the service is to be provided in accordance with Article 3 of the PWD, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers, and thus supporting the functioning of the internal market".

According to the recitals of the Enforcement Directive, the following practical issues were to be addressed:

- Combat, prevent and avoid abuse, fraud and circumvention of the applicable rules<sup>79</sup>
- Combat pseudo self-employment<sup>80</sup>
- Provide easier access to information<sup>81</sup>

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<sup>76</sup> An issue addressed the Temporary Agency Work Directive 2008/104/EC, see VI.

<sup>77</sup> Those were addressed under III.

<sup>78</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ( 'the IMI Regulation' )

<sup>79</sup> Also see Recitals (7) and (50) of the Enforcement Directive: In order to prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU and/or of the application of Directive 96/71/EC, the implementation and monitoring of the notion of posting should be improved and more uniform elements, facilitating a common interpretation, should be introduced at Union level. Since the objective of this Directive, namely to establish a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, cannot be sufficiently achieved by the Member States, and can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective

<sup>80</sup> See Recitals (10) of the Enforcement Directive: The elements set out in this Directive relating to the implementation and monitoring of posting may also assist the competent authorities in identifying workers falsely declared as self-employed. According to Directive 96/71/EC, the relevant definition of a worker is that which applies in the law of the Member State to whose territory a worker is posted. Further clarification and improved monitoring of posting by relevant competent authorities would enhance legal certainty and provide a useful tool contributing to combating bogus self-employment effectively and ensuring that posted workers are not falsely declared as self-employed, thus helping prevent, avoid and combat circumvention of the applicable rules.

<sup>81</sup> See Recitals (20) and (21) of the Enforcement Directive: In order to improve accessibility of information, a single source of information should be established in Member States. Each Member State should provide for a single official national website, in accordance with web accessibility standards, and other suitable means of communication. The single official national website should, as a minimum, be in the form of a website portal and should serve as a gateway or main entry point and should provide in clear and precise way links to the relevant sources of the information as well as brief information on the content of the website and the

- Enhance and encourage cooperation between the national authorities of the sending and receiving member state<sup>82</sup>
- Strengthening of the posted workers right of enforcement.<sup>83</sup>

In order to achieve its aims, the Enforcement Directive obliges the member states to:

- "Clarify the definition of posting increasing legal certainty for posted workers and service providers, while at the same time avoiding the multiplication of "letter-box" companies that do not exercise any genuine economic activity in the Member State of origin but rather use posting to circumvent the law
- Set more ambitious standards to raise the awareness of workers and companies about their rights and obligations regarding the terms and conditions of employment
- Improve cooperation between national authorities in charge of posting (obligation to respond to requests for assistance from competent authorities of other Member States; a two-working day time limit to respond to urgent requests for information and a 25-working day time limit for non-urgent requests)
- Define member states responsibilities to verify compliance with the rules laid down in the PWD (Member States will have to designate specific enforcement authorities responsible for verifying compliance; obligation of member states where service providers are established to take necessary supervisory and enforcement measures)
- Establish a list of national control measures that the Member States may apply in order to monitor the compliance of PWD and the Enforcement Directive itself
- Improve the enforcement of rights, and the handling of complaints, by requiring both host and home member states to ensure that posted workers, with the support of trade unions and other interested third parties, can lodge complaints and take legal and/or administrative action against their employers if their rights are not respected
- Ensure that administrative penalties and fines imposed on service providers by one Member State's enforcement authorities for failure to respect the requirements of the

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links referred to. Such websites should include in particular any website put in place pursuant to Union legislation with a view to promoting entrepreneurship and/or the development of cross-border provision of services. Host Member States should provide information on the periods laid down in their national law for which the service providers have to retain documents after the period of posting; Posted workers should have the right to receive from the host Member State general information on national law and/or practice that is applicable to them.

<sup>82</sup> See Recital (16) and (17) of the Enforcement Directive: Adequate and effective implementation and enforcement are key elements in protecting the rights of posted workers and in ensuring a level-playing field for the service providers, whereas poor enforcement undermines the effectiveness of the Union rules applicable in this area. Close cooperation between the Commission and the Member States, and where relevant, regional and local authorities, is therefore essential, without neglecting the important role of labour inspectorates and the social partners in this respect. Mutual trust, a spirit of cooperation, continuous dialogue and mutual understanding are essential in this respect; Effective monitoring procedures in Member States are essential for the enforcement of Directive 96/71/EC and of this Directive and therefore they should be established throughout the Union.

<sup>83</sup> See Recital (34): To facilitate the enforcement of Directive 96/71/EC and ensure its more effective application, effective complaint mechanisms should exist through which posted workers may lodge complaints or engage in proceedings either directly or, with their approval, through relevant designated third parties, such as trade unions or other associations as well as common institutions of social partners. This should be without prejudice to national rules of procedure concerning representation and defence before the courts and to the competences and other rights of trade unions and other employee representatives under national law and/or practice.

1996 Directive can be enforced and recovered in another Member State. Sanctions for failure to respect the Directive must be effective, proportionate and dissuasive

- Provide for measures ensuring that posted workers in the construction sector can hold the contractor in a direct subcontractor relationship liable for any outstanding net remuneration corresponding to the minimum rates of pay, in addition to or in place of the employer. Alternatively, Member States may take other appropriate enforcement measures, in accordance with EU and national law, which enable in a direct subcontracting relationship, effective and proportionate sanctions against the contractor

Undertakings, who post their employees abroad are required to:

- Declare their identity, the number of workers to be posted, the starting and ending dates of the posting and its duration, the address of the workplace and the nature of the services
- Keep basic documents available such as employment contracts, payslips and time sheets of posted workers
- Accordance with EU and national law, which enable in a direct subcontracting relationship, effective and proportionate sanctions against the contractor".<sup>84</sup>

Before addressing the actual provisions concerning subcontracting, Art 4 of the Enforcement Directive must to be taken into account.

Again, fraudulent or abusive subcontractors and practices of subcontracting are not only prevented by establishing a liability scheme in subcontracting scenarios. Instead complementary measures tackling abusive and fraudulent forms, which do often appear within subcontracting processes but are not necessarily require a subcontracting situation, do also prevent abuse.

In terms of addressing practical issues identified in connection with the PWD, Art. 4 of the Enforcement Directive tackles the following practices very common among subcontracting processes:

Art. 4 of the Enforcement Directive ("Identification of a genuine posting and prevention of abuse and circumvention") addresses the issue of "**Letter Box Companies**" by providing a definition of "**established**" in sense of the PWD<sup>85</sup> stating that a posting company must develop "substantial activities" in the sending state, other than purely internal management and/or administrative activities. The national authorities are obliged to make an overall assessment of all factual elements characterizing those activities, taking account of a wider timeframe, carried out by an undertaking in the Member State of establishment, and where necessary, in the host member state. Such elements may include in particular:

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<sup>84</sup> Enumeration taken from: Posting of workers: EU safeguards against social dumping, MEMO/14/344 of the European Commission, May 2014, page 3

<sup>85</sup> See for instance recital 18 of the PWD, which reads as follows: Whereas the principle that undertakings established outside the Community must not receive more favourable treatment than undertakings established in the territory of a Member State should be upheld; Further, Art. 1 No. 1 of the PWD reads as follows: This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

- The place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional license or is registered with the chambers of commerce or professional bodies;
- The place where posted workers are recruited and from which they are posted
- The law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;
- The place where the undertaking performs its substantial business activity and where it employs administrative staff;
- The number of contracts performed and/or the size of the turnover realized in the Member State of establishment.

The facts mentioned above do work as indicators, which are enumerated conclusively. Further elements may be considered by the national authorities.

Since "**Letter Box Companies**" often act as "**Disappearing Subcontractors**", this fraudulent practice is indirectly tackled as well.

To determine whether a worker declared as posted by the employer is actually a posted worker and not one sent to replace a domestic one, Art 4 (4) provides for a list of indicators for "**genuine posting**".

In order to assess whether a posted worker temporarily carries out his or her work in a member state other than the one in which he or she ordinarily works, all factual elements characterising such work and the situation of the worker shall be examined. Such elements may include in particular:

- The work is carried out for a limited period of time in another Member State;
- The date on which the posting starts;
- The posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 (Rome I) and/or the Rome Convention;
- The posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted;
- The nature of activities;
- Travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
- Any previous periods during which the post was filled by the same or by another (posted) worker.

Again, the Enforcement Directive fails to determine how long a posting period may last. Consequently, there is still an inconsistency with the Social Security Regulation.

According to Art. 4 (5), these elements shall be used by the national authorities in the overall assessment in order to determine whether a person falls within the applicable definition of a worker in accordance with Article 2(2) of the PWD.

These rules are aimed at tackling **rotational/permanent posting** situations addressed in the section on the PWD.<sup>86</sup>

Taking into account the respective rulings of the CJEU on pseudo self-employment<sup>87</sup>, member states should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterized in any arrangement, whether contractual or not, that may have been agreed between the parties. Art 4 (5) therefore targets the practical issue of **"pseudo self-employment"**, which, as shown above, is very common among subcontracting chains as well.

In terms of effective enforcement of worker's claims on outstanding wage, Art. 11 of the Enforcement Directive establishes that member states shall ensure that trade unions and other third parties, such as associations, organizations and other legal entities which have, a legitimate interest in ensuring that PWD as well as the Enforcement Directive are complied with may engage, on behalf or in support of the posted workers or their employer, in any judicial or administrative.

This could prove an important feature of the Enforcement Directive as there is strong evidence, that workers do not initiate proceedings claiming their rights due to a lack of information and support as well as the high legal cost in the host state. If the social partners take their mission seriously, they will support workers and authorities in enforcing the PWD.

Concerning the enhancement of the cooperation, exchange of information and mutual assistance provided for in Art. 6, 7, 10(3) and Art. 14 to 18 of the Enforcement Directive shall be implemented through the Internal Market Information System (hereinafter IMI).

The **Internal Market Information (IMI)** System has been introduced with the aim to strengthen mutual administrative cooperation and assistance among member states. It is an online cooperation tool that is used by competent authorities across Europe to exchange information regarding the transnational posting of workers.

With the Enforcement Directive, IMI will also be implemented via two new functions that concern the request for notification of any administrative measures or court orders and the request for recovery of a penalty and/or fine from the authorities of another member state. Such functions can be used by the requesting authority exclusively when requesting documents concerning the breach of legislation regarding the transnational posting of workers.<sup>88</sup>

Of particular interest for this study is Art. 12 of the Enforcement Directive as it establishes a mandatory liability scheme in subcontracting chains for the construction sector.

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<sup>86</sup> See III.

<sup>87</sup> See cases of Asscher vs. Staatssecretaris van Financiën (C-107/94); Jany and Others vs. Staatssecretaris van Justitie (C-268/99); Nadin, Nadin-Lux SA vs. Durré (C-151/04) and (C-152/04)

<sup>88</sup> <http://www.istaccoue.lavoro.gov.it/Pages/Home.aspx?lang=eng>

Art. 12 (2) establishes that member states shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a **direct subcontractor** liable, in addition to or in place of the employer, for the respect of the posted workers' rights according to Art. 3 of the PWD.<sup>89</sup>

The subcontracting liability in Art. 12 of the Enforcement Directive is limited to the **construction sector**, as defined by the list of activities included in the Annex to the PWD.<sup>90</sup> Posting by TAW-agencies is included provided it is aimed at activities in the construction sector. Other economic sectors are not being touched by the directive and remain under control of national legislation. Therefore, under consideration of the rulings of CJEU in the case of Wolff & Müller (C-60/03) and Commission vs. Belgium (C-433/04), member states are enabled to extend liability schemes to other sectors and provide for more stringed liability schemes.<sup>91</sup>

The concept of a **direct joint and several liability** in the directive extends liability in respect of any **outstanding net remuneration** (according to the minimum rates of pay of the host state) and/or **contributions due to common funds** or institutions of social partners regulated by law or collective agreement (as far as these are covered by Article 3(1) of the PWD<sup>92</sup>) **one link up** in the chain, only. It does not entitle the posted worker to hold the principal or other subcontractors further up in the chain liable, but only the one subcontractor directly contracting the employer of the posted worker. However, Member States remain free to provide for more stringent liability rules under national law or to go further under national law on a non-discriminatory and proportionate basis.

As for Art 12 (6) none of the member states examined in this study opted for "other appropriate enforcement measures."<sup>93</sup> All of them rely on the concept of a direct joint and several liability. Some member states, which already had measures in place, went beyond that by extending liability on other links or even the whole subcontracting chain.<sup>94</sup>

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<sup>89</sup> See Art. 12 (2), which reads as follows: 2. As regards the activities mentioned in the Annex to Directive 96/71/EC, Member States shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer, for the respect of the posted workers' rights referred to in paragraph 1 of this Article.

<sup>90</sup> all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work: excavation, earthmoving, actual building work, assembly and dismantling of prefabricated elements, fitting out or installation, alterations, renovation, repairs, dismantling, demolition, maintenance, upkeep, painting and cleaning work and improvements

<sup>91</sup> See Art. 12 (4), which reads as follows: Member States may, in conformity with Union law, equally provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis with regard to the scope and range of subcontracting liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those referred to in the Annex to Directive 96/71/EC.

<sup>92</sup> See recital (36) of the Enforcement Directive, which reads as follows: Compliance with the applicable rules in the field of posting in practice and the effective protection of workers' rights in this respect is a matter of particular concern in subcontracting chains and should be ensured through appropriate measures in accordance with national law and/or practice and in compliance with Union law. Such measures may include the introduction on a voluntary basis, after consulting the relevant social partners, of a mechanism of direct subcontracting liability, in addition to or in place of the liability of the employer, in respect of any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners regulated by law or collective agreement in so far as these are covered by Article 3(1) of Directive 96/71/EC. However, Member States remain free to provide for more stringent liability rules under national law or to go further under national law on a non-discriminatory and proportionate basis.

<sup>93</sup> Art. 12 (6) reads as follows: Instead of the liability rules referred to in paragraph 2, Member States may take other appropriate enforcement measures, in accordance with Union and national law and/or practice, which enable, in a direct subcontracting relationship, effective and proportionate sanctions against the contractor, to tackle fraud and abuse in situations when workers have difficulties in obtaining their rights.

<sup>94</sup> For instance Germany, Italy and the Netherlands.

In addition to this very limited scope of liability, Art 12 (5) enables member states on voluntary basis to provide for a “due diligence escape clause”, according to which a contractor that has undertaken due diligence obligations as defined by national law shall not be liable. Specific requirements are not defined and left to the discretion of the member states.

In summary, the liability of Art 12 Enforcement Directive resembles a very “soft touch” approach on liability in subcontracting chains. In comparison to other concepts of liability it only provides for liability one up in the chain and contains a voluntary escape clause, whose requirements are not defined. Member states reluctant to the concept of subcontracting liability might use that in order to undermine liability by defining only little requirements for a proper due diligence, for instance by simply providing a written statement of respecting the minimum rates of pay.

Therefore, the subcontracting liability according to Art. 12 of the Enforcement Directive is easy to circumvent by inserting a “letter box company” or other form of bogus subcontractor, which goes bankrupt in case of being held liable. However, due to the recent implementation in mid-2016, there is no reliable data or practical experience with the flanking measures of Art. 4 of the Enforcement Directive. This might alter the assessment aforementioned.

This soft touch approach is somewhat surprising considering the first draft on the Enforcement Directive provided by the European Legislator.

**Box 3: Comparison of the first draft of Art. 12 Enforcement Directive with the final Article**

<p><b>Article 12 Subcontracting – Joint and several liability</b></p> <p><i>1. With respect to the construction activities referred to in the Annex to Directive 96/71/EC, for all posting situations covered by Article 1(3) of Directive 96/71/EC, the Member States shall ensure on a non-discriminatory basis with regard to the protection of the equivalent rights of employees of direct subcontractors established in its territory, that the contractor of which the employer (service provider or temporary employment undertaking or placement agency) is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker and/or common funds or institutions of social partners for non-payment of the following:</i></p> <p><i>(a) any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social</i></p>	<p><b>Article 12 - Subcontracting liability</b></p> <p><i>1. In order to tackle fraud and abuse, Member States may, after consulting the relevant social partners in accordance with national law and/or practice, take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer (service provider) covered by Article 1(3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC.</i></p> <p><i>2. As regards the activities mentioned in the Annex to Directive 96/71/EC,</i></p>
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<p><i>partners in so far as covered by Article 3 (1) of Directive 96/71/EC;</i></p> <p><i>(b) any back-payments or refund of taxes or social security contributions unduly withheld from his/her salary.</i></p> <p><i>The liability referred to in the present paragraph shall be limited to worker's rights acquired under the contractual relationship between the contractor and his subcontractor.</i></p> <p><i>2. Member States shall provide that a contractor who has undertaken due diligence shall not be liable in accordance with paragraph 1. Such systems shall be applied in a transparent, non discriminatory and proportionate way. They may imply preventive measures taken by the contractor concerning proof provided by the subcontractor of the main working conditions applied to the posted workers as referred to in Article 3 (1) of Directive 96/71/EC, including pay slips and payment of wages, the respect of social security and/or taxation obligations in the Member State of establishment and compliance with the applicable rules on posting of workers.</i></p> <p><i>3. Member States may, in conformity with Union law, provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis in regard to the scope and range of subcontractor liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those contained in the Annex to Directive 96/71/EC. Member States may in these cases provide that a contractor that has undertaken due diligence as defined by national law shall not be liable.</i></p> <p><i>4. Within three years after the date referred to in Article 20, the Commission shall, in consultation with the Member States and social</i></p>	<p><i>Member States shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer, for the respect of the posted workers' rights referred to in paragraph 1 of this Article.</i></p> <p><i>3. The liability referred to in paragraphs 1 and 2 shall be limited to worker's rights acquired under the contractual relationship between the contractor and his or her subcontractor.</i></p> <p><i>4. Member States may, in conformity with Union law, equally provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis with regard to the scope and range of subcontracting liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those referred to in the Annex to Directive 96/71/EC.</i></p> <p><i>5. Member States may in the cases referred to in paragraphs 1, 2 and 4 provide that a contractor that has undertaken due diligence obligations as defined by national law shall not be liable.</i></p> <p><i>6. Instead of the liability rules referred to in paragraph 2, Member States may take other appropriate enforcement measures, in accordance with Union and national law and/or practice, which enable, in a direct subcontracting relationship, effective and proportionate sanctions against the contractor, to tackle fraud and abuse in situations when workers have difficulties in obtaining their rights.</i></p> <p><i>7. Member States shall inform the Commission about measures taken under this Article and shall make the</i></p>
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<p><i>partners at EU level, review the application of this Article with a view to proposing, where appropriate, any necessary amendments or modifications.</i><sup>95</sup></p>	<p><i>information generally available in the most relevant language(s), the choice being left to Member States.</i></p> <p><i>In the case of paragraph 2, the information provided to the Commission shall include elements setting out liability in subcontracting chains.</i></p> <p><i>In the case of paragraph 6, the information provided to the Commission shall include elements setting out the effectiveness of the alternative national measures with regard to the liability rules referred to in paragraph 2.</i></p> <p><i>The Commission shall make this information available to the other Member States.</i></p> <p><i>8. The Commission shall closely monitor the application of this Article.</i></p>
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While both provision contain a **direct subcontracting liability “one up in the chain”**, one can see that there are several differences between both versions. The scope of Art. 12 of the Enforcement Directive was seriously diminished and watered down from the first proposal to the final article during the legislative procedure.

First of all, outstanding net remuneration and contributions to common funds were banished to the recitals (36).

Secondly, back-payments or refund of taxes or social security contributions unduly were completely removed from Art. 12 of the Enforcement Directive, seriously diminishing the scope. A liability for the full scale of possible wage components would have significantly strengthened the position of the posted worker and would have made fraudulent practices much more unattractive due to the risk of being held liable for the whole remuneration.

Thirdly, paragraph (2) of the first draft provided a prestructured due diligence proposing how a reasonable due diligence could be performed and implemented into national legislation. A contractor could prevent liability asking for documents such as pay slips and such concerning the payment of wages, respect of social security and/or taxation obligations in the member state of establishment and compliance with the applicable rules on posting of workers.

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<sup>95</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services /\* COM/2012/0131 final, page 36

A lack of definition has already proven to lead to inconsistencies and insecurity in applying European Law. This should have been prevented. As these obligations are now left to the discretion of member states, some of them might apply less requirements, also on the quality and origin of documents provided. The assessment if a due diligence of the contractor on the subcontractor has been sufficient to be excluded from liability lies in the hands of the national courts and might thus differ among the member states. This results in wider range of interpretation of law and legal uncertainty.<sup>96</sup>

However, it must be taken into consideration that the concept of liability in subcontracting chains is a highly controversial matter within the Union. The concept of more stringent liability<sup>97</sup> up to a full chain liability, which was demanded by some trade unions, has proven to be too ambitious as some member states were reluctant to implement a liability scheme in subcontracting scenarios into their national legal system.<sup>98</sup> Keeping in mind the different interests of the western (receiving) and eastern (sending) member states, this is not surprising. The Enforcement Directive is an act of compromise.

In summary, the directive resembles a soft touch approach on the concept of subcontracting liability, flanked by further indirect measures of worker protection by providing instruments of better access to information and by enhancing the cooperation between the national authorities of the member states. If the newly introduced measures work effectively must be closely monitored in the upcoming years.

However, due to the recent implementation in mid-2016, there is no reliable data or practical experience with the flanking measures of Art. 4 of the Enforcement Directive.

Furthermore, it is still limited to the construction sector although there is evidence of the practice of subcontracting spreading on to other sectors transportation, meat processing, agriculture and other sectors.<sup>99</sup>

The Enforcement Directive has also failed to address emerging practices, such as 'Regime Shopping' in the context of posting of workers.

Inconsistencies with other Regulations such as the Social Security Regulation were left untouched as well.

Thus, the Enforcement Directive may be considered as a first step towards a full reform of the rules concerning labour mobility within the European Union through posting of workers.

No later than 18 June 2019, the Commission shall present a report on its application and implementation to the European Parliament, the Council and the European Economic and Social Committee and propose, where appropriate, necessary amendments and modifications. This might be overtaken by a prior reform of the PWD.<sup>100</sup>

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<sup>96</sup> This result is also drawn in: Theresia Johanna Bakermans, Liability within the EU in the draft Enforcement Directive on posted workers in the construction industry, April 2014, page 20

<sup>97</sup> For instance, IG-Bau: <http://www.verbaende.com/news.php/Protest-gegen-Angriff-auf-EU-Durchsetzungsrichtlinie-IG-BAU-warnt-vor-drohender-Prozessflut-bei-Arbeitsgerichten?m=90572>

<sup>98</sup> See for instance in **chapter 3**, sections on Hungary and the UK.

<sup>99</sup> For further details see the individual country reports

<sup>100</sup> See VIII.

## 2.5. The Employers Sanctions Directive

The Enforcement Directive has not been the first European legal act establishing a concept of liability in subcontracting chains. Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (hereinafter Employers Sanctions Directive) contains rules on subcontracting liability in its Art.8.

It was enacted in order to counteract illegal immigration by requiring member states to prohibit the employment of non-EU nationals staying illegally in the EU. It sets out minimum EU-wide rules on the penalties and other measures that can be applied against employers found to have breached this ban.<sup>101</sup> The directive further intends to reduce the attractiveness for employers to employ workers who are illegally staying in the EU by introducing a liability regime.

The directive does not apply to all EU countries. Denmark, Ireland and the UK<sup>102</sup> having opted out.

In terms of liability in subcontracting chains Art. 8(1)(a) and (b)<sup>103</sup> establishes that where the employer is a direct subcontractor, the contractor should be liable to pay, in addition to or in place of the employer, any financial sanction imposed under Article 5<sup>104</sup> and any back payments due under Article 6(1)(a) and (c) and Article 6(2) and(3)<sup>105</sup>.

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<sup>101</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14566>

<sup>102</sup> See the written statement to Parliament on the EU directive on sanctions against employers of illegally staying third-country nationals, accessible under <https://www.gov.uk/government/speeches/eu-directive-on-sanctions-against-employers-of-illegally-staying-third-country-nationals-which-states>: "While sympathetic to the objectives behind this measure, the UK did not opt in under Title V of the Treaty on the Functioning of the European Union during the negotiations because there were significant aspects of the draft Directive which the UK did not support. These included the creation of additional administrative burdens on both employers and the public sector in requiring employers to notify the authorities every time they recruit new third country national employees and in requiring compliance inspections. The directive also extended the legal definition of employment in a manner, creating further costs and liabilities to both employers and the authorities. This would mean, for instance, that enterprises utilising subcontractors might be held liable for instances of illegal employment by the subcontractor. The directive also guaranteed additional rights to illegally-staying employees, including provision of back payments where an employee has earned less than the minimum national wage, which would be difficult to administer and would send the wrong message by rewarding breaches of immigration legislation."

<sup>103</sup> Art. 8 (1) (a) and (b) of the Employers Sanctions Directive reads as follows:

1. Where the employer is a subcontractor and without prejudice to the provisions of national law concerning the rights of contribution or recourse or to the provisions of national law in the field of social security, Member States shall ensure that the contractor of which the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay:

(a) any financial sanction imposed under Article 5; and

(b) any back payments due under Article 6(1)(a) and (c) and Article 6(2) and(3).

<sup>104</sup> Art. 5 of the Employers Sanctions Directive reads as follows:

1. Member States shall take the necessary measures to ensure that infringements of the prohibition referred to in Article 3 are subject to effective, proportionate and dissuasive sanctions against the employer.

2. Sanctions in respect of infringements of the prohibition referred to in Article 3 shall include:

(a) financial sanctions which shall increase in amount according to the number of illegally employed third-country nationals; and

(b) payments of the costs of return of illegally employed third-country nationals in those cases where return procedures are carried out. Member States may instead decide to reflect at least the average costs of return in the financial sanctions under point (a).

3. Member States may provide for reduced financial sanctions where the employer is a natural person who employs an illegally staying third-country national for his or her private purposes and where no particularly exploitative working conditions are involved.

<sup>105</sup> See respective paragraphs of Art. 6 of the Employers Sanctions Directive, which reads as follows:

1. In respect of each infringement of the prohibition referred to in Article 3, Member States shall ensure that the employer shall be liable to pay:

(a) any outstanding remuneration to the illegally employed third-country national. The agreed level of remuneration shall be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established

This resembles a **system of a direct liability** of the direct contractor of the employer and is the same established with the Enforcement Directive in posting scenarios. In terms of wage components, the scope is however extended on back payments, taxes and social security contributions and respective costs. Furthermore, the liability covers **all economic sectors** and not only the construction sector.

In addition to this direct liability Art.8(2)<sup>106</sup> of the Employers Sanctions Directive rules that, where the employer is a subcontractor, the **main contractor** and **any intermediate subcontractor** may also be liable to pay fines, if they knew that the employing subcontractor employed irregular migrants. This establishes a **full chain liability**, which implies the strongest protection and highest preventive effect as possible, because every link of the subcontracting chain is a possible debtor.

While very strict and effective on first sight, liability is seriously diminished and watered down by the requirement condition of **all links**<sup>107</sup> in the subcontracting chain knowing of illegal employment of third country nationals by another link, which becomes more and more unlikely the longer the chain is. Consequently, longer subcontracting chains are favoured as it is very difficult for workers as well national authorities to prove this knowledge by every link of the chain.

In addition to the already diminished scope, Article 8(3)<sup>108</sup> establishes an escape clause on a voluntary basis. Member states may require in their national implementation law that a contractor that has carried out due diligence obligations will not be liable under Art. 8(1) and (2) of the Employers Sanctions Directive. Therefore, it is very easy possible to escape the joint and several liability, if the employer possesses and presents a written statement in which the direct subcontractor confirms that no third country nationals illegally staying are employed. In such a case, it will be even more difficult to prove any knowledge of the contractor or other links in the chain.

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- (b) practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages; an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines;
  - (c) where appropriate, any cost arising from sending back payments to the country to which the third-country national has returned or has been returned.
2. In order to ensure the availability of effective procedures to apply paragraph 1(a) and (c), and having due regard to Article 13, Member States shall enact mechanisms to ensure that illegally employed third-country nationals:
- (a) may introduce a claim, subject to a limitation period defined in national law, against their employer and eventually enforce a judgment against the employer for any outstanding remuneration, including in cases in which they have, or have been, returned; or
  - (b) when provided for by national legislation, may call on the competent authority of the Member State to start procedures to recover outstanding remuneration without the need for them to introduce a claim in that case.

Illegally employed third-country nationals shall be systematically and objectively informed about their rights under this paragraph and under Article 13 before the enforcement of any return decision.

3. In order to apply paragraph 1(a) and (b), Member States shall provide that an employment relationship of at least three months duration be presumed unless, among others, the employer or the employee can prove otherwise

<sup>106</sup> Art. 8 (2) of the Employers Sanctions Directive reads as follows: 2. Where the employer is a subcontractor, Member States shall ensure that the main contractor and any intermediate subcontractor, where they knew that the employing subcontractor employed illegally staying third-country nationals, may be liable to make the payments referred to in paragraph 1 in addition to or in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor.

<sup>107</sup> The wording of Art. 8 suggest that all links must have knowledge, though another interpretation in sense of a liability of those in the chain, who know apart from those who do not is possible.

<sup>108</sup> Art. 8 (3) of the Employers Sanctions Directive reads as follows: A contractor that has undertaken due diligence obligations as defined by national law shall not be liable under paragraphs 1 and 2.

Again, there is no legal definition of what measures must be taken by the parties conducting due diligence. This further hamper and effective liability regime as there is a wide margin between the individual member states.

In summary, the Employment Sanctions Directive provides for a mitigated chain liability, which goes way beyond the Enforcement Directive. Not only minimum wages, but also the full spectrum of wage components as well as penalties are covered by the liability regime. One may conclude that on a European level third country nationals illegally staying in the EU enjoy a slightly better and more far reaching protection than posted workers.<sup>109</sup>

Flaws in terms of definition remain the same as with the Enforcement Directive.

It has to be kept in mind, that employing third country national illegally staying in the EU is illegal and considered a crime. Therefore, stricter rules justify and were less controversial.

## 2.6. The Temporary Agency Work Directive

The Temporary Agency Work Directive 2008/104/EC (hereinafter TAW-Directive) was approved by the European Parliament in October 2008 after nearly three decades of debate and failed attempts on regulation.

The TAW-Directive does not provide any direct measures liability in subcontracting chains, but workers employed with a TAW-Agency are often posted by this agency. For some TAW-Agencies, this practice is part of their business model. Therefore, the Provision of the TAW-Directive have to be displayed more narrowly.

The TAW-Directive aims to guarantee TAW-workers **equal pay** and **equal conditions** with employees of the user undertaking, if the TAW-workers perform the same work as direct and permanent employees. Its purpose is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency workers, and by recognizing temporary-work agencies as employers, while considering the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to job creation and to the development of flexible forms of working.<sup>110</sup>

Transposition of the directive was carried out in a variety of different ways. In some member states<sup>111</sup> TAW was already regulated prior to the directive by statutory law, CLAs or by a combination of both. Other member states did not have a legal framework applicable to TAW or the legal framework was limited to licensing schemes, so they had to specifically introduce such rules for the first time while transposing the Directive.<sup>112</sup> Some member states amended one piece of legislation, while others modified several legal texts. Among Luxembourg and France, Poland was of the opinion that their

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<sup>109</sup> This result is also drawn in: Theresia Johanna Bakermans, Liability within the EU in the draft Enforcement Directive on posted workers in the construction industry, Aril 2014, page 21

<sup>110</sup> Aims according to Art 2 of the TAW-Directive

<sup>111</sup> For instance, in Germany, the Netherlands and Italy

<sup>112</sup> For instance Bulgaria and Latvia

national provisions already complied with the Directive and did not require any amendment on its entry into force<sup>113</sup>

The TAW-Directive includes two **main principles**:

Art. 4 defines clear **limits to prohibitions and restrictions** that may be imposed on the use of temporary agency work by the member states. Limitations are only justified on grounds related to the protection of temporary agency workers, to ensure proper function of the domestic labour market and the prevention of abuses. Member states are obliged to review prohibitions and restrictions on temporary agency work and to report to the European Commission.<sup>114</sup>

Art. 5 establishes the principle of **"equal treatment"** for temporary agency workers. The basic employment and working conditions shall - for the duration of the assignment at the user company - be equal to those of a directly and permanently employed worker working on the same position. However, member states may authorize the social partners to define specific working and employment conditions for agency workers in CLAs', Art. 5 (3). After consulting with the social partners, member states are also entitled to provide the option to derogate from the principle of equal pay for those agency workers, who have a permanent contract of employment and who continue to be paid between two assignments, Art. 5 (2).<sup>115</sup>

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<sup>113</sup> European Commission - Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final of 21.3.2014, page 3

<sup>114</sup> 1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

2. By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.

3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.

4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies.

5. The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011.

<sup>115</sup> 1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:

(a) protection of pregnant women and nursing mothers and protection of children and young people; and

(b) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation;

must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which

The principle of equal treatment applies to the basic working and employment conditions relating to:

- the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
- pay
- the protection of pregnant women and nursing mothers;
- the protection of children and young people;
- equal treatment for men and women;
- protection against discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation.<sup>116</sup>

As with the PWD and other EU directives in the area of European Labour Law, the purpose of the TAW-Directive is to establish common minimum standards and maintain core rights for TAW in the EU. The overall aim is to **prevent unfair competition** and a **"Race to the Bottom"** between the different member states.

A special issue arises, if a worker, employed with a TAW-Agency, is posted to another member state than the country of origin of the employer. In this situation the question arises, if the PWD or the TAW-Directive are governing minimum working conditions and core rights.

While the TAW Directive establishes that temporary agency workers should be granted the same working and employment conditions as comparable workers of the user undertaking, in the PWD such a principle is not mandatory, but is left to the discretion of the member states.<sup>117</sup> Regarding this relationship between the TAW-Directive and PWD, recital 22 the TAW-Directive states that it should be implemented in compliance

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derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. In particular, Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph 1. Such arrangements shall also be without prejudice to agreements at national, regional, local or sectoral level that are no less favourable to workers.

5. Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures.

<sup>116</sup> Art 3 (1) f of the TAW-Directive reads as follows:

basic working and employment conditions' means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

- (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
- (ii) pay.

<http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32008L0104>

<sup>117</sup> See Art. 3 (9), which reads as follows:

Member States may provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1 (3) (c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out.

with the provisions of the Treaty on the freedom to provide services and the freedom of establishment and without prejudice to the PWD.<sup>118</sup>

The majority of the member states<sup>119</sup> have transposed Art 3 (9) ensuring the equal treatment principle also applying to posted TAW-workers, but thirteen Member States (Austria, Cyprus, Estonia, Greece, Finland, Croatia, **Hungary**, Ireland, Latvia, **Poland**, Portugal, Slovenia, and Slovakia) do not set any specific provision for this category of workers, meaning that those workers fall under the scope and protection of the PWD, only.

As a result, TAW-workers posted to the group of member states mentioned above are exposed to risks of differentiated pay and working conditions in comparison to locally recruited (domestic) TAW-workers. Some temporary agencies based in a particular member may open a subsidiary in another member state, where social security contributions are less favorable to workers, and then post TAW-worker to work in a third country or even the agency's member state of origin. The agency thus benefits from the less favorable conditions for workers which apply in the country where the subsidiary is based. This phenomenon strongly connects with the practical issues addressed with the PWD, namely "**Letterbox Companies**" and "**Forum Shopping**".

In terms of registration or licensing schemes for TAW Agencies, the TAW-Directive does not provide any provisions, which leaves this issue to national discretion of the member states. Therefore Art. 4 (1), (2) and (3) shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies.

Licensing and registration are important measures to prevent abuse of TAW, especially with a view on subcontracting chains. Measures of the member states will be discussed in Chapter 4 of the study as they do not fall in the scope of European Labour Law.

According to the Commission's report, the Commission is of the opinion that, in general, the TAW-Directive has been correctly implemented and applied but that its twofold goal has not yet been fully fulfilled. It resumes, that on the one hand, the extent of the use of certain derogations from the principle of equal treatment may, in specific cases, have led to a situation where the application of the TAW-Directive has no real effects upon the improvement of the protection of TAW workers. On the other hand, the review of restrictions and prohibitions on the use of temporary agency work has served, in the majority of cases, to legitimate the status quo, instead of giving an impetus to the rethinking of the role of agency work in modern, flexible labour markets.<sup>120</sup>

The Commission announces to continue to monitor the application of the Directive and work closely with the member states and social partners to ensure that the goals of the TAW-Directive are achieved. Given the fact that the Directive has been implemented by the Member States recently and that more time is needed to accumulate experience

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<sup>118</sup> Recital 22 of the TAW-Directive reads as follows : This Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

<sup>119</sup> Including Germany, Italy, the Netherlands and the UK

<sup>120</sup> European Commission - Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final of 21.3.2014, page 19

in its application, the Commission considers that no amendments are necessary at this stage.<sup>121</sup>

## 2.7. The Regulation on the Coordination of Social Security Systems

Ensuring the right of social security when the right of freedom of movement is exercised has been one of the major concerns for the member states.

Recognizing the importance of this issue, it was necessary to adopt social security measures, which prevent EU citizens working and residing in a Member State other than their state of origin from losing some or even all their social security rights. This contributes to the general aim of the Union to improve the standard of living and protection of migrant citizens.<sup>122</sup>

The Social Security Regulation<sup>123</sup>, although adopted in 2004, became applicable through the Implementing Regulation<sup>124</sup> on 1st of May 2010.<sup>125</sup> It lays down common rules to protect social security rights when moving within the EU. It is not meant to replace national systems on social security, but coordinates them.

The Regulation itself does not contain any provisions concerning the liability in subcontracting chains, but corresponds to it by providing common rules for the applicable law on social security. Furthermore, it protects the (posted or self-employed) worker from a loss of social security and partly tackles abusive forms identified above. Fraudulent practices affecting and diminishing the gross salary also diminish the amount of social contributions paid by the employer. Therefore, all measures trying to tackle fraud, circumvention or evasion of the need to pay the full salary do also encourage the payment of (full) social contributions. In that regard, many of the countries examined in this study do have liability frameworks, which include the payment of social contributions.<sup>126</sup>

In terms of scope, the Social Security Regulation applies to all EU citizen as well as their family members, who are covered by the social security legislation of a member state. The rules apply to employees and self-employed people, civil servants, students and pensioners, but also to people who are unemployed, not yet working or no longer working.<sup>127</sup>

The Social Security Regulation stipulates an exemption to the general rule that workers and self-employed persons pay contributions in the member state where their work is performed ("**lex loci laboris**").<sup>128</sup>

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<sup>121</sup> European Commission - Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final of 21.3.2014, page 19

<sup>122</sup> See Recital (1) of the Social Security Regulation, which reads as follows:

The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

<sup>123</sup> Regulation (EC) No 883/2004 — on the coordination of social security systems

<sup>124</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems

<sup>125</sup> Following and replacing (EEC)No 1408/71, supplemented by Implementing Regulation (EEC) No 574/72

<sup>126</sup> See for instance the country reports of Germany (in certain cases) and Italy.

<sup>127</sup> See SUMMARY OF: Regulation (EC) No 883/2004 — on the coordination of social security systems, accessible via: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ac10521>

<sup>128</sup> Article 11 of the Social Security Regulation reads as follows:

Instead, (posted) workers and self-employed workers continue to pay their social security contributions in the member state of origin and not in the receiving state to which they are temporarily posted for up to **24 months**. Furthermore, workers cannot be posted to replace a person, who has completed posting.<sup>129</sup>

The regulation covers all the traditional branches of social security, which includes:

- sickness
- maternity and paternity
- old-age pensions
- pre-retirement and invalidity pensions
- survivors' benefits and death grants
- unemployment
- family benefits
- accidents at work and occupational illness.<sup>130</sup>

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1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

- (a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;
- (b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;
- (c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;
- (d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;
- (e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

4. For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.

<sup>129</sup> Art 12 of the Social Security Regulation reads as follows:

1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another person.

2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months..

<sup>130</sup> See Art 3 of the Social Security Regulation, which reads as follows: 1. This Regulation shall apply to all legislation concerning the following branches of social security:

- (a) sickness benefits;
- (b) maternity and equivalent paternity benefits;
- (c) invalidity benefits;
- (d) old-age benefits;
- (e) survivors' benefits;
- (f) benefits in respect of accidents at work and occupational diseases;

The rules also apply to non-EU nationals and their family members residing legally in the EU.<sup>131</sup>

From the Social Security Regulation derive four "Basic Principles", which have to be taken into account:

Firstly, the posted workers and self-employed are covered by the legislation of a single country and pays social security premiums in that single country alone. The organizations managing social security decide the legal jurisdiction to which they belong (**principle of single applicable law**); there is no right to choose.

Secondly, posted workers and self-employed have the same rights and obligations as nationals of the country in which they are covered (**principle of equal treatment or non-discrimination**).

Thirdly, the workers and self-employed are guaranteed that previous periods of insurance, work or residence in other member states will be taken into account during the calculation of their benefits (**principle of aggregation of periods**).

Lastly, workers and self-employed can, if entitled to a cash benefit in a country, collect this benefit even if they do not reside in that country (**principle of the exportability of benefits to all EU countries where the beneficiary or family members reside**).<sup>132</sup>

Regarding implementation and enforcement, the Regulation itself is comparable to the PWD. A fundament of rules is given, which, left for themselves, gives the addressees to much space for circumvention of rules and fraudulent practices due to a lack of definition and enforcing rules. In addition, there are little rules providing for an efficient cooperation and exchange of information between the national authorities of the sending and receiving state.

Furthermore, the Regulation itself does not define the legal terms of employment or self-employment, but leaves the details, characteristics and requirements to the discretion of the member states. Determination of status is therefore based on 27 national frameworks on self-employment. As the PWD and the Enforcement Directive before, both Regulations fail to provide for a European definition of self-employment.

The practical issues stated above, have been tackled by the Implementing Regulation. The legislative package of Social Security and Implementing Regulation is referred to

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- (g) death grants;
  - (h) unemployment benefits;
  - (i) pre-retirement benefits;
  - (j) family benefits.

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

4. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a shipowner's obligations.

5. This Regulation shall not apply to social and medical assistance or to benefit schemes for victims of war or its consequences.

<sup>131</sup> EU Regulation number EC/1231/2010 for third countries is applied with effect from 1 January 2011. Thereby, the area of application of the Social Security has been extended to persons, who are third country nationals.

<sup>132</sup> See for a more detailed review: An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009, International Labour Office, ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe. - Budapest: ILO, 2010, page 8 and following

by the European Legislator as "modernised coordination" of social security systems.<sup>133</sup> Clarifications in the application of Article 12 are set out in Art. 14 of the Implementing Regulation and in the decisions of the Administrative Commission for the Coordination of Social Security Systems (hereinafter the Administrative Commission)<sup>134</sup>.

The Implementing Regulation as well as the decisions of the Administrative Commission address issues already identified above and are therefore of particular interest and relevance for this study.

First, there must be a direct and continuing relationship between the employer and the employee during the period of posting, if the work shall be regarded as being performed for the employer and therefore as posting of workers in the sense of the PWD and the Social Security Regulation. "In order to establish whether such a direct relationship continues to exist, assuming therefore that the worker continues to be under the authority of the employer, which posted him, a number of elements have to be taken into account, including responsibility for recruitment, employment contract, remuneration (without prejudice to possible agreements between the employer in the sending State and the undertaking in the State of employment on the payment to the workers), dismissal, and the authority to determine the nature of the work."<sup>135</sup>

This tackles the issue of **pseudo self-employment** as well as the false declaration of **permanent replacement** of national workers as posting.

An employer may only hire workers for posting, if the workers were subject to the legislation of the member state where their employer is established in for at least one month.<sup>136</sup>

This tackles the issue of "**Forum Shopping**", where an employee is falsely declared to reside or asked to move to a member state with lesser social security cost.

As already stated above, the PWD speaks of an undertaking "established" in a member state without giving any further definition of "established" and which criteria or requirements should be met. Regarding social security and according to Art. 14 (3) of the Implementing Regulation, an employer must carry on substantial economic activity in the State where they are established in order to post workers.<sup>137</sup> The activity may

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<sup>133</sup> <http://ec.europa.eu/social/main.jsp?catId=857&langId=en&intPageId=983>

<sup>134</sup> The Administrative Commission for the coordination of social security systems comprises a representative of the government of each EU country and a representative of the Commission. It is responsible for dealing with administrative matters, questions of interpretation arising from the provisions on social security coordination, and for promoting and developing collaboration between EU countries. The composition, operation and tasks of the Administrative Commission are laid down by Articles 71 and 72 of Regulation 883/2004.

<sup>135</sup> Administrative commission for the coordination of social security systems - decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State, page 2

<sup>136</sup> Administrative commission for the coordination of social security systems - decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State, page 3

<sup>137</sup> Art. 14 (3) of the Implementing Regulation reads as follows:

For the purposes of the application of Article 12(2) of the basic Regulation, the words 'who normally pursues an activity as a self-employed person' shall refer to a person who habitually carries out substantial activities in the territory of the Member State in which he is established. In particular, that person must have already pursued his activity for some time before the date when he wishes to take advantage of the provisions of that Article and, during any period of temporary activity in another Member State, must continue to fulfil, in the Member State where he is established, the requirements for the pursuit of his activity in order to be able to pursue it on his return.

not be purely of administrative nature and there must be at least two months between two periods of the same company posting the same worker in the same State.<sup>138</sup>

The conditions determining whether or not substantial activity is carried out are outlined in the Decision A2 of the Administrative Commission: "In order, where necessary and in cases of doubt, to determine whether an employer ordinarily performs substantial activities in the territory of the Member State in which he/she is established, the competent institution in the latter is required to examine all the criteria characterising the activities carried on by that employer, including the place where the undertaking has its registered office and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, the turnover during an appropriately typical period in each Member State concerned and the number of contracts performed in the sending State. This is not an exhaustive list, as the criteria should be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the State in which it is established."<sup>139</sup>

The Administrative Commission provides for a decent definition of "substantial activity" in order to tackle the issues of "Forum Shopping" as well as letter box companies and "Disappearing Subcontractors".

This does also apply to self-employed workers. The self-employed person must have carried on business for at least two months in the member state they are established before qualifying for providing services. According to Art. 14 (3), during the period of providing services, they must continue to fulfil the conditions for the continuation of their activity upon return such as maintaining an office and paying business taxes (Article 14(3) of the Implementing Regulation). The activity in the other State must be similar to that normally exercised in their State of origin.

According to the provisions of Article 12(1) of the Social Security Regulation shall not apply or shall cease to apply in the following cases:

- if the undertaking to which the worker has been posted places him at the disposal of another undertaking in the Member State in which it is situated;
- if the worker posted to a Member State is placed at the disposal of an undertaking situated in another Member State;
- if the worker is recruited in a Member State in order to be sent by an undertaking situated in a second Member State to an undertaking in a third Member State.<sup>140</sup>

When an employer posts a worker to another Member State or when self-employed persons post themselves, they must contact the competent institution in the posting state, and this should be done in advance whenever possible.

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<sup>138</sup> See An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009, International Labour Office, ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe. - Budapest: ILO, 2010, pages 11 f.

<sup>139</sup> Administrative commission for the coordination of social security systems - decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State, page 3

<sup>140</sup> administrative commission for the coordination of social security systems - decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State, page 4

Posted workers must prove that they have paid their social security in the Member State where they are normally based by producing a so-called 'A1'<sup>141</sup> certificate (previously known as E101) (previously known as E101).<sup>142</sup> This document certifies that the worker qualifies to be a posted worker up to a certain date. It should also indicate, where appropriate, under what conditions the worker comes within the special rules for posted workers. Foreign authorities and contractors may request proof of social security obligations in the home country in order to fulfil their obligation of due diligence.

The Regulation provides for excellent examples of definition and enforcement. It has to be kept in mind however, that the definitions do not apply to the PWD as well as the Enforcement Directive.

## 2.8. Lookout: Reform of the PWD

While the Enforcement Directive 2014/67/EC focused mainly on improving processes and rules in order to better apply and enforce the provisions of the existing PWD, it does not touch more fundamental questions relating to the framework of posting, namely with regards to a better definition of the 'hard core' of working and employment conditions, as well as inconsistencies between the PWD and regulations in the field of social security coordination that were identified above.

Against this limited scope of the Enforcement Directive, the EU Commission within its 2015 Work Programme on labour mobility published a proposal to revise the PWD in March 2016.

The aim is figuring out a better balance between economic freedoms and social protection rights. Apart from a limited number of proposed changes, the Commission's proposal constitutes a significantly altered perspective on the rights of posted workers: a revised PWD should guarantee **"that the same work in the same place is rewarded by the same pay"**.<sup>143</sup>

Some member states (Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) have claimed that further development and reform of the PWD conditions would trigger Subsidiarity Control Mechanism ("Yellow Card")<sup>144</sup>. This mechanism has been triggered three times, yet. In 2012, 2013 and now in 2016 concerning the reform of the PWD. This has been refused by the Commission, who is continuing to push towards a reform. <sup>145</sup>

Nonsurprisingly, the member states posing against a further reform of the PWD are merely considered as sending states of posted workers, who would lose part of their advantages in labour competition. In respect of a reform of the PWD the European Union is divided between the western member states and those in the east, who resemble the younger members of the Union.

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<sup>141</sup> For an overview of the other social security certificates correlating with the Regulation see [http://europa.eu/youreurope/citizens/work/social-security-forms/index\\_de.htm](http://europa.eu/youreurope/citizens/work/social-security-forms/index_de.htm)

<sup>142</sup> MEMO/14/344 of the European Commission, May 2013

<sup>143</sup> See Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, Page 8

<sup>144</sup> Subsidiarity is the principle of European Legislation, after which legislative action is only taken at EU level, when it is more effective than EU countries acting alone at national, regional or local level. Where national parliaments consider that a proposed law does not comply with this principle, they can make their views known under the subsidiarity control mechanism, if at least one third of the MP's votes for it.

<sup>145</sup> [http://europa.eu/rapid/press-release\\_IP-16-2546\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2546_en.htm)

Calls for a reform of the PWD have been raised in since 2003 and have been constantly growing since then. More recently, several factors have further contributed to the debate:

Firstly, there has been an increase in the number of postings, as well as an evidence of unfair competition and the substitution of domestic workers in labour-intensive sectors. Posting of workers involved 1.9 million European workers in 2014. Although it represents only 0.7% of total EU employment, posting of workers supports the cross-border provision of services in the Internal Market, particularly in construction and some personal and business services sectors.<sup>146</sup>

Secondly, there has been strong evidence in abusive and fraudulent practices, such as **letter-box companies, bogus self-employment, "Regime Shopping", "Disappearing Subcontractors"** and several other forms of abuse and circumvention of rules, which leads to a possible exploitation of workers.

Thirdly, questions have been raised as to whether the almost twenty-year-old PWD provides a sufficient legal instrument for ensuring a level playing field in the free cross-border provision of services within the EU, whilst also delivering a sufficient foundation for the protection of posted workers.<sup>147</sup>

With a proposal for a revision of the PWD in March 2015, the Commission provided it's opinion on an efficient reform:

- Introduction of equal rules on remuneration and the **extension to all sectors of the reference to universally binding CLAs**. This shall result in a more effective option to attain a more level playing field for companies and improved legal clarity.
- Applying the labour law of the host state in situations of **long term posting** exceeding a period of 24 month, which would match the reformed PWD with the Social Security Regulation. In case of replacement of posted workers performing the same task at the same place, the cumulative duration of the posting periods of the workers concerned shall be taken into account, with regard to workers that are posted for an effective duration of at least six months.<sup>148</sup>

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<sup>146</sup> European Commission - commission staff working document: executive summary of the impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016) 53 final, page 2

<sup>147</sup> See recital (4) of the proposal: Almost twenty years after its adoption, it is necessary to assess whether the Posting of Workers Directive still strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers.

<sup>148</sup> See also recital (8) of the proposal: In view of the long duration of certain posting assignments, it is necessary to provide that, in case of posting lasting for periods higher than 24 months, the host Member State is deemed to be the country in which the work is carried out. In accordance with the principle of Rome I Regulation, the law of the host Member States therefore applies to the employment contract of such posted workers if no other choice of law was made by the parties. In case a different choice was made, it cannot, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law of the host Member State. This should apply from the start of the posting assignment whenever it is envisaged for more than 24 months and from the first day subsequent to the 24 months when it effectively exceeds this duration. This rule does not affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services in circumstances also where the posting exceeds 24 months. The purpose is merely to create legal certainty in the application of the Rome I Regulation to a specific situation, without amending that Regulation in any way. The employee will in particular enjoy the protection and benefits pursuant to the Rome I Regulation.

- Application of **equal terms and conditions to posted TAW-workers**<sup>149</sup> in comparison to those recruited locally, which would provide consistency with the TAW-Directive.<sup>150</sup>
- Concerning posted workers in **subcontracting chains** the establishment of equal pay between posted workers and workers employed by the main contractor including those of company level agreements **on a voluntary basis**<sup>151</sup>, which would primarily affect member states with a high tendency of wage bargaining on a company level<sup>152</sup>. This will be only possible on a proportionate and non-discriminatory basis and would thus in particular require that the same obligations be imposed on all national sub-contractors.<sup>153</sup>

This provision is directly related to a recent CJEU ruling<sup>154</sup> on public procurement, after which member states may impose the obligation to respect the statutory minimum applicable rates of pay to the tenderers and their subcontractors.

Labour Ministers from lower-wage and higher-wage member states have debated the Commission's proposal.

The labour ministries of several high-wage EU countries<sup>155</sup> were generally in favour of the proposal, pointing out that a fair European competition would be in danger due to employers of posted workers having an unfair advantage compared to employers in host countries.

They highlight that the maximum duration of posting is not defined in the PWD and on several occasions the 'temporary' posted positions do in fact replace domestic workers of the host country.

They draw particular attention to the abusive use of the PWD and while welcoming the Enforcement Directive, they demand the "*modernisation*" of the directive to ensure "*equal pay for the equal work at the same place*".<sup>156</sup>

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<sup>149</sup> See also recital (15) of the proposal: Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work gives expression to the principle that the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job. This principle should also apply to temporary agency workers posted to another Member State.

<sup>150</sup> European Commission - commission staff working document: executive summary of the impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016) 53 final, page 2

<sup>151</sup> See also recital (14) of the proposal: Laws, regulations, administrative provisions or collective agreements applicable in Member States may ensure that subcontracting does not confer on undertakings the possibility to avoid rules guaranteeing certain terms and conditions of employment covering remuneration. Where such rules on remuneration exist at national level, the Member State may apply them in a non-discriminatory manner to undertakings posting workers to its territory provided that they do not disproportionately restrict the cross-border provision of services.

<sup>152</sup> For instance DK, SE and the UK

<sup>153</sup> European Commission - Proposal for a commission staff working document: executive summary of the impact assessment commission staff working document: executive summary of the impact assessment amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final, pages 7 and 12 (containing the actual proposal)

<sup>154</sup> RegioPost C-115/14

<sup>155</sup> AT, BE, FR, DE, LU, NL, SE

<sup>156</sup> [https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjDx4jzmM\\_UAhXGNxQKHUx4CvqQFgqIMAA&url=https%3A%2F%2Fwww.rijksoverheid.nl%2Fbinaries%2Frijksoverheid%2Fdocumenten%2Fbrieven%2F2015%2F06%2F19%2Fbrief-aan-europees-commissaris-thyssen-over-de-detacheringsrichtlijn%2F2015-06-18-consolidated-version-letter-to-thyssen.pdf&usq=AFQjCNG5MpDGEY0HBraAbrasIFzz35h2oJA](https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjDx4jzmM_UAhXGNxQKHUx4CvqQFgqIMAA&url=https%3A%2F%2Fwww.rijksoverheid.nl%2Fbinaries%2Frijksoverheid%2Fdocumenten%2Fbrieven%2F2015%2F06%2F19%2Fbrief-aan-europees-commissaris-thyssen-over-de-detacheringsrichtlijn%2F2015-06-18-consolidated-version-letter-to-thyssen.pdf&usq=AFQjCNG5MpDGEY0HBraAbrasIFzz35h2oJA)

The labour ministers of nine eastern European EU countries<sup>157</sup>, instead, argued that the 2014 Enforcement Directive would already provide sufficient provisions to protect the rights of posted workers and respect fair competition. Given that the Enforcement Directive had been enacted agreed recently a revision was considered premature.

They argue that pay rate differences would not constitute unfair competition, but being a structural feature of a union of heterogeneous countries and result from different levels of economic development, tax systems, labour law regulations and social welfare systems.

Any reference to "*equal pay for the equal work at the same place*" would be misguided and incompatible with a genuine single market.<sup>158</sup>

Opinions among the social partners were diverse.<sup>159</sup> While the European Trade Union Confederation and the European Builders' Confederation were in favour of a revision, Business Europe, UEAPME and CEEMET have expressed a position in favour of waiting for an implementation of the Enforcement Directive before acting.<sup>160</sup>

In summary, the proposal addresses issues previously identified such as the inconsistency with the Social Security Regulation as well as the TAW-Directive, other issues like bogus self-employment have not been addressed or only indirectly.

The newly proposed provision on subcontracting enables mainly receiving countries to enhance the protection of workers in subcontracting chains. Experience tells that this provision will have to sustain heavy attacks by several member states.

Lastly, it is a fine step forward to extend the scope of the reformed PWD to all economic sectors covered by binding CLAs' as evidence of other labour-intensive sectors suffering from social dumping has been there for a long time.

## 2.9. Concluding Remarks

First steps to improve the protection of (posted) workers in subcontracting chains have been taken.

The Reform of the PWD must be closely monitored in the upcoming month as its scope might change in the legislative process. It could solve many urgent issues addressed above.

However, the authors have serious doubt, if the Commission's favoured proposal can be generally accepted among the eastern member states. The Enforcement Directive is a prominent example for this. As shown, the first draft provided for more extensive measures but was watered down during the legislative process. The same fate could be faced by the reformed PWD.

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<sup>157</sup>BG, CZ, EE, HU, LT, LV, PL, SK, RO

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[http://arbetsratt.juridicum.su.se/euarb/1503/nio\\_medlemsstater\\_utstationeringsdirektivet\\_augusti\\_2015.pdf](http://arbetsratt.juridicum.su.se/euarb/1503/nio_medlemsstater_utstationeringsdirektivet_augusti_2015.pdf)

<sup>159</sup> For a comprehensive summary of the positions of the social partners see Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, page 49 and following

<sup>160</sup> European Commission - commission staff working document: executive summary of the impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016) 53 final, page 2

As a reform of the PWD is still in progress at the time finishing this study, assessment of the status quo will be focused on.

The newly introduced direct subcontracting liability of Art 12 of the Enforcement Directive is relatively easy to circumvent by inserting a letter box company. The effectiveness is further hampered by a escape clause lacking any definition of due diligence, which results in a wide margin of interpretation and therefore legal uncertainty. The Regulation on social security would have provided for excellent examples of definition and enforcement. Also, paragraph (2) of the first draft of Art. 12 provided a prestructured due diligence proposing how a reasonable due diligence could be performed and implemented into national legislation

Furthermore, it is still limited to the construction sector although there is evidence of the practice of subcontracting spreading on to other sectors transportation, meat processing, agriculture and other labour-intensive sectors.

Until this point it is uncertain, if the liability regime can develop preventive effects on contractors and subcontractors.

Apart from the newly introduced liability scheme, the Enforcement directive on its own has only addressed the problems and shortcomings of the PWD that are related to the implementation and enforcement of existing rules, which means better implementation rules, intensified coordination and information exchange and other measures.

The Enforcement Directive has also failed to address emerging practices, such as 'Regime Shopping' in the context of posting of workers.

However, due to the recent implementation in mid-2016, there is no reliable data or practical experience with the flanking measures of Art. 4 and 11 of the Enforcement Directive., which could have a very positive influence on the protection of workers.

If further EU action is necessary will be assessed under consideration of the examination of the national legal systems of the member states in Chapters 3 and 4.

### **3. CHAPTER 3: LIABILITY IN SUBCONTRACTING CHAINS - NATIONAL RULES**

#### **3.1. Preliminary remarks**

##### **3.1.1. Taxes**

There are no European Taxation rules and therefore no coordination rules within the PWD or any other regulation determining in which member state (income) taxes have to be paid in case of cross border worker and service mobility or posting. Art. 153 TFEU does not contain any competence in that regard.

Instead there are bilateral tax agreements, which in most cases rule that taxes are to be paid in the member state, where the work is performed and the income is earned.

However, in the case of posting EU Member States follow the "183 Days rule" defined in the context of the "OECD Model Tax Convention on Income and on Capital". The Convention stipulates that the posted worker will be subject to income tax in the sending member state on the basis that they work for less than 183 days within a period of 12 months in the receiving state.<sup>161</sup>

The study will pick up liability schemes on taxes in selected member states.

##### **3.1.2. Common loopholes, abusive and circumventive practices**

All rules examined in this study, aim to prevent so called "Social Dumping", the exploitation of workers and unfair competition through illegal practices and evasion/circumvention of rules. Further, they aim on protecting workers from fraudulent or disappearing subcontractors by providing an additional guarantor or debtor.

However, it has to be clearly stated that there will always be issues of non-compliance, circumvention or fraud no matter how far reaching of elaborate a system of liability may be. Therefore, an absolute effectivity of liability schemes and enforcement rules is impossible. In every member state examined exist "extreme examples" of fraud, circumvention and abuse. The authors believe that these "extreme examples" do not provide for any gain of knowledge. The study goes without such examples mostly and tries to highlight common patterns of fraud, abuse and circumvention practices.

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<sup>161</sup> See Art. 15 of the OECD Tax Convention, which reads as follows:

#### **INCOME FROM EMPLOYMENT**

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
  - a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and
  - b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
  - c) the remuneration is not borne by a permanent establishment which the employer has in the other State.
3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated

Pattern for fraud, abuse and circumvention in general are in most cases based on the following practices:

**“Permanent posting”**, which mean that domestic workers are permanently replaced by posted ones.<sup>162</sup> There are examples of the whole domestic workforce being dismissed and replaced by posted workers of a foreign temporary work agency in order to save cost.<sup>163</sup>

Also, the practice of **rotational posting** of the same worker is often used, where workers are solely recruited to be repeatedly posted to different member states, but never perform any work in the home state, where the worker should have been working given normal terms.<sup>164</sup> There are examples of workers residing under letter boxes in order to make the posted workers appear as residing in the sending country for two months, providing incorrect A1-Certificates.<sup>165</sup>

**“Letterbox Companies”** often comprise many local affiliates or a network of different companies in different member states, which seriously hampers an effective control by authorities.

As those **“Letterbox Companies”** develop very little to none economic activity, this mounted in the common practice of “Disappearing Subcontractors”. This means undertakings, who are quickly founded in a member state with low wages, taxes and social contributions and hire workers in order to post them to a project. The workers begin working, the subcontractor is being paid, but refuses to pay it’s workers. If the workers claim their wages, the subcontractor disappears or goes bankrupt and cannot be held liable.

In cases of **pseudo or bogus self-employment**, contracts are being drafted in order to create a self-employed worker on paper, while from a legal point of view the contractual relationship must be considered as employment. A self-employed worker is not protected by labour law or the PWD, receives no sick pay, has no paid holidays and is often not paid the minimum wages of the receiving country. Social contribution must be paid by the pseudo self-employed workers themselves. Contractors, who (sub-)contract self-employed workers save of up to 50 % in comparison to employees.

In addition, there is evidence **undercutting and circumvention of minimum rates of pay**. The posting employee is paying the minimum wages of the receiving country on paper, but is charging the posted workers excessively on housing, clothing and even working materials such as tools.

Furthermore, it must be highlighted, that most forms are strongly connected among each other. A “Disappearing Subcontractor” could for instance be a temporary work agency without a license, which is established in a member state with low social contribution by a letter box, falsely declaring its employees as self-employed workers.

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<sup>162</sup> Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, Page 28 and following

<sup>163</sup> See European Commission, IMPACT ASSESSMENT - Revision of the legislative framework on the posting of workers in the context of provision of services, SWD(2012) 63 final, Brussels 2012, pages 36 “Example 7”

<sup>164</sup> Eckhard Voss - Posting of Workers Directive - current situation and challenges, Study for the EMPL Committee, 2016, Page 28 and following

<sup>165</sup> European Commission, IMPACT ASSESSMENT - Revision of the legislative framework on the posting of workers in the context of provision of services, SWD(2012) 63 final, Brussels 2012, pages 35 and 36 “Example 8”

The legal framework of the Union or a member state must be adjusted to tackle and cope with these general patterns of maleficent practice.

Bearing this in mind, in Italy, the Netherlands and Germany were far reaching joint and several as well as chain liability schemes concerning clients and primary contractors to be found. Furthermore, these countries have an elaborate system of liability in subcontracting processes, which results in a high probability of finding examples and input for "best practice".

The construction sector, as the eldest one affected by a wider use of subcontracting, has the most coverage of national rules, also due to the Enforcement Directive. Beneath the construction sector, the phenomenon of subcontracting chains has been reported for facility management, transport, hotels, meat processing, healthcare and agriculture. All of them are worker intensive industries, which resembles a common pattern.

In general, "status problems" concerning the classification as employee have been reported from all countries examined, in particular from the UK and Poland. This hinders application of measures concerning subcontracting- chains from the start, because in most countries examined these measures are applicable on employees, only. Self-employed workers do not fall within the scope.

In Poland, concerning the status of workers as employees or self-employed workers priority is given to the will of the parties, which opens the door for evasion of rules. In the UK, there is a major issue the principal contractor and subcontractor asserting that all workers working on a construction site are "self-employed" in order to circumvent liability. Contracts with workers tend to be drafted in that respect, designating workers as self-employed.

In summary, the issue of pseudo-self-employment has to be emphasized especially.

This loophole and evasive practice is of special relevance for subcontracting as it encouraged the phenomenon of "Letterbox Companies" acting as (bogus) subcontractors, which also includes TAW-agencies.

Furthermore, a lack of information and information rights, also in the national's language, as well as an ineffective cross border enforcement of rights and titles has been complained about by a majority of national experts. The Enforcement Directive has addressed these issues. However, due to the recent implementation effectiveness of rules cannot be assessed, yet.

Lastly, in many countries it is up to the worker to start proceedings in case of infringements or abuse of workers' rights in subcontracting-chains. Workers tend to not take action due to fear of a job loss and the financial stake of initiating proceedings in an alien country and law system as well as a lack of information. In addition, the problem of inefficient cross border enforcement of rights and titles has been reported. However, this issue has recently been attended to by introduction of Art. 11 of the Enforcement Directive, which enables trade unions and other third parties, such as associations, organisations and other legal entities having a legitimate interest in compliance with the PWD may engage, on behalf or in support of the posted workers or their employer, and with their approval, in any judicial or administrative proceedings

Local authorities and social partners play an important role in this regard either by monitoring compliance with the rules and/or as potential claimants involved in the liability regimes. The social partners play multiple roles – for instance, they are acting

as advisers, representatives and providers of legal aid to individual workers as well as parties to collective labour agreements.

As most of the countries examined, implemented the Enforcement Directive in mid-2016, an analysis of the impact and effectiveness will be difficult due to the recent adoption.

**We therefore recommend reviewing the situation in 2019.**

## **3.2. The legal framework on subcontracting chains in selected member states**

### **3.2.1. Germany**

Liability in subcontracting chains has a long history in the German legal framework. In early 1996 the Act on the Posting of Workers (Arbeitnehmerentsendegesetz, hereinafter AEntG)<sup>166</sup> was enacted even prior to the PWD. While also protecting the rights of workers posted from abroad, the new rules were mainly intended to protect domestic employers/undertakings and seal off Germany's national labour market against competition from a globalized economy (at the time from Portugal and Spain) by imposing a joint and several liability.<sup>167</sup> Since then, focus has shifted to maintain minimum working conditions for domestic workers as well.<sup>168</sup>

Implementing the Enforcement Directive, Germany made use of Art. 9 of the directive by demanding undertakings posting to Germany to make an obligatory notification to the Central Customs Authority.

The notification must include the following details:

- The industry in which the posted workers are to be active (the details are voluntary in the case of a notification being made pursuant to the Minimum Wage Act),
- The place of activity; in the case of construction services, the building site,
- The beginning and expected end of the activity,
- The place in Germany where the documents required pursuant to Article 17 of the Minimum Wage Act or Article 19 of the Posted Workers Act (in particular, employment contracts, working time records, pay slips, records of wage payments) will be available for inspection,
- The surname, first name, date of birth, and German address of the relevant contact in Germany (accountable domestic representative),
- The surname, first name, and address of an individual in Germany who is authorised to accept the service of documents (authorised recipient),

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<sup>166</sup> The rules imposed by the AEntG have been addressed in the CJEU Wolff & Müller (C-60/03) case, see Box 1 for further details

<sup>167</sup> BT-Drs. 13/2414, page 7

<sup>168</sup> Schlachter, Erfurter Kommentar zum Arbeitsrecht, § 1 AEntG, Rn. 1

- The surnames, first names, and dates of birth of the workers whose services are used by the employer in Germany, and the lengths of their activities (as an attachment to the notification if sent by fax).<sup>169</sup>

Oddly, there are notification obligations. One according to MiLoG and one according to the AEntG.

With the new Minimum Wage Reporting Obligations Regulation (Mindestlohnmeldeverordnung, hereinafter MiLoMeldV) coming into force on the 1<sup>st</sup> of January 2017 foreign employers are required to submit notifications of workers posted to Germany using the Minimum Wage Notification Portal provided online. The same applies to businesses that use workers leased from a foreign TAW-agency.

The duty of notification under the MiLoG stretches to the following sectors:

- Setting up and dismantling trade fairs and exhibitions,
- Building industry,
- Meat industry,
- Forestry,
- Catering and hotel business,
- Industrial cleaning,
- Passenger transportation industry,
- Fairground and amusement sector,
- Haulage, transport, and associated logistics industry.<sup>170</sup>

Foreign employers who post one or more workers to Germany in order to provide services in the sectors covered by the AEntG, in which sectors an employer is obligated to grant at least certain minimum conditions of employment and/or make holiday fund contributions, are required pursuant to Article 1 (1) AEntG in conjunction with Section 1 MiLoMeldV to submit a written notification.

The duty of notification under the AEntG stretches to the following sectors:

- Waste management, including street cleaning and winter road maintenance,
- Training and further training services in accordance with the second or third volumes of the Social Code,
- The mainstream construction and construction-related industries,
- Mail services,
- Building cleaning services,
- Agriculture, forestry, and horticulture,

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<sup>169</sup> Enumeration taken from [http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Obligatory-notification-workers-posted/Notification/notification\\_node.html](http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Obligatory-notification-workers-posted/Notification/notification_node.html)

<sup>170</sup> Ibid

- Care provision,
- Processing and preserving of meat and production of meat products,
- Security services,
- Textile and clothing industry, or
- Laundry services for commercial clients.<sup>171</sup>

In both cases the notification must be accompanied by an assurance pursuant to Article 16 (2) MiLoG and Article 18 (2) AEntG in which the employer declares that he is complying with the minimum conditions of employment as laid down in the MiLoG and the AEntG.

There are even exceptions from the obligation to notify. Notifications pursuant to the MiLoG are not required, if a posted worker's sustained pay exceeds a gross 2,958 € a month, or whose sustained regular monthly pay exceeds a gross 2,000 € provided that the employer can submit evidence of such payment for the past full twelve months as laid down in Section 1 of the Ordinance on Minimum Wage Documentation Obligations (Mindestlohndokumentationspflichten-Verordnung - MiLoDokV).<sup>172</sup>

This is considered inefficient and confusing by the authors. One common notification online form with options would have done the deed. In it yet unclear whether a wrong notification, for instance under the AEntG although the posted worker falls under the MiLoG, will be sufficient or if a fine will be imposed.

It is the authors view, that the mechanism shown above is in urgent need of revision.

In terms of liability in subcontracting chains the legal situation has significantly changed over the past few years.

With introduction of a country wide minimum wage regardless the economic sector or branch, the system of liability in subcontracting chains has been extended to any kind of work, whereas rules for minimum remuneration did only exist in the selected sectors, where universally binding CLAs existed, before.<sup>173</sup>

In application of Art. 14 of the Posting of Workers Act (Arbeitnehmerentendegesetz, hereinafter AEntG) respectively now according to the Minimum Wage Act (Mindestlohngesetz, hereinafter MiLoG) the contractor is held liable for any depth concerning (minimum-) wages as well as social fund payments according to art. 8 AEntG irrespective of any fault or responsibility. This liability applies irrespective of any preventive measures of the contractor, even the most thorough due diligence will not prevent possible liability as there is no escape clause.<sup>174</sup>

As of January 1, 2015, Art. 13 of the MiLoG stipulates exactly the same rules as Art. 14 of the AEntG by referring to it.

Therefore, the study displays both provisions together.

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<sup>171</sup> Ibid

<sup>172</sup> [http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Obligatory-notification-workers-posted/Notification/notification\\_node.html](http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Obligatory-notification-workers-posted/Notification/notification_node.html)

<sup>173</sup> For instance, in the economic sectors of construction, facility cleaning, private security service and meat processing according to § 4 AEntG

<sup>174</sup> Reinfelder in Düwell/Schubert, Mindestlohngesetz, Handkommentar, 2015, § 13, Rn. 1

The Minimum Wage Act has been issued in order to determine a non-disposable minimum wage for all domestic and foreign employers employing workers in Germany.

Both provisions stipulate a **chain liability** for contractors, who hire subcontractors and do not pay (minimum-) wages. With introduction of Art 13 MiLoG liability is being extended on all contractors regardless the economic sector and regardless of collective labour agreements concerning wages etc.<sup>175</sup>

This chain liability applies irrespective of any responsibility or fault to every link of a subcontracting chain except the investor unless acting as contractor himself. This means that the primary/principal contractor, a contractor of the primary contractor and subcontractors of both of them as well as labour market intermediaries acting as subcontractors can be subjects of liability for **net wages**. Net wages are the minimum wages irrespective of taxes, social insurance contributions and employment promotion or similar social security contributions. Therefore, a **chain liability** is given, in which the links are liable as guarantors, who waived the defence of failure to pursue remedies.<sup>176</sup>

As a result, unpaid workers are entitled to claim their net wages directly from the contractor without the need of prior action against their employer.

The investor however does not fall under the scope of MiLoG and AEntG in a majority of cases.

Such restrictive jurisdiction also applies in cases where administrative offences are committed through a subcontracting chain. According to § 21(2) MiLoG and § 23(2) AEntG it is considered an administrative offence to subcontract to subcontractors, who do not respect the minimum wages according to the MiLoG or universally applicable CLAs. However, only a person or undertaking is regarded an employer who, when entering the contractual relationship with the contractor, passes on or fulfils a contractual obligation that already had arisen to a third party (investor), or who intends to use the contractor for fulfilling a contractual obligation which will typically arise as part of that person's business model.<sup>177</sup>

TAW-workers ordinarily do not fall under the scope of § 14 and 13 of the AEntG and MiLoG as the contract between TAW-agency and user undertaking is not considered a contract of services. An exception is made, if a TAW-agency has been commissioned by a direct contractor or subcontractor of the principal in order to fulfil contractual obligations.<sup>178</sup> Although an exception, this should apply to almost every subcontracting chain involving TAW-agencies as subcontractors.

Unpaid wages may be enforced by posted workers in the competent German labour court, § 15 AEntG

In terms of social security contribution Germany's framework does not go as far as Italy's. There is no general liability for social security contributions in subcontracting chains. An exemption is made for the construction sector, only. According to § 28 e (3a) Social Code IV (Sozialgesetzbuch IV, hereinafter SGB IV) an undertaking of the construction sector, which contracts another undertaking with construction works is

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<sup>175</sup> Ibid, Rn. 12

<sup>176</sup> Ibid, Rn. 24 and following

<sup>177</sup> Employees and social partner have often challenged that in court by initiating proceedings against the investor. All have failed.

<sup>178</sup> Reinfelder in Düwell/Schubert, Mindestlohngesetz, Handkommentar, 2015, § 13, Rn. 19

jointly liable for social contribution not paid by that (sub) contractor. This also applies for social contribution, which have to be paid abroad. There an escape clause, which releases from liability, if a due diligence was conducted by requesting a clearance certificate from the competent authority.

Over the past decade the sector of meat processing has been in focus.

There have been reports of undertakings in the meat industry, who substituted a significant part of their direct workforce with a combination of posted workers by subcontractors, TAW-workers and (pseudo) self-employed workers from other member states. Only a minority of domestic workers was still directly employed with the undertaking. Wages were way below minimum rates at approximately 3 € per hour. Workers very mainly provided by letter box companies from Poland, Hungary and Romania. Contracts were even passed between the posting letter box companies.<sup>179</sup>

In order to tackle these abuses, the Act for Protection of Workers' rights in the Meat Industry (Gesetz zur Sicherung von Arbeitnehmerrechten in der Fleischwirtschaft, hereinafter GSA) was enacted on the 1<sup>st</sup> of June 2017. According to its § 3 the rules from § 28e SGB IV are being inherited, which leads to a joint and several liability of the contractor and the subcontractor for social security contribution in the meat industry.

A common loophole is being tackled by the new regulation as well. As in the Netherlands there has been evidence of a practice of circumvention of the minimum wages by imposing excessive charges on employees for housing during their stay in the Germany for work clothing and tool as well as transport to the place of work. The new provisions rule that any mandatory clothing<sup>180</sup> must be provided to the employee free of charge.

### 3.2.2. Hungary

Hungary has recently implemented the Enforcement Directive 2014 /67/EU on the Posting of Workers Directive into its national legal framework. Article 12 of the Enforcement Directive 2014/67/EU has been transposed by section 126. Act LXVII. of 2016. It amended Section 297 of Act I. of 2012 on the Hungarian Labour Code (hereinafter the Labour Code).

The Labour Code lays down the fundamental rules for decent work according to the principle of free enterprise and the freedom of employment, taking into account the economic and social interests of employers and workers alike. It is not sector specific, but governs all employment relationship.

According to the recently introduced rules, posted workers involved into subcontracting can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer. It establishes a **direct liability** scheme according to the minimum requirements of the Enforcements Directive in terms of liable parties of a subcontracting chain. This rule applies to all employers and actors on the Hungarian Labour Market, including TAW-Agencies.

Due to the general scope the of the Labour Code, the joint and several liability in a subcontracting scenario, which involves the posting of workers, is not limited to the construction sector like Art. 12 of the Enforcement Directive, but applies to **all economic sectors**. The trade unions also voted in favour of this.

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<sup>179</sup> <https://www.etuc.org/press/letterbox-type-practices-avoiding-taxes-and-exploiting-workers-across-eu#.WUvTMmsCHM0>

<sup>180</sup> Either due to hygienical reasons or reasons of work security

However, the Hungarian government has expressed that although the transposing acts do not explicitly exclude the transport sector from the scope the PWD and Enforcement Directive, road transport (including cabotage) would not fall within the scope of the posting of workers directive, and it is believed that the application of the posting-related requirements in the transport sector is neither possible and nor appropriate.<sup>181</sup>

Subcontracting is very common in the transport sector. Due to high cost pressure for logistics work is often subcontracted to smaller undertakings or even self-employed drivers. This results in the tendency to shift the responsibility for social security payments and employment benefits to the subcontractor and some self-employed drivers are indeed working as 'hidden' or false self-employed employees<sup>182</sup>

As the transport sector is very important in Hungary, the authors doubt that this opinion complies with the law.

It has to be highlighted, that a provision for a joint and several liability of the contractor and the posting subcontractor has already been in place. According to the previously existing regulations, Hungarian employers had to act as guarantors towards an employee posted to Hungary in case one failed to inform the foreign employer in advance about Hungarian working terms and conditions, Section 297 of the Labour Code.<sup>183</sup> Liability was stretched on all claims according to Section 295 of the Labour Code.<sup>184</sup>

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<sup>181</sup> [http://ommf.gov.hu/index.php?akt\\_menu=554](http://ommf.gov.hu/index.php?akt_menu=554)

<sup>182</sup> AECOM Ltd., Collection and Analysis of Data on the Structure of the Road Haulage Sector in the European Union, 2014, page 9

<sup>183</sup> Section 297 of the Labour Code reads as follows:

Prior to the conclusion of a services contract the beneficiary shall inform the foreign employer in writing concerning the working conditions applicable pursuant to Section 295. In the event of failure to provide the information described above the beneficiary shall be subject to full financial liability for the employee's claims under Section 295.

<sup>184</sup> Section 295 of the Labour Code reads as follows:

(1) If a foreign employer employs a worker in the territory of Hungary - under agreement with a third party - in an employment relationship that is not covered by this Act pursuant to Subsection (2) of Section 3, with the exceptions set out in Subsection (4), Hungarian law shall apply to such employment relationships in terms of:

- a) maximum working time and minimum rest periods;
- b) minimum duration of annual paid leave;
- c) the amount of minimum wages;
- d) the conditions for temporary agency work as per Sections 214-222;
- e) occupational safety;
- f) the conditions of employment or work by pregnant women or women who have recently given birth, and of young people; furthermore
- g) the principle of equal treatment;

including the provisions of a collective agreement with extended scope as pertaining to the employment relationship in question.

(2) The provisions of Subsection (1) shall also apply where employment is provided at the Hungarian branch of a foreign employer, or of an employer that belongs to the same group of companies as the foreign employer.

(3) In the application of Paragraph c) of Subsection (1), the concept of minimum wage shall be understood as the remuneration defined in Sections 136-153. Minimum wage shall not include payments made to voluntary mutual insurance funds, and any remuneration provided to the employee that is not subject to personal income tax.

(4) As regards employers engaged in construction work that involves the building, remodeling, maintenance, improvement or demolition of buildings, thus particularly excavating, earthwork, actual building work, the assembly and dismantling of prefabricated components, fitting and installations, renovation, restoration, dismantling, demolition, maintenance, upkeep, painting and cleaning work, in terms of the requirements specified in Subsection (1) hereof the workers employed for these activities shall be subject to collective agreements covering the entire industry or an entire sector.

(5) The provisions of Subsections (1)-(4) need not be applied if the law governing the employment relationship contains more favorable regulations for the employee in terms of the requirements defined in Subsection (1) hereof.

A system of joint and several liability was therefore already known to the Hungarian legal system before the transpositions of the Enforcement Directive.

Hungary made use of Art. 12 (5) of the Enforcement Directive 2014/67/EU, which enables the member states to exempt the contractor from liability, who has undertaken due diligence obligations as defined by national law. The principles according to which a prior due diligence is to be assessed in particular cases are yet to be established by case law in the years to come.

In order to enforce controllability, and information rights, both the Hungarian and the foreign employers will be subject to various document retention, record keeping and other administrative requirements, whose legal basis was laid in the Enforcement Directive<sup>185</sup>.

The Hungarian employer will be required to retain the employment records (such as labour contract, working-time accounts, pay slips) of the posted employee at its registered seat during the entire period of the posting and in the following 3 years. In the same time, the foreign employer will be obliged to indicate a person providing the Hungarian employer with the above documents in the event of a labour audit by the Hungarian Labour Authority. This contact person be responsible for liaison between social partners and the service provider in the interest of collective bargaining for the duration of the service. If the person does not permanently reside in Hungary, the contact person appointed must be available upon reasonable and justified request.

In accordance with the new regulations, the foreign employer is also obliged to report the posting of workers (own identity, number of workers posted and their identity, the anticipated duration of the posting etc.) to the Hungarian Labour Authority on the website of the Hungarian Labour Authority<sup>186</sup>, by the starting date of the posting at the latest. The declaration can be made either in English or in Hungarian. The declaration must be made **before** the actual commencement of the posting and can only be accepted if it is sent via the designated web page.

In accordance with the new regulations, the rules of labour inspection were also amended as of 8 July 2016.<sup>187</sup> Pursuant to these amendments, labour inspectors will have the right to determine — based on certain pre-defined criteria (e.g. characteristics of the enterprise, the temporary nature of employment) — whether an individual posted within the framework of cross border services is to be considered a posted worker or not.<sup>188</sup>

Section 1 (5) of the labour Inspection Act stipulates that, the inspector is entitled to qualify the legal relationship between the employer and worker based on the facts provided upon the official inspection. The inspector is also entitled to qualify the legal category of the relationship serving as a basis for transferring employees between two parties for work, as well as the relationship established by virtue of the de facto employment.

Section 1 (6) of the Labour Inspection Act further stipulates that at a workplace, where employees are performing work for multiple employers at the same time (for instance

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<sup>185</sup> In particular Art. 9 and 10 of the Enforcement Directive

<sup>186</sup> The declaration of posting to Hungary should must done - after registration - on the following web page by filling the form properly: [http://www.ommf.gov.hu/index.php?akt\\_menu=552](http://www.ommf.gov.hu/index.php?akt_menu=552)

<sup>187</sup> Which are based on Art.

<sup>188</sup> <https://www.ps-bpo.com/newsletters/liability-rules-concerning-posting-of-workers-in-framework-of-provision-of-services-in-hungary/>

on an construction site) and the labour inspection is unable to identify the actual employer of each of the workers in site, it will be presumed with regard to subsection (5) hereof – unless the contrary is proven – that the employer of the employees concerned is the one who actually controls the activity at the place of work.

Branding the receiving Hungarian entity as legal employer can lead to several adverse legal consequences (such as unregistered employment, arrears in tax and social contribution liabilities). The principal contractor must in his own interest know, which company carries out which works and should apply reasonable measures of due diligence before entering a contract with a subcontractor. This important in terms of a contractor's responsibility for the safety protection of workers.

The provisions mentioned above, in fact impose a presumed liability for unpaid wages on the principal contractor, who is made responsible for the work performed by the (sub-)contractors in case those prove unreliable or even fraudulent.

From authors legal opinion, another recent amendment of the Hungarian Civil Code could prove as an liability instrument tackling letter box companies and other fraudulent form of subcontracting.

Under the amendment, senior executives of an undertaking shall be joint and several liable with the legal person for any damage caused to third parties when acting in their capacity, if the damage has been caused by them on purpose<sup>189</sup>, which extends the liability of directors and executive officers towards third parties. While pursuant to the provisions applicable before the amendment, directors and executive officers were held liable only in exceptional cases and especially to creditors if a company became insolvent, now they will have to accept stricter liability regime also towards third parties, which includes subcontractor or even employees of a subcontractor, if there has been an intentional collaboration between the legal person and the subcontractor or vice versa in order to exploit workers.<sup>190</sup>

On a European level it was stated that a better exchange of information between the authorities would help the creation of a system in which the authorities of Member States would be in a better position to react in a timely and more efficient manner. It was suggested to reactivate the Commission's expert group (Union level, non-mandatory fora) for facilitating cooperation of information exchange between Member States.

This issue has been addressed by the Enforcement Directive and the amendment to the IMI-Regulation.

### **3.2.3. Italy**

Italy has an extensively widespread system of liability in subcontracting chains. Almost all provisions in civil and labour law determine a joint and several and/or chain liability of the actors involved in subcontracting processes concerning almost all wage components or possible damages. Joint and several liability measures can be found in almost every field of law.

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<sup>189</sup> <https://www2.deloitte.com/content/dam/Deloitte/hu/Documents/legal/HU-legalnews-20160623-EN%20-%20final.pdf#page=2&zoom=auto,-274,652>

<sup>190</sup> See also a summary of the amendment at: [http://www.roedl.com/fileadmin/user\\_upload/Roedl\\_Hungary/Newsletter/Hungarian-Civil-Code-2014-02.pdf](http://www.roedl.com/fileadmin/user_upload/Roedl_Hungary/Newsletter/Hungarian-Civil-Code-2014-02.pdf)

With respect to the service/work contracts<sup>191</sup> Art. 1676 of the Italian Civil Code (Codice Civile Italiano, hereinafter ICC) merits attention as it grants a direct right of action against the principal contractor to those, who have been recruited by a subcontractor to execute a contract. Under this provision, workers may sue the principal in order to obtain any credit due in connection with their activities rendered by executing the contract, with the limit of the debit due by the principal contractor to the subcontractor as compensation for the contract at the moment of the action was brought.

This provision applies to **any type of contract**, whether the parties are private or public entities. However, the provision is applicable only vis-à-vis the workers who performed the works or services provided under the contract the principal is party to. The principal is not liable for other (sub-)contractors' workers, nor for the portion of the salary of the workers that is unrelated to the performance of the contract entered between the principal and the (sub-)contractor.

In respect of wages as well as social contributions, subcontracting liability is disciplined by art. 29, paragraph 2 of Legislative Decree 276/03. This provision has been implemented by art. 1, paragraph 911 Law 296/06 and introduces a system of joint and several liability of the principal contractor and his contractor and the subcontractor of the contractor for wages, insurance premiums and social security contributions. Moreover, subcontractors may sue the principal directly. This establishes a system of a chain liability.

Liability does not arise whether the principal is a natural person, who does not pursue professional or business activities. Under this circumstance, only the contractor (or the subcontractor) will be liable.

The norm provides a mandatory time limit of two years from the execution of the contract to enforce this liability and states that this protection covers only the period of performance of the contract. Both the employees and the social security authorities have a cause of action the liable parties involved in the subcontracting chain.

It must be noticed that this provision not only covers net or minimum wages, but also important wage components like insurance premiums and social security contributions. It resembles one of the most far reaching and strict provisions encountered in this study.

With Ministerial Circular of 29<sup>th</sup> of August 2013 n. 35 the Italian Ministry of Labour and Social Policy provided an interpretation of the aforementioned provision, emphasizing the following:

Firstly, it specified that the provision applies to "parasubordinate" workers, whose social security and insurance contributions are to be paid by the employer. In legal terms, economically dependent workers are self-employed. The basic and common characteristic of these workers is that they are similar to self-employed workers as they work on their own risk and are not subordinate to an employer. At the same time, they are 'economically dependent' in the sense that they are more or less exclusively reliant on just one client enterprise.

Secondly, it states that social partners may have an active role by modifying joint and several liability for salaries, but not for insurance and social security contributions.

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<sup>191</sup> Which may for instance be the contractual relationship between a principal contractor and a subcontractor by which the latter undertakes to perform a service or realize a piece of work with own organization of workforce, instruments and risk

Notwithstanding what CLAs provide, insurance and social security institutions shall retain the right to collect the amount due from the principal (or the contractor).

Still in case of service/work contracts in sense of Art. 1676 ICC, par. 26 of the Legislative Decree No. 81/2008 (s.c. "Consolidated Act for health and safety at work") provides that the principal and the (sub)contractor are jointly liable for all damages suffered by the employees deriving from violation by their employer of the health and safety rules.

Given the broad definition of Italian service/work contract within the ICC, legislations does covers **all economic sectors** where the performance of services or the realization of a work is possible.

In addition to the aforementioned framework, Italy has recently adopted the Enforcement Directive.

It has been implemented by Legislative Decree 136/16, which ensures the same level of workers' protection to workers posted to Italy as to domestic workers. During the period of posting Section 4, paragraph 1 applies the same terms and conditions of an Italian employment to a posted worker.

In addition, paragraph 2 of the same section specifies that Art. 1676 ICC and art. 29, par. 2 of Legislative Decree 276/03 apply to posted workers as well. Therefore, not only net remuneration is covered in posting scenarios, but also insurance premiums and social security contributions.

Foreign employers (EU and non-EU) and temporary work agencies that post employees to Italy are now required to send notice to Italy's Ministry of Labour at least 24 hours before the employee is posted and in the event of any change in the employee's status in Italy or with the company.

Article 10 of the Legislative decree No 136/2016 establishes that **foreign service providers** posting to Italy are required to:

- make an advance **declaration** ("UNI\_DISTACCO\_UE"), setting out specific information regarding the posting of the worker(s), by midnight of the day preceding the start of the posting itself and must notify of any subsequent modifications within 5 days of the change being made
- maintain for inspection, all the **documentation** - hard or electronic copies in Italian - relating to the employment of the posted worker (contract of employment, or other document containing the information set down in Articles 1 and 2 of Legislative decree No 152/1997), payslips, timesheets, documents that demonstrate the payment of remuneration as well as certification regarding legislation on applicable social security (A1 Certificate) and public registration of the establishment of the working relationship (for the entire period of posting and up to two years following its termination).
- designate a **liaison officer domiciled in Italy** to liaise with the competent authorities. Failing this, the registered office or company premises of the Italian employer will be considered the liaison office of the foreign posting company (for the entire period of posting and up to two years following its termination).
- designate a person, not necessarily the same as the one above, who will have the role of **legal representative**, for the purpose of putting the interested social partners in contact with the service provider for possible collective negotiations; this person does

not have to be present at the workplace of the posted worker, but must be available if there is a duly motivated request (for the entire period of posting and up to two years following its termination).<sup>192</sup>

Circular No 3/2016 of the Italian National Labour Inspectorate (INL) further specifies that as from 26 December 2016 all foreign service providers are required to notify the posting of workers in Italy via the Compulsory Communications procedure. Furthermore, by 26 January 2017 all postings that began after 22 July 2016 and that are still active on 26 January 2017 must be notified electronically.

Public procurement and public tendering have been entirely reformed by Legislative Decree (D.Lgs.) n. 50/2016.

In case that there are irregularities in worker's labour contributions found with a contractor, the principal will take over these obligations by paying the contributions directly to the social security institution. The amount paid will be withheld for compensation from the certificate of payment of the contractor. Afterwards, a 0,5% withholding will be made on the contractor's fee and it will be released only when the work will be terminated and upon producing a new and legitimate DURC.

If the irregularities concern wages, the Tender Responsible Officer (Responsabile Unico del Procedimento) will serve to the obligor (as well as to the principal contractor) a written notice to fulfil his obligation within a period of 15 days. If the notice is not contested, the administration will pay outstanding remunerations directly to workers (even during the execution of the contract), detracting the due amount from the contractor's fee.

Italy, although as shown above has one of most strict and extensive legal frameworks concerning liability in subcontracting chains faces the problem of relative inefficiency of the rules in place due to circumventive strategies identified and practiced by players on the labour market. In addition, Italy suffers from internal social dumping, which is why in some sectors (with a slight exception to the construction sector) almost no foreign subcontractors operate.

Until the Eighties every worker was directly hired by the company, even cleaning staff. During the Nineties offshoring and outsourcing have increased, mostly industrial and labour-intensive sectors. There are Italian companies known for a lack of own employees with only a few being direct employees.

Between the nineties and the millennium, a peculiar phenomenon has taken place: Large undertakings won tenders but did not perform the contract themselves. Instead they subcontracted their contractual obligations to different contractors and subcontractors, which resulted in massive subcontracting chains, in which no one knew which was the workers' treatment or salary.

This resembles the reason for the strict rules.

In terms of circumvention of rules, the use of **pseudo self-employed** workers is a well-known issue, both in case of subcontracting as well as in a direct engagement. It is very present in the construction sector. This issue has been continuously addressed by the Italian government through several law initiatives/amendments since the year 2003 with the aim of limitation of the engagement of self-employed workers.

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<sup>192</sup> Enumeration taken from: <http://www.distaccoue.lavoro.gov.it/Pages/Home.aspx?lang=eng>

The latest provision concerning self-employed workers is par. 2 of the Legislative Decree 81/2015, which states that, starting from January 2016, any self-employment relationship with a personal and continuative performance, notwithstanding its formalisation in the service contract, remains subject to the laws of regular employment, in case the activity is organized and structured by the principal. This refers to timing and working place and general subordination in particular. This assumption by law increases the risk of litigation aiming at the establishment of a regular employment relationship by a court. Respective proceedings may be engaged both by the self-employed worker as well as the Labour/Social Security Authorities. Exceptions of this rule are specific cases such as self-employment provided by the National Collective Labour Agreements, reserved jobs (lawyers, tax accountants, etc.) and members of company boards.

Given the above recent provision, engagement of workers through self-employment has become very risky and is subject to a strict control by Labour and Social Security Authorities.

Another issue is the lack of enforcement by the authorities. Due to extremely high unemployment rates, especially in the South of Italy, workers do not denounce unlawful conduct or union-busting activities by themselves, while the authorities do not have the capacity for sufficient inspection.

In that regard, the social partners play a crucial role on the Italian Labour Market protecting the interest of workers. They are acting both as advisor of the employees and as settlement bodies in case of claims (in Italy, a labor settlement is only fully valid and secured, if executed before an authorized settlement body such as a trade union).

Collective Labour Agreements play an important role not only as self-regulation with respect to employment terms and conditions, but also as general source of law where recalled by the labour law provisions. Some CLAs and company agreements have reached a high level of worker protection. For example, Lamborghini's<sup>193</sup> Agreement of 8<sup>th</sup> June 2015, under which the company agreed **to avoid subcontracts** from January 1<sup>st</sup>, 2018. Moreover, the Union has the right to know how many and which subcontracting companies are working for Lamborghini, which is called "mapping". The list has to be updated every six months.

#### **3.2.4. Poland**

Poland has traditionally a high incidence of cross border subcontracting as a sending state, whilst the posting of workers to Poland is less often. Therefore, the use of foreign subcontractors is rare.

The Enforcement Directive been recently implemented into the national legal framework on June 10, 2016.

In implementation of Art 12 of the Enforcement Directive, liability in subcontracting chains involving posted workers in respect of wages is addressed by the Provisions for the Posting of workers within the framework of the Provision of Services Act of 10<sup>th</sup> June 2016 (Ustawa z dnia 10 czerwca 2016 r. o delegowaniu pracowników w ramach świadczenia usług, Dz.U. 2016 poz. 868, hereinafter POS). Particularly the provisions contained in the third chapter, titled "Joint and several liability of contractor entrusting

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<sup>193</sup> Lamborghini is a renowned manufacturer of sports cars and belongs to the German Volkswagen AG

the execution of works” establish for a **direct liability** as defined in Art. 12 of the Enforcement Directive.

According to Art. 7 (1) POS the contractor, which entrusts the execution of tasks to an employer who sends an employee on the territory of the Republic of Poland shall be liable to the employee jointly and severally with the employer for his liabilities that arose during such work due to outstanding salary and allowance for overtime work.

These liability rules are limited to the construction sector.

Like Hungary, Poland made use of Art. 12 (5) of the Enforcement Directive, which enables the member states to except the contractor from liability, who has undertaken due diligence obligations as defined by national law. Art. 8 POS stipulates that in an event of due diligence by the contractor, the contractor shall not be liable.

The escape clause in the Enforcement Directive has been assessed as possible loophole of the directive.

According to Poland’s national website on posting, the following requirements have to be met **in order to prevent** a joint and several liability:

a.) The transfer of written information to an employer posting a worker to the territory of the Republic of Poland relating to:

- standards and working hours, and daily and weekly rest periods;
- annual leave;
- minimum wage determined on the basis of separate provisions. In addition, in the case of an employer established in a non-member State, the amount of salary, which will be paid to a foreigner for the performance of work may not be lower than 30 % of the average wage in the voivodship, published by the President of the Central Statistical Office;
- the amount of salary and allowance for overtime work;
- health, safety and hygiene at work;
- protection of women workers during pregnancy and during maternity leave;
- the employment of minors and performing work or other gainful activities by a child;
- the principle of equal treatment and the prohibition of discrimination in employment referred to in article 11 i art. 11 of the Act of 26 June 1974 – the Labour Code;
- performing of work in compliance with the provisions on the employment of temporary workers;

b.) Confirmation of receipt of a declaration from the employer containing the following information necessary to carry out factual controls at the workplace:

- identification data of the employer include:
  - the name,

- the seat (address) and phone number and business e-mail address and where the employer is a natural person - his place of residence (address) and phone number and business e-mail address,
- the tax identification number NIP or identification number obtained in the Member State of residence of the employer for tax and insurance purposes;
- the anticipated number of workers posted to the territory of Poland together with the data, including their name and surname, date of birth and nationality;
- the forecasted date of the start and end of the posting of workers in the territory of Poland;
- workplace addresses of posted workers in the territory of Poland;
- nature of the services justifying the posting of workers in the territory of Poland;
- data of the person authorised to liaise when dealing with the National Labour Inspectorate and to send and receive documents or notifications, staying in Poland during the period of posting, including name and surname, address of residence, telephone number and business e-mail address - in the case of employers from the EU, and in the case of employers from outside the EU, staying in Poland and authorised to represent the employer before the National Labour Inspectorate, including his/her name and surname, address of residence, telephone number and business e-mail address
- storage place of:
  - a copy of the employment contract of a worker posted to the territory of Poland or another equivalent document certifying the conditions of employment that has been established in the framework of an employment relationship;
  - record of the working time of the posted worker in the territory of Poland for the starting and finishing times and the number of hours worked on a given day or copies thereof;
  - documents setting out the amount of the remuneration of the posted worker in the territory of Poland together with the amount of deductions made in accordance with applicable law and proof of payment of remuneration to the worker or copies thereof.

If the worker posted to the territory of Poland is to perform work for the user-employer within the meaning of the legislation on the employment of temporary workers, the statement also includes the identification data of the employer, i.e.:

- name,
- seat (address) and phone number and business e-mail address and where the employer is a natural person - his place of residence (address) and phone number and business e-mail address,
- tax identification number (NIP) or identification number obtained in the Member State in which the employer is established for tax and insurance purpose<sup>194</sup>

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<sup>194</sup> Enumeration taken from <https://www.biznes.gov.pl/przedsiębiorcy/biznes-w-polsce/prowadze-firme/pracownicy/delegowanie-pracownikow-do-polski/odpowiedzialnosc-solidarna>

Many of the requirements aforementioned are based on Art. 9 of the Enforcement Directive. While Art. 9 does not connect the control measures mentioned in Art. 9 with the subcontracting liability of Art 12 of the Enforcement Directive, the Polish provisions do, which result in high stakes in terms of compliance by undertaking posting employees to Poland. Time will show, if this rather strict opinion is backed by the courts. It should be rather effective, if seriously enforced by the national authorities.

Failure to comply with obligations may trigger a fine of up to PLN30,000 (approximately €7,000). The fine is always imposed on the guilty individual within the employer's organisation and not the entity as such, which hampers effectivity as one employee could be scapegoated.<sup>195</sup>

Aside from the legal framework on posting, liability schemes for subcontracting processes have been known to the national legal framework since 2003.

The Polish Civil Code (hereinafter CC), aside from general rules on liability, also contains a regulation concerning the constructions sector and the practice of subcontracting, including a **full chain liability** system in Art 647 CC.<sup>196</sup> Art. 647 CC was introduced by amendment to the Civil Code of 14<sup>th</sup> February 2003 (Journal of Laws 2003, No. 49, item 4008). It took effect on 25<sup>th</sup> September 2003.

According to Art. 647 (5) CC, the investor and the contractor are jointly and severally liable for the payment compensation for construction work performed by a subcontractor, if the building contractor enters into a contract with the subcontractor.

The investor's liability only extends to subcontractors executing works based on the construction agreement. Construction works are understood to be activities that lead to the delivery of the building or structure to the investor. Therefore, the investor's liability has to be checked against the subject of the agreement concluded with the subcontractor, to see whether it is related to construction elements. Art. 647(1) of the Civil Code does not provide protection for agreements entered into with parties providing services as architects, designers, producers and suppliers of goods and materials.

In addition, before contracting a subcontractor the contractor requires the investor's consent, which will be implicated by the investor not submitting objections or stipulations in writing within in a 14 days period.

Nevertheless, Art. 647 (5) CC established a **full chain liability** by extending it even on the investor of the project and not only main/principal contractor.

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<sup>195</sup> <http://www.lexology.com/library/detail.aspx?q=18813788-503d-40de-ba6c-ff02938a1e95>

<sup>196</sup> Art. 647 CC reads as follows:

§ 1. In the construction works contract referred to in Article 647 executed between the investor and the contractor (general contractor), the parties set forth the scope of the works which the contractor will perform personally or through subcontractors.

§ 2. The execution by the contractor of a construction works contract with a subcontractor requires the investor's consent. If, within 14 days of receiving from the contractor a contract with a subcontractor or a draft contract, together with part of the documentation concerning performance of the works set forth in the contract or in the draft, the investor does not submit objections or stipulations in writing, he is deemed to have consented to the execution of the contract.

§ 3. The execution of a contract by the subcontractor with a further subcontractor requires the consent of both the investor and the contractor. The provision of the second sentence of § 2 applies accordingly.

§ 4. The contracts referred to in § 2 and 3 should be executed in writing; otherwise they will be invalid.

§ 5. The person executing the contract with the subcontractor and the investor and the contractor bear joint and several liability for payment of remuneration for the construction works performed by the subcontractor.

§ 6. Any provisions of the contracts referred to in this article to the contrary are invalid.

Source of translation: <https://supertrans2014.files.wordpress.com/2014/06/the-civil-code.pdf>

Besides, there are new provisions on minimum wage in force, which may help SMEs and self-employed subcontractors in practice.

The new provisions of a minimum hourly rate at 13 PLN (ca. 3.07 €) were announced in the Act of 22 July 2016 on the amendment of the Minimum Wage Act (Journal of Law 2016, item 1265). So far, minimum wages were only applicable on workers on employment contracts (classic employees). From the 1<sup>st</sup> of January 2017 on, the minimum wage is also to some civil law relationships, which previously did not fall under the scope of the Minimum Wage Act. Even if the parties agree on lower wages, e.g. 8 PLN (ca. 1.89 €), the minimum hourly rate of 13 PLN (ca. 3.07 €) is mandatory.

Although Art. 647 of the Civil Code does not provide a direct measure of workers' protection, it indirectly protects the subcontractor's employees by protecting the subcontractor himself. In that regard, one has to bear in mind that not only posted workers are in need of protection but also self-employed individuals as well as SMEs providing their services and run the risk of being exploited. Furthermore, the provisions mentioned above apply to all foreign subcontractors as long as their contractual relationship with the contractor or investor is governed by Polish law.

Furthermore, Poland renewed Public Procurement Law of 29.01.2004 (Ustawa prawo zamówień publicznych, hereinafter PPL) in the End of 2013 (Journal of Laws 2013, item 1473), with an amendment concerning a civil law liability in subcontracting chains.

According to Art 1 (9b) PPL subcontract shall mean a written contract for pecuniary interest having as its subject matter services, supplies or works constituting part of the public contract concluded between economic operator selected by the contracting authority and other entity (subcontractor) and in case of public contracts for works also between the subcontractor and further subcontractor or between further subcontractors.

According to Art 143c PPL the contracting authority shall directly pay due remuneration to a subcontractor or further subcontractor that entered into subcontract for works accepted by the contracting authority, or that entered into subcontract submitted to contracting authority, having supplies or services as its subject matter, in case of evasion of payment respectively by the economic operator, subcontractor or further subcontractor of contract for works.

The very idea was to tackle abuses and frauds in connection with fraudulent practices subcontracting in the construction sector, for instance with regard to the building of public highways.

In terms of enforcement of the provisions, the National Labour Inspectorate checks, among other things, if workers are lawfully posted to Poland whenever there are doubts if a worker may be considered as posted worker.

Authorities will check:

- whether the employer posting the worker to Poland conducts a major business activity in the country from which the employee is posted, other than internal management or administrative activities, and
- whether the worker posted to Poland performs his/her work here temporarily only.

The Polish National Labour Inspectorate checks also the conditions of employment of workers posted to Poland.

The National Labour Inspectorate has the right to request posting employers and enterprises in the meaning of the Freedom of Economic Activity Act "to provide necessary information concerning the posting of workers to or from Poland in reply to reasonable requests therefor from competent authorities, pertaining especially to those workers, their employment conditions and the employer posting the workers to or from Poland". This means that the information obligation applies not only to the posting enterprises but to all businesses – that is also the customers of those enterprises or their subsidiaries to which the workers are posted.

If the entity does not provide the posting-related information requested by the National Labour Inspectorate, it is liable to a fine from PLN 1,000 (ca. 236 €) to PLN 30,000 (ca. 7080.15 €). Similar penalties may be imposed if employers posting their workers to Poland fail to meet the new statutory obligations.<sup>197</sup>

One of the main issues in the member state of Poland is that currently the liability schemes do cover the construction sector, through there is evidence of other sectors facing similar issues.

Letter box companies founded in Poland for the purpose of hiring in a surrounding of lesser social security, often in combination with pseudo self-employment are considered a problem. As one of the member states with one of the highest numbers of send posted workers, letter box companies are very attractive to set up and have not been efficiently tackled, yet.

Still, the description of status as worker or self-employed is subject to the will of the parties. It should be highlighted that it is very easy to take recourse to temporary agency work and civil law contractors in Poland, which offer very limited protection. Conclusion of civil law contracts instead of employment contracts

Lastly, national experts also reported on loopholes in connection with TAW, which will be displayed in Chapter 4.

### **3.2.5. The Netherlands**

Like Italy and Germany, the Netherlands are another example of a member state with a high density of rules concerning liability in subcontracting chains.

In Addition, the Netherland feature a dualist or hybrid system by installing statutory law, which is support or even augmented by collective labour agreements. Labour market intermediaries, for instance, are mostly governed by collective labour agreements issued by ABU (Algemene Bond Uitzendondernemingen).

On the 18<sup>th</sup> of June 2016, the Terms of Employment Posted Workers in the European Union Act (hereinafter WagwEU) became effective. It combines the Dutch implementation of the PWD and the Enforcement Directive in a single law. It replaced the Terms of Employment Cross-Border Work Act (Waga).

It covers three situations of posting of workers to the Netherlands:

- Posting based on a contract between the service provider and the service recipient, the service provider not being a temporary work agency

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<sup>197</sup>[http://www.roedl.com/pl/en/hot\\_news/labour\\_law\\_and\\_social\\_insurance\\_in\\_poland/new\\_supervision\\_rights\\_of\\_the\\_national\\_labour\\_inspectorate.html](http://www.roedl.com/pl/en/hot_news/labour_law_and_social_insurance_in_poland/new_supervision_rights_of_the_national_labour_inspectorate.html)

- Posting within multinational groups, which takes place by seconding an employee of a branch of a group to another member state to a branch of the same group in the Netherlands
- Temporary agency work by making temporary agency workers available in the Netherlands, while the temporary employment agency has its registered office in another member state.

According to the WagwEU employers are obliged to apply certain minimum and “hard core” terms of employment to the personnel that comes to the Netherlands to work temporarily. According to Dutch Labour Law the following legal acts mandatory:

- the Minimum Wage and Minimum Holiday Allowance Act,
- the Working Hours Act,
- the Working Conditions Act,
- the Placement of Personnel by Intermediaries Act (Waadi)
- and the Equal Treatment Act.

As the Netherlands have a system of declaring CLAs universally applicable, a foreign employer must apply the hard core of the terms of employment from these CLA of the sector, in which they are universally binding. Prior to posting the foreign employer must check, if a CLA is applicable for the services conducted.<sup>198</sup>

When these obligations are not observed, the Inspectorate SZW<sup>199</sup> (hereinafter the SZW) may impose heavy fines. If the hard-core provisions from the universally binding collective agreement are not observed, employees and/or social partners may institute an action against the employer.<sup>200</sup>

The Netherlands made use of the voluntary provision of Art. 9 of the Enforcement Directive. The law now imposes a number of administrative obligations for foreign companies posting workers to the Netherlands.

It involves four aspects:

- The obligation to provide information to the SZW
- The obligation to have documents such as payslips and summaries of working hours available at the workplace (or have them digitally available at once);
- The duty to report: foreign service providers must report in advance about where and when and with which employees work will be performed in the Netherlands. The service recipient in the Netherlands has to check whether the report has been made and whether it is correct.

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<sup>198</sup> [www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act](http://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act)

<sup>199</sup> The Inspectorate SZW is a combination of the organisations and activities of the former Labour Inspectorate, the Work and Income Inspectorate and the Social and Intelligence Investigation Service of the Ministry of Social Affairs and Employment. The Inspectorate SZW works for fair, healthy and safe working conditions and socio-economic security.

<sup>200</sup> [www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act](http://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act)

- The obligation to appoint a contact person who functions as a point of contact and who can be contacted by the Inspectorate SZW<sup>201</sup>

With the aim to tackle bogus self-employment, these administrative obligations will also be applied to self-employed workers coming to the Netherlands to temporarily provide services. In that regard, Dutch government has emphasized the will to prevent pseudo self-employment.

In addition, according to universally applicable provisions of Dutch labour law, employers are obliged to verify the identity of all workers on the basis of an original identity document, irrespective of the origin of the employer. This applies to Dutch workers, foreign workers, and interns that are employed and if TAW-workers are hired or if employers are employed by contractor or subcontractor. These provisions apply vice versa for a Dutch principal, contractor or subcontractor.

The employer must be able to provide a copy of their identity document within 48 hours upon request of the SZW.<sup>202</sup>

In terms of liability in subcontracting chains, a direct implementation of Art. 12 of the Enforcement Directive was not necessary as such a system already existed. In the so-called Sham Arrangements (Bogus Schemes) Act (or Artificial Constructions Act, *Wet aanpak schijnconstructies "DLMFA"*, hereinafter BSA), a new system of chain liability has been introduced in 2015 with recent amendments in January 2016, July 2016 and January 2017.

Objective of the BSA is to prevent unfair competition between companies by preventing underpayment of (foreign) employees and to strengthen the legal status of employees. It is especially drafted to protect workers involved in subcontracting chains.<sup>203</sup> It is applicable regardless any economic sector.

Before the BSA entered into force, an employee was only able to hold his employer liable, if (minimum) wages remained unpaid. Since the 1<sup>st</sup> of July 2015 employees can hold not only their employer but also their employer's principal liable for the payment of the wages due to statutory law, a collective agreement or an employment contract.

Temporary workers, employees of contractors/subcontractors and employees of companies, who work for another company under a contract for services can also rely on the chain liability. In that respect, it is irrelevant to Dutch law whether one of the above is established in the Netherlands and enlisted in the Dutch Company Register or if a foreign undertaking provides services on a temporary basis. Dutch legislation does not differentiate between foreign or Dutch service providers. In Dutch legislation, specific rules apply to the activity itself.<sup>204</sup>

The BSA introduces a new approach to the concepts of liability in subcontracting chains. It is a concept of successive or sequential liability. It means that all links in the subcontracting chain may be held liable for unpaid wages, until the main client is liable. This concept may not be misunderstood as classic concept of chain liability, because certain conditions have to be met before the employee is entitled to move on to the next link in the chain.

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<sup>201</sup> Ibid

<sup>202</sup> <http://www.answersforbusiness.nl/regulation/verifying-identity-employees>

<sup>203</sup> <http://www.hifadvocaten.nl/en/news/The-artificial-constructions-law-Wet-Aanpak-Schijnconstructies---WAS>

<sup>204</sup> <http://www.answersforbusiness.nl/regulation/crossborder-establishment>

The following situations have to be distinguished in order to determine liability of a link of the subcontracting chain:

General case:

- Employees must inform their employer that wages are not (fully) paid. They may also directly turn to the employer's client. If none provides for payment, the employee must initiate proceedings at a Dutch Labour Court against the employer and/or direct client. If the court rules in favour of the employee, he must try to enforce judicial decision with the help of a bailiff. If this is unsuccessful, the employee may turn to the next link.<sup>205</sup>

While this resembles the ordinary case, the law imposed a variety of special cases, which have to be taken into consideration:

- If the employer or direct client cannot be found ("Disappearing Subcontractor") the employee may hold the next link in the chain liable, if a statement from the bailiff is provided, in which it is stated that the whereabouts of the employer or direct contractor remain unknown and that enforcement of the judicial decision failed. If the next link in the chain knows where to find the employer or direct client, the employee must again try to collect unpaid wages from the original employer or direct client of the employer.<sup>206</sup>
- If the employer or client is not registered with the Chamber of Commerce or registered with a foreign business register the employee may directly turn to the next link.<sup>207</sup>
- If the employer or other link has gone bankrupt and there are no sufficient liquidation assets, the employee may turn to the next link.<sup>208</sup>
- If the Client is not liable due to a court ruling, the employee may turn to the next link.<sup>209</sup>

As shown above, the clients that are higher up in the chain than the employer's direct client may be held liable one after the other under specific conditions. The employee can skip links in the chain in order to hold the main client liable immediately after his own employer and/or the employer's client in two situations:

- if the employee is subject to serious underpayment and has been waiting for his wages for six months.
- Secondly, if the employee has not received the wages owed to him within one year of notifying the main client that he is being underpaid.<sup>210</sup>

Chain liability does not apply, if the work is performed by self-employed workers or if the client is a private individual.

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<sup>205</sup> Chain liability for wage; information for employers and clients, accessible via <https://www.government.nl/topics/tackling-sham-employment-arrangements/documents/leaflets/2016/02/05/information-for-employers-and-clients>

<sup>206</sup> Ibid

<sup>207</sup> Ibid

<sup>208</sup> Ibid

<sup>209</sup> Ibid

<sup>210</sup> Ibid

There are no due diligence escape clauses. The Dutch Legislator solely recommends taking a 5-step plan, which should be followed in order to minimise the risk of being held liable. It includes checking the domestic and/or foreign Commercial Register (1), asking for a certificate for the payment of the agreed wages (2), paying a reasonable fair price for the service provided (3), concluding contracts with clear reference to minimum wages and CLAs (4) and lastly to interfere, if there is evidence of a misconduct (5). Even if these steps are followed one by one, Dutch courts may still hold the other links in the chain beneath the employer liable, if the court is of opinion that no every effort to prevent underpayment was taken, which will prove very difficult.<sup>211</sup>

As from the 1<sup>st</sup> of January 2017, the SZW will publish inspection details and will publish the names of companies that do not follow the rules for minimum wages.<sup>212</sup> This will make a due diligence before engaging a (sub) contractor more easy and efficient. This proves as an example of "best practice".

As previously emphasised, national taxation rules do not fall under the scope of Art. 153 TFEU. In this field, the European Legislator is without competence. However, as in Germany (liability) rules on taxation can be consulted for examples of effective provisions and enforcement.

The Dutch system on taxation is very elaborated and far reaching.

If a principal contracts a TAW-agency or a (foreign) subcontractor to perform parts of the contractual work, it is mandatory for both to register as an employer with the Dutch Tax and Customs Administration for social security purposes. The foreign employer will receive a payroll tax number and several forms to fill in.

The TAW-agency or the (sub) contractor have to pay the payroll tax for their staff. If one of these actors fails to do so, the Dutch Tax and Customs Administration (Belastingdienst) may hold the principal/contractor liable for unpaid taxes. In case a TAW-agency is involved liable even stretches to turnover taxes owed.<sup>213</sup>

It is possible to prevent liability, if a TAW-agency is hired that has been issued with a SNA quality mark (NEN-4400 1 or 2 certificate) from the Dutch Labour Standards Foundation (Stichting Normering Arbeid, hereinafter SNA).

In the other case, liability will cease in case the principal/contractor pays 25% of the invoice amount (including turnover tax) into the a so called "G account" of the temporary employment agency, which has the sole purpose of covering wages and taxes.<sup>214</sup>

Due to the far-reaching measures, many fraudulent or circumventive practices to not exist in a considerable number of cases in the Netherlands.

"Regime Shopping" is not an issue as the Dutch legal system as it is very unattractive for quickly setting up letter box companies due to the administrative burdens concerning taxes.

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<sup>211</sup> Ibid

<sup>212</sup> <https://www.government.nl/topics/tackling-sham-employment-arrangements/contents/asures-against-sham-employment-arrangements>

<sup>213</sup> <http://www.answersforbusiness.nl/regulation/liability-payroll-turnover-tax>

<sup>214</sup> <http://www.answersforbusiness.nl/regulation/liability-payroll-turnover-tax>

Due to the harsh liability rules and fines imposed, domestic undertakings are very sensible when (sub) contracting.

The enforcement of rules by the SZW is considered very efficient, including the publishing of undertakings, who do not respect minimum wages.

There has been evidence of a practice of circumvention of the minimum wages by imposing excessive charges on employees for housing during their stay in the Netherlands, for work clothing and tool as well as transport to the place of work. The SZW Inspectorate is aware of the situation and will fine employers who make excessive salary deductions.

As self-employment numbers are rising, the issue of bogus self-employment has been addressed by the Assessment of Employment Relationships (Deregulation) Act (hereinafter DBA Act). According to the new legislation there will be imposed a joint and several liability for taxes, when employers use self-employed workers, who turn out to be employees.

As self-employed professionals have been complaining that they're losing assignments due to this liability scheme, the Dutch Tax and Customs Administration has announced to postpone enforcement of this Act until 1 January 2018. This means that if contractors and subcontractors fail to comply with this Act, they will not be fined or be taxed with retroactive effect.

However, the Act will be fully applicable and enforceable in case of a party with a malicious intent. A party with malicious intent refers to a contracting party or contracted party 'that deliberately allows a situation of evidently bogus self-employment to arise or continue, because it knows - or could have known - that there is an employer-employee relationship (and by doing so obtains an improper financial advantage and/or affects the playing field in an unfair manner).'<sup>215</sup>

### **3.2.6. The United Kingdom**

In comparison to the other member states examined, it is fair to say that the UK's approach on posting as well as subcontracting liability is unique and significantly differs from the other member states examined. Despite recent events, this results partly of the UK being traditionally sceptic about the integration of European Legislation into the national legal framework.

A liability system in subcontracting chains, though known to the legal framework in terms of taxes, has not been known to the labour law sector until the transposition of the Enforcement Directive. Until the implementation of the Enforcement Directive, there has been no right of action against a contractor, where a worker is unpaid. Workers could only claim payment from the direct employer and HM Revenue & Customs (hereinafter, HMRC) could only take action against the direct employer with regard to arrears of National Minimum Wage (hereinafter NMW).

In general, UK's position to posting as well subcontracting liability is ambivalent. Very little evidence exists on the number of posted workers in the UK as the UK does not collect any information on the flow of posted workers to and from the country. The main evidence available on the volume of posted workers may be taken from the number of portable document A1-Certificates issued under application of the Social Security

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<sup>215</sup> <https://www.vbk.nl/en/sharing-knowledge/legal-update/update-assessment-of-employment-relationships-deregulation-act-%5Bdba-act%5D/>

Regulation as a proxy indicator of a posting situation.<sup>216</sup> Compared to the size of UK's labour market and economic power the number of workers posted to the UK is low with only receiving 24,089 A1-Certificates in 2015.<sup>217</sup> In comparison Germany received 367,207 and the Netherlands received 54,664 A1-Certificates during the same period.<sup>218</sup>

Beneath Denmark and Ireland, the UK is the only member state, who has not adopted the Employers Sanctions Directive with its Art 8 containing a subcontracting liability scheme in case of the employment of workers illegally residing in the EU. Within the reasoning behind this decision it was stated that:

*"While sympathetic to the objectives behind this measure, the UK did not opt in under Title V of the Treaty on the Functioning of the European Union during the negotiations because there were significant aspects of the draft Directive which the UK did not support. These included the creation of additional administrative burdens on both employers and the public sector in requiring employers to notify the authorities every time they recruit new third country national employees and in requiring compliance inspections. The directive also extended the legal definition of employment in a manner, creating further costs and liabilities to both employers and the authorities. This would mean, for instance, that enterprises utilising subcontractors might be held liable for instances of illegal employment by the subcontractor".*<sup>219</sup>

In case of the Employers Sanctions Directive the introduction of a liability scheme was prevented due to the voluntary character of the directive.

In case of the Enforcement Directive, implementation of Art. 12 was mandatory to the member states.

Prior to implementing, government launched a consultation in implementing the Enforcement Directive with different trade union, legal experts and stakeholders, which received limited response.

The response was very limited with only nine responses to the consultation, which consisted of:

- business representative groups (4)
- trade unions (3)
- legal representatives (2)<sup>220</sup>

While the trade unions were strongly in favour of the Enforcements Directive and voted for extending liability on all wage components as well as beyond the construction sector,

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<sup>216</sup> The numbers shown are proxy as only such posted workers, who bother to collect a certificate and who fall under the scope of the Social Security Regulation are counted.

<sup>217</sup> Jozef Pacolet & Frederic De Wispelaere – HIVA-KU Leuven, Posting of workers Report on A1 portable documents issued in 2015, 2016, figure on page 49, accessible via <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes>

<sup>218</sup> Ibid

<sup>219</sup> See the written statement to Parliament on the EU directive on sanctions against employers of illegally staying third-country nationals, accessible under <https://www.gov.uk/government/speeches/eu-directive-on-sanctions-against-employers-of-illegally-staying-third-country-nationals>

<sup>220</sup> <https://www.gov.uk/government/consultations/posted-workers-enforcement-directive>

business representative bodies wanted to see limits placed on posted workers' rights so did not favour an expansive interpretation of the Enforcement Directive.<sup>221</sup>

In the end Posted Workers (Enforcement of Employment Rights) Regulations came into force on 18<sup>th</sup> June 2016, resembling a **"light touch approach"** that does not go beyond the minimum requirements. The government did not follow the suggestions of the trade unions in terms of scope.

Therefore, subcontracting liability will be limited to the construction sector and to the contractor one up the supply chain from the posted worker's direct employer, which implements **direct liability**.

There is a strong belief within the UK construction industry that the introduction of the Enforcement Directive will have little impact on the sector. Even within the engineering construction (sub-)sector, where posted workers are more often used and encountered, the directive is not seen as an issue. Our interview partners suggest that most undertakings do not use posted workers, also due to domestic pressure by trade unions and workers. Where they do they are paid above the National Minimum Wage, so this is not perceived as a major concern. This is also due to the limited numbers of posted workers overall.

Like Poland and Hungary, the UK made use of Art. 12 (5) of the Enforcement Directive, which enables the member states to exempt the contractor from liability, who has undertaken due diligence obligations as defined by national law.

In terms of scope, consultation respondents suggested that the level of due diligence undertaken is likely to vary dependent on a number of factors including organisation size, contract value and the business relationship. Some concerns were raised as well: trade unions opposed a defence of due diligence as they feel it avoids liability whilst business organisations considered the need for due diligence as a high burden, which could prompt firms to rationalise their supply chains, with SMEs likely to suffer the most.<sup>222</sup>

In that regard, the government expressed that many undertaking would seek warranties and indemnities to call on in case subcontracting liability is claimed and as specifying what due diligence means could be an unhelpful precedent, given that the respondents have pointed out that it will mean different things in different circumstances, the Government stated that they not provide a definition of due diligence in legislation but will develop guidance on what due diligence might be appropriate.<sup>223</sup>

In that regard, a trade union body offered a range of checks that could be made including:

- checking companies were genuine;
- checking workers were genuinely posted workers; c

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<sup>221</sup> Government Response to the consultation on Implementing the Posted Workers Enforcement Directive, Government of the UK, 2016, page 4, accessible via [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/495964/BIS-16-26-government-response-posted-workers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495964/BIS-16-26-government-response-posted-workers.pdf)

<sup>222</sup> Government Response to the consultation on Implementing the Posted Workers Enforcement Directive, Government of the UK, 2016, page 18

<sup>223</sup> Government Response to the consultation on Implementing the Posted Workers Enforcement Directive, Government of the UK, 2016, page 10

- checking whether court or tribunal claims had been brought against the company in the last five years in the UK or abroad;
- audits and spot checks of subcontractors<sup>224</sup>

From the standpoint of the authors it is doubtful that the above-mentioned requirements will find their way into the guidance on due diligence. From the overall tone of the UK, it is more likely that the requirements will be developed in strong favour of the contractors, which is likely to render due diligence in the UK ineffective in the prevention of circumvention and fraud.

Again, a flaw of the Enforcement Directive manifests. There are no minimum requirements to the due diligence in Art 12 (5) of the Enforcement Directive. The member states reluctant to the concept of subcontracting liability might use that weakness to impose so little requirements for a due diligence that contractors/principals can easily circumvent and prevent liability.

Unlike other EU member states, the UK will not be putting a registration system in place for posted workers, so contractors will not have any new administrative reporting burdens. Unlike any other member states examined there will be no formal requirements (notification of number and identity of posted workers as well as duration of posting, appointment of a responsible contact person, providing of hard copies of the employment contract etc.) to be met.

Equally, in regard of enforcement, it is expected that enforcement inspections envisaged in the directive will be carried out under HMRC's existing NMW powers. In that regard, no additional measures were taken as well.

While not liability in subcontracting chains was unknown to the UK's legal system until the recent implementation of the Enforcement Directive, it was well known in regard of the collection of taxes.

Where the tax-debtor's contact details in a subcontracting chain are unclear or remain unknown, HMRC can issue a notice to a third party (for instance the contractor if the unknown subcontractor) to obtain the debtor's contact information. Where debtors cannot be traced, in some circumstances responsibility for tax debts may be transferred to other parties, for example where there is a deliberate failure to pay in cases involving an employment intermediary or even an employer.

A strong focus is laid on collective labour agreements and information and consultation rights for workers representatives. Therefore, the social partners play a very significant role in the labour market of the United Kingdom. The UK does not have legal mechanisms for declaring collective agreements and arbitration awards universally applicable.

In terms of practical issues pseudo self-employment is considered a major issue.

There were 4.7 million self-employed workers in early 2016 compared to 3.25 million in 2001. Trade unions estimate that around half a million of those are bogus self-employed and working for a single employer, using the status to collude in order to pay less taxes.<sup>225</sup> It is considered immoral though not illegal.

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<sup>224</sup> Ibid

<sup>225</sup> <https://www.theguardian.com/commentisfree/2017/mar/13/bogus-self-employment-exploits-workers-scams-tax-philip-hammond-national-insurance-uneven-taxation>

Pseudo self-employment is reported to be considerably widespread in the construction sector. It is estimated that over 50% of those working in the construction industry are falsely self-employed.<sup>226</sup>

### **3.3. Comparison of the different systems and concluding assessment of the measures in place**

There are still differences in terms of scope between the member states examined.

While Germany, Italy and the Netherlands have very far reaching and elaborated systems of chain liability, sometimes even covering all wage components, Poland, the UK and in part Hungary are pursuing a part strictly according to the minimum requirements of the Enforcement Directive.

It is positive in regard of worker protection that Hungary has extended the scope of liability in subcontracting chains on all economic sectors. However, the government is of the opinion that the transport sector, where subcontracting chains are a widespread phenomenon, does not fall within the scope of the PWD. This should be addressed by the commission.

Italy is unique as it has very strict liability rules, but has lesser activities of foreign subcontractors. Even posting is less relevant than in other member states. This might hint to a preventive nature of strict and far reaching liability rules. However, Italy is traditionally facing issues with the enforcement of rules.

Unlike other EU member states examined, the UK will not be putting a registration system in place for posted workers. Equally, it is expected that and e enforcement inspections envisaged in the directive will be carried out under HMRC's existing powers.

This 'light touch' approach to implementing the new rules might be a mistake.

At least the notification obligation in the Enforcement Directive could prove invaluable in preventing letter box companies or bogus subcontractors to post their employees to the UK. It therefore a step in the right direction that every other member states request a notification prior to posting.

These measures could prove to be very effective in fighting letter box companies and other fraudulent forms of subcontracting.

Both the reports from Germany and the Netherlands showed evidence of a practice of circumvention of the minimum wages by imposing excessive charges on employees for housing during their stay for work clothing and tools as well as transport to the place of work. This practice is being tackled by both member states.

In all member states (with a slight exception for the Netherlands) pseudo self-employment was considered an issue. Although the Enforcement Directive addresses that issue, there is still a lack of a reliable European definition, which could provide guidance to the member states in fighting that issue.

In an overall assessment, the situation in terms of liability in subcontracting chains has changed in a positive way. However, implementing an effective Union-wide liability system will involve further development and assessment that is likely to require an extended period of monitoring, evaluation and modification of the measures already in

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<sup>226</sup> <https://www.ucatt.org.uk/false-self-employment>

place. It is too early to finally assess the effectiveness of the measures adopted in mid-2016 at this point.

## **4. CHAPTER 4: REGULATION OF LABOUR MARKET INTERMEDIARIES IN CONNECTION WITH SUB-CONTRACTING CHAINS**

### **4.1. Preliminary Remarks**

All countries examined have a clear statutory framework on TAW and TAW-agencies. All establish for a licensing or registration scheme as well as limitations and restrictions that are imposed on TAW-agencies.

As already addressed in chapter 2 problems may arise with regard to the posting of workers, where this concerns bogus TAW-agencies.

An example of this applies to social security. Some TAW-agencies based in a particular member states may open a subsidiary in another country, where social security contributions paid by employers are low, and then send TAW-workers to a third country or the agency's country of origin. The agency thus benefits from the less favourable conditions for workers which apply in the country where the subsidiary is based.

Furthermore, TAW-agencies often act as labour only subcontractors, providing workforce only, while the user undertaking provides for work equipment and materials.

Since the minimum terms of employment are governed by the TAW-Directive, which does not impose any rules concerning the registering or licensing of TAW-agencies, a strong focus will be laid on these schemes in the following.

### **4.2. The legal framework on labour leasing - and temporary work agencies in selected countries**

#### **4.2.1. Germany**

Concerning TAW-agencies, Germany has a long history of strictly regulating labor and employment practices. This is mostly done to protect workers and the domestic labor market itself as well as to provide companies with guidelines and barriers within which they must act.

The use of temporary work and workers has been heartily embraced by German business in the past few years. Between 2003 and 2015 the number of temporary work agencies nearly doubled. In the same period, the number of temporary workers increased from roughly 300.000 to approximately 1.008.000.<sup>227</sup>

Due to the increased dangers that the German Legislator suspects in the area of commercial TAW, it is placed under a preventive prohibition with the need to acquire a license for TAW.

Therefore, in application of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz, hereinafter AÜG) a TAW-agency is required to register with and be licensed by the German government irrespective of whether supplying workers is the main or a secondary purpose. Authorities will check if an

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<sup>227</sup> "Aktuelle Entwicklungen der Zeitarbeit", Berichte: Blickpunkt Arbeitsmarkt, Herausgeber Bundesagentur für Arbeit Statistik/Arbeitsmarktberichterstattung, Stand Januar 2017, page 6

applicant is reliable in financial as well as an actual way. A license must be applied for in written form.

A fee is charged from the applicant for the processing of applications for the issuing and/or renewal of a license according to AÜG. Fee are 1,000 € for the granting or extension of a temporary permit and 2,500 € for granting of an unlimited permit.<sup>228</sup>

The license (for the first time) or the renewal of the license is not granted in accordance with § 3 AÜG, if the TAW-agency is not considered reliable or is not able to meet the usual employer obligations due to his company's organization.<sup>229</sup> The agency reliability is for instance displayed by compliance with social insurance legislation and the payment of taxes.

Compliance with OHS is also required. In terms of company organization, the applicant has to fulfill certain minimum requirements, for example there must be a sufficient number staff to be able to meet the contractual obligations to the user undertakings, which hinders the establishment of letter box companies.

In addition, there should also be a certain volume of contractual relationship and sufficient business premises. Furthermore, the company organization must be structured in such a way that it is able to manage payroll accounting, the payment of wage tax and social contributions. A liquidity / creditworthiness of EUR 2,000.00 is required for every employed TAW-worker, but at least EUR 10,000.00, to ensure payroll and salary payments.<sup>230</sup>

In the first three consecutive years, the license is issued for a period of one year at a time, after which the authority can grant the permit indefinitely. An application for renewal of the license shall be submitted to the competent authority three months before expiry at the latest.

This applies to German and foreign temporary work agencies companies alike and is mainly done to keep dubious and suspect companies out of the market, thus to inhibit and prevent fraudulent forms of TAW. TAW without a license is considered an infringement of law, which will result in heavy fines of up to 30,000 €. Any penalty higher than 200 € will be registered in the central commercial register.<sup>231</sup>

No license is required where an employee works for another employer affiliated to the same group of companies, providing that the employee has not been recruited in order to work as a temporary assigned worker. Also, if falling within the scope of the CLA that applies to both the supplier and the user, and if both belong to the same economic sector, the leasing of workers in order to avoid short-time working and/or redundancies does not require a license.<sup>232</sup>

The scope of a license to supply workers does not extend to supplying workers for the mainstream construction trade.<sup>233</sup> TAW is strictly forbidden in the construction sector

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<sup>228</sup> Bundesagentur für Arbeit, Informationen zur Arbeitnehmerüberlassung, Stand 04/2017, page 3

<sup>229</sup> Ibid

<sup>230</sup> Ibid

<sup>231</sup> [http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Temporary-work-temporary-worker-assignment/Consequences-of-illegal-supply-and-use-of-workers/consequences-of-illegal-supply-and-use-of-workers\\_node.html](http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Temporary-work-temporary-worker-assignment/Consequences-of-illegal-supply-and-use-of-workers/consequences-of-illegal-supply-and-use-of-workers_node.html)

<sup>232</sup> [http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Temporary-work-temporary-worker-assignment/Requirements/requirements\\_node.html](http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Temporary-work-temporary-worker-assignment/Requirements/requirements_node.html)

<sup>233</sup> [http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Temporary-work-temporary-worker-assignment/Requirements/requirements\\_node.html](http://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Temporary-work-temporary-worker-assignment/Requirements/requirements_node.html)

in order to prevent fraudulent forms of TAW, also in connection with subcontracting chains.

Regarding the terms of employment, the TAW-agency must ensure that the TAW worker is granted the basic working conditions applicable to comparable employees of the user undertaking, which also includes rates of pay **(the principle of equal treatment/equal pay)**. An exception to the principle of equal treatment may be made in the case of a corresponding collective agreement, which may allow for deviating regulations.

Due to the recent reform of the AÜG in April 2017, several provisions concerning the terms of employment have been renewed and adopted to recent developments and demands.<sup>234</sup>

Concerning the principle of equal pay, a TAW-worker will be entitled to receive equal pay in comparison to direct employees of the user undertaking after 9 consecutive months with the same user regardless any other provisions in a CLA.<sup>235</sup>

Concerning subcontracting chains the problem of so called "Chain Leasing" (Kettenverleih) arised. "Chain Leasing" occurs, when a contractor (borrower) of a TAW-agency (lender) transfers the workers to another (sub-) contractor and therefore acts as a second lendor (Kettenverleih).

Although this practice had been deemed illegal by the German Agency for Labour, violations often remained without legal consequences, if at least the lender could provide a valid TAW-license. This practice enabled enterprises without a license to provide the services of a TAW-agency.

As this is an example of ineffective regulation of labour market intermediaries, this evasive practice will be impossible under the revised law. With effect of 1st of April 2017, "Chain Leasing" will be prohibited according to § 1 AÜG. Temporal workers may be assigned by their contractual employer only, not by third parties. In case of a violation of Art. 1 AÜG a fine of up to 30.000 € will be imposed. Furthermore, an open-ended employment relationship of the agency worker with the contractor will constitute, § 10a AÜG.

A second circumventive practice will be tackled by the reform as well. It is "hidden supply of temporary workers" ("verdeckte Arbeitnehmerüberlassung"). This often involves pseudo self-employed workers. The TAW-agency supplies (pseudo self-employed) workers to the user undertaking without billing them correctly as employees. Furthermore, the providing TAW-agency is often without a license and no staff leasing agreement is concluded between the parties or a contract, which legally qualifies as staff leasing agreement, is labeled a contract for services, which do not fall under the scope of the AÜG.

TAW-agencies and user undertakings are now required to label a staff leasing agreement as such before and to specify the TAW-workers before commencing to supply workers. If the parties fail, an open-ended employment relationship of TAW-worker with the contractor will be constituted.

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<sup>234</sup> It was for instance criticized that too many CLAs deviated from the principle of equal pay leading to fragmentation.

<sup>235</sup> Ibid

This will make pseudo self-employment in TAW riskier for the parties involved.

As these practices also involve subcontracting, joint and several liability will be applied to the parties. Beneath the TAW-agency, the user undertaking will be jointly and severally liable for unpaid wages, social contributions and taxes. With regard to the transfer of the total social insurance contribution, § 28e SGB IV already provides for a joint liability. § 42d (6) of the EStG applies to non-deducted wage tax.

With the reform of 2017 the principle of equal pay will be extended in scope and maximum duration of a TAW-workers working with the user undertaking will be limited to 18 months. If the worker continues to work in the user undertaking after 18 months, the TAW-worker must be taken over as employee by the user undertaking. If the user undertaking is not willing to take over, the TAW-agency has to withdraw the TAW-worker from the user. A breach results in a void employment contract with the TAW-agency and the TAW-worker will enter a permanent employment with the user undertaking. An infringement may also result in the loss of the TAW-license and a fine.

In terms of equal pay, the TAW-worker will be entitled to receive the same salary as permanent workers. CLAs may provide for derogations, but only for the first nine months of a transfer. A longer deviation from the principle of equality through a CLA (15 months maximum) is only possible in close cases of exceptional circumstances. Failure to comply with the Equal Pay constitutes an administrative offense, is penalized with a fine of up to € 500,000 and may result in the loss of license.

In summary, the recent reform will address several abusive forms of TAW in Germany. Due to the very recent implementation, there is no reliable date on the effectiveness available. However, competent authorities already expressed their intention do strictly enforce the new rules.

#### **4.2.2. Italy**

TAW is regulated by Chapter I, article 4 and following sections of Legislative Decree n. 276/2003 (the so-called Biagi Reform), which replaced the former discipline of “temporary employment agencies” provided by Law n. 196/97 (named “package Treu”). In addition, Legislative Decree n. 24/2012 has played an important role for it has implemented the TAW-Directive.

In general terms, intermediation, research, recruitment, outplacement and workforce providing activities are considered regulated activity and shall only be carried on by entities duly authorized and enrolled by the Ministry of Labour. Prior to pursuing one of the activities listed above, the agency shall file an application to the competent Ministry of Labour, where it has to specify which activity is intended to be carried on.

The authorisation is issued by the Ministry of Labour, if the requirements provided by par. 5 of Legislative Decree No. 276/2003 are met. These are in particular:

The agency shall be incorporated as limited liability company, joint stock company, cooperative or consortium of cooperatives in Italy or in another EU country;

The registered office or a local office shall be in Italy or in another EU country;

The agency shall have premises suitable to carry out its activities and shall own proper professional skills concerning the human resources and industrial relationships sectors;

The senior managers (directors, general managers, managers with representative powers, etc.) shall not have criminal burdens;

The agency shall permanently exchange information on the labour market throughout "Borsa Nazionale del Lavoro" (IT data base managed by the Ministry of Labour with the aim of promoting the employment in the labour market);

Depending on the kind of activity to be performed, the Agencies engaged in classical TAW activities shall also meet additional financial requirements such as a corporate capital reserved (at least € 600.000 paid-up capital), the broad presence in the national territory, activation of financial guarantees for the employees' credits released by a EU bank (at least € 350.000 paid-up capital), the regularity of payment of the social security contributions, mention in the corporate purpose of TAW activities like the providing of temporary workforce.

The aim of the financial requirement is to guarantee that employees' claims against the employer will always be satisfied. These financial obligations might only be avoided by European agencies, if they have already fulfilled similar provisions provided by the legislation of their country of origin.

If the aforementioned requirements are met, a process of authorisation commences:

The candidate to be authorized shall apply before the Ministry of Labour indicating the kind of activity he is willing to perform

Within 60 days the Ministry of Labour issues a temporary authorization and enrolls the candidate in the specific section of the Registry. The temporary authorisation elapses after a 2-year term.

Within 90 days from the latter term the candidate can apply to have permanent authorisation (to be issued within the following 90 days); It will be issued under two conditions: verification with positive result that every legal obligation has been met and a good performance of the Agency in its temporary authorized activity.

The agency shall comply with communication obligations towards local authorities of any information related to its location and any other information requested as well as being subject to periodic controls by the Ministry on the possession of the requirements provided by the law.

The unauthorized performance of intermediation, research, recruitment, outplacement and workforce providing activities is sanctioned with administrative fines from € 5.000 up to € 50.000 depending on the kind of activity performed.

Restrictions/limitations to TAW are provided by Legislative Decree 81/2015 with respect to the providing of workforce (on fixed-term and open-ended basis) that can be summarized as follows:

Providing of workforce shall be done within the limit of 20% of the total regular (open-ended employment) employed population of the User (save for different limits provided by the CLA's applied to the user undertaking

Providing of workforce on open-ended basis shall be done with employees hired by means of open-ended employment contracts;

Providing of workforce providing on fixed-term basis shall be done within the limits provided by the Collective labour agreements applied by the User (exceptions to this rule are certain categories of employees such as unemployed individuals, employees dismissed as part of redundancy programs, etc.);

Providing of workforce may not be used to replace employees on strike, employees dismissed as part of redundancy program within the last 6 months and employees belonging to units under social dumping program (e.g. solidarity agreement, funded suspension of work, etc.);

The contract between user undertaking and the providing agency shall be executed in written with a specific content (among others, the reference to the authorization of the Provider, the number of employees to be provided, duration, any risk related to health and safety at work shall be specified). Lacking the written form, the contract is void and the employees are recognized as employees of the user undertaking;

The user undertaking shall periodically inform the Union about the number, duties and duration of the workforce provided by the Provider;

Noncompliance with the requirements above results in administrative fines (up to € 1.250) both towards the user undertaking as well as the providing agency depending on the kind of violation and in case of action by the employees towards the User in order to be recognised as his employees.

User undertaking and the agency are bound by a joint and several liability with respect to salary and social security contributions,

In all cases of TAW par. 35 of the Legislative Decree No. 81/2015 provides that the User and the Provider are jointly liable for the salary and social contributions due with respect to the employees of the Provider.

There are not many foreign work agencies which pursue their activity in Italy. In 2010 there were only 81 TAW-agencies with 2692 subsidiaries employing ca. 595.000 TAW-workers<sup>236</sup>

Any infringements of law are vigorously pursued by the social partners, who play a significant role in worker protection in Italy.

In regard of practical issues, it has been reported that even if the law or a CLA provides equal treatment for every worker, it can be difficult to enforce the rules, because workers might not be aware of their rights and might prefer not to sue their employer in order to avoid a negative impact on their job, such as retaliations or dismissals.

The worker might not be aware even of what the union has obtained with collective bargaining, maybe because he does not even go to union assemblies. On the other hand unemployment levels are so high that sometimes the worker knows his rights but he prefers not to claim them in order to keep his job.

#### **4.2.3. Hungary**

The volume of temporary agency work in Hungary is about 2.4% of the labour force. In terms of full-time equivalent, it makes up only 0.9% of the working hours of the

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<sup>236</sup> [http://www.personalorder.de/index.php?load=3,9&art\\_id=22077](http://www.personalorder.de/index.php?load=3,9&art_id=22077)

employed.<sup>237</sup> It is of less importance than in other member states, but relatively strictly regulated in some points.

According to the Labour Code the activity of temporary work agencies in Hungary is subject to compulsory registration and licensing. Government decree 118/2001 lays down the rules for the procedure of registration and the conditions of operation.

The application for registration is to be submitted to the competent employment service – in practice to the district office of the capital/county government office. Apart from professional requirements (at least one employee with the necessary competencies on a 20 hour / week basis) applicants must have assets as security deposit of 5.000.000 HUF (ca. 16.000 €) and appropriate permanent office in Hungary. The deposit may only be used for the singular purpose of solving claims arising from the employment relationship with the hired TAW-worker.

These provisions have been introduced in to fight letter box companies, “Regime Shopping” and bogus TAW-Agencies fleeing into bankruptcy in case of claims made. A security deposit of ca. 16.000 EUR poses a high sum in comparison to other member states<sup>238</sup>, who require a deposit or other form of proof of funds for registration and licensing. Therefore, it is considered rather effective in tackling letter box companies.

The government office maintains a register of borrowers and temporary work agencies, with separate registration numbers. Temporary-work agencies are obliged to provide data on a regular basis to the competent authorities. The Labour Inspectorate is authorised to control the employment practice of both temporary work agencies and user undertakings and to monitor compliance with the above criteria.

Although the Labour Code prescribes domestic registration of the TAW-agency, this does not exclude out foreign companies’ entry to the Hungarian Labour Market through their subsidiaries registered in Hungary. It is mandatory that there is a business association established in Hungary whose members have limited liability, or a cooperative society, who satisfies the requirements prescribed in the Labour Code and in other legislation and must be registered by the government employment service. In case of a foreign company it is the government office of Budapest which is competent for registration, but the deposit and the need to have an office in Hungary is the same.

Therefore, foreign companies cannot operate from another member state, but have to carry out “significant economic activities” in Hungary, which contributes to the avoidance if letter box companies, too.

In 2006 the most important provisions of TAW were redesigned with the aim of tackling undeclared work, which had been a major issue and loophole of the 2001 regulation.

The amended law now prohibits any kind of ownership ties between the agency and the user enterprise - thus companies will be banned from setting up their own in-house agencies, which has been a common source of wage inequalities within workplaces.<sup>239</sup>

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<sup>237</sup> László Neumann, Hungary: Temporary agency work and collective bargaining in the EU, EuroFound 2008, accessible via: <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/hungary/hungary-temporary-agency-work-and-collective-bargaining-in-the-eu>

<sup>238</sup> Bearing in mind that for instance Germany has a minimum requirement of only 10.000 €

<sup>239</sup> See Section 217 of the Labour Code, which reads as follows:

1) The agreement between the placement agency and the user enterprise shall specify the material conditions of placement, and the sharing of employer’s rights. Employment may only be terminated by the placement agency. The agreement shall be made in writing. An agreement between the temporary-work agency and the user enterprise shall be null and void if:

It is also prohibited to deploy someone as an agency worker who was dismissed from the user enterprise in the previous six-month period.

In terms of further restriction on TAW concerning the scope of activities and the employment relationship and workers' rights, Section 216 of the the Labor Code (Act I, 2012) stipulates the following:

(1) The assignment of workers is not allowed:

- a) in the cases specified by the relevant employment regulation;
- b) to replace workers on strike;
- c) beyond the duration specified in Article 2014 (2)<sup>240</sup>

(2) The borrower company shall not have the right to order a temporary agency worker to work at another employer.

(3) An agreement shall be considered invalid if:

- a) it contains a clause to ban or restrict any relationship with the borrower company following the termination of the employment relationship;
- b) it contains a clause to stipulate the payment of a fee by the employee to the temporary work agency for the assignment, or for entering into a relationship with the borrower company.

(4) The borrower company shall inform the local works council:

- a) of the number of temporary agency workers employed and of the employment conditions;
- b) on vacant positions;

at least once in a six-month period, and shall keep the temporary agency workers it employs informed on regular basis."

Therefore, the assignment of agency workers is not allowed in the cases specified by the relevant employment regulations (either law or collective agreement) and prohibited with a view to replacing workers on strike.

The duration of assignment may not exceed five years, including any period of extended assignment and re-assignment within a period of six months from the time of termination of the previous employment, irrespective of whether the assignment was made by the same or by a different temporary-work agency. The user enterprise shall not have the right to order a temporary agency worker to work at another employer.

This is meant to tackle the problem of "Chain Leasing", which had for instance been a practical issue in Germany and lead to chains of subcontracting user enterprises, who acted as TAW-Agencies (often without a licence or registration).

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a) the temporary-work agency and the user enterprise are affiliated by way of ownership in part or in whole,  
b) at least one of the two employers holds some percentage of ownership in the other employer, or  
c) the two employers are connected through their ownership in a third organization.

<sup>240</sup> Which is currently the long period of 5 consecutive years

The TAW-Agency is required to provide the user company with proof of the agency worker's lawful employment (for instance provide the employment contract outlining the agreed wages), the relevant enquiry to the social security system and registration of the agency. If an agency fails to meet the legal criteria or there is no appropriate employment contract, it will be assumed that an employment relationship with the user enterprise is established from the date the agency worker starts work for the period specified in the contract between the agency and the user enterprise.<sup>241</sup> This rule aims to make the user enterprise responsible for the lawful employment of agency workers and the choice of the TAW-Agency.

Furthermore, Hungary imposes a system of "Equal Pay" in Section 219 of the Labour Code, which reads as follows:

(1) The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment, at least those available to the workers employed by the user enterprise under employment relationship.

(2) The basic working and employment conditions referred to in Subsection (1) shall, in particular, cover:

- a) the protection of pregnant women and nursing mothers; and
- b) the protection of young workers;
- c) the amount and protection of wages, including other benefits;
- d) the provisions on equal treatment.

(3) As regards the payment of wages and other benefits, the provisions on equal treatment shall apply as of the one hundred and eighty-fourth day of employment at the user enterprise with respect to any worker:

- a) who is engaged with a temporary-work agency in an employment relationship established for an indefinite duration, and who is receiving pay in the absence of any assignment to a user enterprise;
- b) who is recognized as a long-term absentee from the labor market as defined in Point 1 of Subsection (2) of Section 1 of Act CXXIII of 2004;
- c) who is working within the framework of temporary agency work at a business association under the majority control of a municipal government or public benefit organization, and a registered public benefit organization.

(4) In the application of Subsection (3), as regards re-assignment to the same user enterprise Subsection (2) of Section 214 shall apply for the calculation of days of the duration of the assignment.

According to our Hungarian experts, the situation of temporary agency workers has significantly improved since 2001, the time TAW was regulated for the first time. The Labour Code amendment of 2006 is considered to have approximated TAW-workers'

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<sup>241</sup> László Neumann, Hungary: Temporary agency work and collective bargaining in the EU, EuroFound 2008

rights to the other workers and to have tightened the legislation on temporary work agencies.

In an overall assessment, fraud and abuse were not considered these days, stating that there were more abuses of law between 2001 and 2010. It was stated, that market had been cleansed and now the legitimate temporary work agencies exclude those, who misuse the law, also press releases open the employers' eyes and now they watch with whom they cooperate.

On a European level, it was stated that a better exchange of information between the authorities would help the creation of a system in which the authorities of Member States would be in a better position to react in a timely and more efficient manner. It was suggested to reactivate the Commission's expert group (Union level, non-mandatory fora) for facilitating cooperation of information exchange between Member States.

This issue has been addressed by the Enforcement Directive and the amendment to the IMI-Regulation. Time will show if in an effective manner.

In the study of 2008 conducted by László Neumann, it has been criticized, that "collective agreements do not regulate temporary agency work, neither at sectoral level, nor at user/agency company level, trade unions are not able to organise agency workers".<sup>242</sup>

This situation has not changed much.

The role of the social partners in collective bargaining is still considered not being significant due to the situation of Hungarian interest reconciliation/social dialogue and the behaviour of the government, not calling call upon the views of the social partners (employers' and employees' side alike) and they do not listen to them.

#### **4.2.4. The Netherlands**

TAW plays a very important role on the Dutch Labour market. In 2012 there were 201,000 TAW-workers and 1,410 TAW-agencies registered in the Netherlands.<sup>243</sup> Considering the overall population these are remarkable high numbers.

The Netherlands pursue a dualist or hybrid system by installing statutory law, which is supported or even augmented by CLAs. Over 90 % of the TAW-workers are governed by the ABU-CLA issued by ABU (Algemene Bond Uitzendondernemingen, hereinafter ABU). It has been made universally applicable.<sup>244</sup>

In 1998 the major regulations on TAW-agencies were abolished, which led to a massive increase in the number of agencies and several issues in terms of fraudulent TAW-agencies involved in worker exploitation. In 2012 the system was reformed from the scratch reintroducing a registration scheme for TAW-agencies with the aim of combatting labour exploitation and protecting temporary agency workers.<sup>245</sup>

Effective from 1 January 2012, the new Intermediaries Act (Wet Allocatie Arbeidskrachten Door Intermediairs, or WAADI) was introduced to counteract illegal

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<sup>242</sup> László Neumann, Hungary: Temporary agency work and collective bargaining in the EU, EuroFound 2008

<sup>243</sup> [http://www.personalorder.de/index.php?load=3,9&art\\_id=22072](http://www.personalorder.de/index.php?load=3,9&art_id=22072)

<sup>244</sup> Ibid

<sup>245</sup> <https://www.eurofound.europa.eu/observatories/emcc/case-studies/tackling-undeclared-work-in-europe/registration-requirement-for-temporary-agencies-the-netherlands>

labour and worker exploitation. It is also designed to allow the government to better monitor worker provision practices in the Netherlands, thus forming part of fraud prevention measures.

TAW-agencies now have to register with trade register held by the Netherlands Chamber of Commerce. Companies which supply workers in the Netherlands must add this activity explicitly to their registration. This applies to foreign companies offering services without a Dutch branch as well irrespective if it is registered in another member state and has no offices or other employees in the Netherlands.<sup>246</sup>

The law applies to companies that provide workers as part of their normal business activities as well as to companies that do on an occasionally basis, only. The law uses the following definition for the provision of workers: *"the provision of workers to another party on a paid basis for the performance of work under the supervision or management of the said party, other than by virtue of an employment contract concluded with the said party"*.<sup>247</sup>

There are three important elements:

- One company is providing workers to another company.
- The company providing workers receives a corresponding payment from the company to which the workers are provided.
- Workers who have been provided work under the supervision and direction of the company to which they are provided.<sup>248</sup>

Violations of the law will result in large fines by the Employment and Social Affairs Inspectorate, of €12,000 per worker. Repeated violations will result in higher fines of €24,000 and €36,000 per worker.<sup>249</sup>

The law also addresses user undertakings. It is forbidden to use TAW-workers provided by agencies that are not properly registered. High fines may be imposed as well.<sup>250</sup> Any user undertaking is therefore strongly advised to check whether the TAW-agency contracted has been registered correctly. This is possible by doing the so called "Waadi Check". The "Waadi Check" is offered by the Chamber of Commerce. By entering the Chamber of Commerce registration number of a TAW-agency online, the check will be performed.

The TAW-agency or the (sub) contractor have to pay the payroll tax for their staff. If one of these actors fails to do so, the Dutch Tax and Customs Administration (Belastingdienst) may hold the principal/contractor liable for unpaid taxes. In case a TAW-agency is involved liable even stretches to turnover taxes owed.<sup>251</sup> According to Art. 7:69 BW (Civil Code) & Wet Allocatie Arbeidskrachten door Intermediairs (WAADI) the contractor may be jointly and severally liable for the payment of wages under the Minimum Wage and Minimum Welfare Benefits Act (WML) to the temporary worker unless he is doing business with a certified and correctly registered TAW-agency.

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<sup>246</sup> <https://www.kvk.nl/english/how-to-register-deregister-and-report-changes/registering-with-the-chamber-of-commerce/>

<sup>247</sup> Ibid

<sup>248</sup> Enumeration taken from: <https://www.kvk.nl/english/how-to-register-deregister-and-report-changes/registering-with-the-chamber-of-commerce/hiring-or-provision-of-workers-in-the-netherlands/>

<sup>249</sup> Ibid

<sup>250</sup> Ibid

<sup>251</sup> <http://www.answersforbusiness.nl/regulation/liability-payroll-turnover-tax>

Additionally, the tax authorities and labour inspectorate are now obliged to pass on the details of all agencies they encounter to the institutes responsible for certifying temporary employment agencies.<sup>252</sup>

Therefore, it is in the interest of both the agency and the hiring company that the agency is correctly registered.<sup>253</sup>

Remarkably, the Dutch system offers additional safety by registering with the Labour Standards Foundation (Stichting Normering Arbeid, hereinafter LSF) and acquiring a NEN 4400-1 or 2 certificate.

LSF aims to protect companies who hire TAW-workers or outsource work against claims that may arise from the strict Dutch liability system in subcontracting chains as displayed in chapter 3 as well as against the high penalties that can be imposed by the authorities if a company is found to be employing persons who are not entitled to work in the Netherlands or whose identity has not been established or has not been established correctly.<sup>254</sup>

Therefore, user undertakings who hire staff or outsource work are strongly advised to contract the services of a registered and certified TAW-agency. A company certified according to standard NEN 4400-1 or 4400-2 and registered in the Labour Standard Register (Register Normering Arbeid) offers a greater protection against fraud and illegality in addition to the registration according to statutory law.

NEN 4400-1 is a Dutch standard, which defines requirements for TAW-agencies and user undertaking, including subcontractors, that have their registered office in the Netherlands with respect to the payment of taxes and social insurance contributions and the legitimacy of employment in the Netherlands. The aim of the standard is to limit the risk of (subcontracting) liability and penalties for employers from the Dutch Tax and Customs Administration and other government agencies.<sup>255</sup>

NEN 4400-2 has been especially developed for TAW-agencies, who have their registered office outside the Netherlands. It includes requirements for checking and assessing any foreign undertaking that provides workers for the purpose of working under the supervision or direction of a third party and for testing and assessing any foreign contractor or subcontractor in order to determine, if they are organised in such a way that it may be safely assumed that obligations from employment are complied with.<sup>256</sup>

As shown, NEN-4400-2 does not only cover TAW-agencies but foreign (sub)contractors, who post workers to the Netherlands as well.

Both standards have been developed by the sectors themselves in cooperation with private sector companies and the social partner with the aim of combating fraud and illegality. It is also backed by the Dutch government.

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<sup>252</sup> Ibid

<sup>253</sup> <https://www.expatax.nl/kb/article/chamber-of-commerce-registration-of-foreign-temporary-employment-agencies-and-other-suppliers-of-workers-waadi-check-321.html>

<sup>254</sup> Dutch Labour Standards Foundation, Information set about Standard NEN 4400 and the Labour Standards Register, Version 11.01, page 1, accessible via [http://www.normeringarbeid.nl/Downloads/Eng\\_%20Informatieset%20SNA%20ENGELS.pdf](http://www.normeringarbeid.nl/Downloads/Eng_%20Informatieset%20SNA%20ENGELS.pdf)

<sup>255</sup> <http://www.normeringarbeid.nl/en/default.aspx>

<sup>256</sup> Ibid

A foreign undertaking may register with the LSF using the registration form available online<sup>257</sup>. After receiving the registration form, LSF will enter the undertaking's name into a List of Notified Companies for maximum duration of three months and will inform the inspection body<sup>258</sup> stated on the registration form of the registration. By having its name included in the List of Notified Companies, a company can show that it is currently taking steps to obtain an inspection certificate based on NEN 4400.<sup>259</sup>

After receiving notification from the LSF, the inspection body concerned will conclude an inspection agreement with the respective foreign undertaking and make an appointment for the initial inspection.<sup>260</sup>

During this inspection the inspection body will determine whether an undertaking complies with the NEN-4400 requirements (conformity).

The inspection body focuses on the following aspects during a conformity assessment (inspection):

- Part A The specifications for the company; the extent to which the company as an entity satisfies the minimum requirements set.
- Part B The specifications for the accounting records.
- Part B.1 The specifications for the personnel administration: the extent to which the registration of commencement and termination of employment has been laid down correctly, fully and in a timely manner and recorded in the personnel administration.
- Part B.2 The specifications for the payroll administration: the extent to which the payroll administration has been conducted correctly, fully and in a timely manner and can therefore be considered as reliable.
- Part B.3 The specifications for the financial accounting records: the extent to which the financial accounting records have been kept correctly, fully and in a timely manner and the extent to which the ensuing obligations are complied with.
- Part B.4 General requirements in specific situation.<sup>261</sup>

As soon as the inspection body establishes that a company complies with the requirements of NEN 4400-1 or NEN 4400-2, it issues an inspection certificate.

The inspection certificate attests that at the time of inspection the assessed company meets the specifications and comply with the following laws:

- European directives and regulations including A1-Certificates
- social insurance
- payroll and sales taxes

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<sup>257</sup> The form can be downloaded

from: <http://www.normeringarbeid.nl/Downloads/Application%20Form%201%20September%202016.pdf>

<sup>258</sup> Inspection bodies are undertakings, who have been especially certified (NEN-EN-ISO/IEC 17020) to conduct the inspections and audits necessary for issues the NEN-4400 certificates

<sup>259</sup> Dutch Labour Standards Foundation, Information set about Standard NEN 4400 and the Labour Standards Register, Version 11.01, page 6

<sup>261</sup> Enumeration taken from Dutch Labour Standards Foundation, Information set about Standard NEN 4400 and the Labour Standards Register, Version 11.01, page 2

- **Minimum Wage and Minimum Holiday Allowance**

This certification process is an excellent example of stakeholders and social partners working together in order to provide for reliable contractors. This is due to the very far reaching, strictly enforced and elaborates liability schemes in subcontracting chains established in the Dutch legal framework. There is a high pressure on the parties involved in subcontracting chains to obey the rules and to contract reliable undertakings.

As already stated, over 90 % of the TAW-workers are governed by the ABU-CLA. It has been made universally applicable. While the Dutch law applies the principle of equal pay, after which TAW-workers shall be entitled to the same pay as the permanent workers of the user company, derogations are possible by CLAs.

Due to the importance for TAW in the Netherlands, the study will focus on the ABU-CLA.

The CLA stipulates that the TAW-worker must be remunerated as the comparable permanent worker if he is in the user undertaking for more than 26 weeks.

For the rest of employment conditions, the CLA establishes a phased system according to which the TAW-workers are classified according to their length of service. The longer employment last, the better is its protection in terms of continued pay, notice periods and social security.

#### **4.2.5. Poland**

In Poland, the temporary agency work is regulated by the the Law of 9th July 2003 on Employment of Temporary Workers (consolidated text: Journal of Laws 2016, item 360).

The regulations concerning TAW have been substantially changed by the Law of 7th April 2017 on the amendment of the Law on employment of temporary workers, recently. It will take effect on 1st June 2017. At the time of completing this study the text had not been published in the Journal of Laws, yet.

Assigning temporary agency work is one of the type of activities that can be carried out by employment/TAW-agencies. In practice, there are undertakings that focus on temporary work only.

Commercial activities of such as TAW are considered as "regulated activities" and are subject to registration (art. 18 d and following). The process of registration is subject to chapter 6 of the Law on the Promotion of Employment and organization of labour market ("Employment agencies"), Art. 18 and following.

In order to successfully register, it is required that the applicant has no arrears concerning taxes as well as social security contributions, has not been sentenced for certain types of crimes (Fraud, bankruptcy etc.) and has not been subject to liquidation or bankruptcy proceedings. The registration process has much in common with licensing schemes established in other member states, but is modest in its requirements for licensing.

The register for TAW-agencies is carried out by the voivodship marshal<sup>262</sup>. The register is accessible to the public.

The marshal issues a certificate of registration, which in case of a first-time registration is valid for one year. On the payment of a fee of 200 PLN (ca. 47.20 €) the agency receives a certificate. The marshal also supervises the activities and is competent to refuse the registration or to remove the agency from the register. The voivodship marshal provides the information to the Minister competent for labour affairs (art. 18 p).

Before the recent amendment, foreign TAW-Agencies from other member states are not subject to registration in Poland. Those entities are required to notify the Polish authorities about commencing activities in Poland by providing information about their country of origin, the name and seat of the foreign employer, the approximate area and the types of activities to be carried out.

Foreign agencies before starting temporary employment activities in the Republic of Poland also have to submit a notice with the following information: the name of the country of origin of the trader; name of the entrepreneur and its place of business; approximate location and date of service and the type of services provided in the territory of the Republic of Poland.

The abovementioned amendment on 7th April introduces changes to the Law on employment promotion and organization of labour market.

- There will be two types of employment agencies. The first one would provide outplacement services, personal and professional advice. The second one would be agencies that deal with temporary work only. Both of them would receive a different certificate upon the registration.
- Employment agencies will be obliged to have premises where the activities are carried out (in order to eliminate "letter box companies").
- The information provided by the yearly basis (until 31st January) to marshal of voivodship should also contain data on number and citizenship of temporary workers.
- There will be more severe financial penalties for violating the provisions of the Law. They can be applied both with regard to Polish and foreign companies.

According to the amendment of 7<sup>th</sup> April, the duty to register will apply also to agencies from EU/EEA countries, that send foreign nationals to work for the benefit of entities that are situated in Poland. The agencies will be obliged to inform about sending foreign nationals to Polish undertakings.

Restrictions concerning TAW are subject to the Law on Employment of Temporary Workers. It lays down the principles of employing temporary agency workers by an employer who is a TAW-Agency as well as the principles for assigning workers and individuals who are not temporary agency workers to perform temporary work for a user undertaking. TAW-Agencies in Poland may employ workers on the basis of fixed – term employment contracts or civil law contracts, in which case they are not considered as employees but as self-employed. The description of status as worker or self-employed is subject to the will of the parties. It should be highlighted that it is very

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<sup>262</sup> „Voivodship” is a territorial unit that can be compared to German „Land”. A marshal of a voivodship is an executive organ of a territorial self – government.

easy to take recourse to temporary agency work and civil law contractors enjoy very limited protection.

In terms of restrictions, the Law the Law on Employment of Temporary Workers introduces the following restrictions:

- The employer cannot act as a user undertaking towards his own employees
- Certain tasks cannot be assigned to temporary workers,
  - works that are particularly dangerous under the provisions on health and safety protection;
  - a position occupied by the user undertaking's employee who participates in strike;
  - in a position where, in the three months prior to the expected commencement of work by the temporary worker, the position was occupied by the employee of the user undertaking, who was dismissed for reasons not attributable to the employee (the latter case refers to a situation, where collective redundancies have been carried out, recently).
- There are time limits concerning the recourse to temporary work. Within a period of thirty-six successive months, a TAW-Agency may assign a temporary agency worker to a particular user undertaking for a maximum period of 18 months. Where TAW is performed to fulfill tasks of an absent employee of a user undertaking, the maximum period may not exceed 36 months. In the latter case, the TAW-worker may not be assigned to perform temporary work at the same user undertaking within the subsequent 36 months.

The abovementioned amendment of the 7<sup>th</sup> of April introduces significant changes respect of restrictions:

- There will be new mode to indicate the position where employment of temporary workers would be prohibited. It would be inadmissible to employ temporary worker to carry out the same type of work that had been performed by the "regular" employee of a user undertaking, dismissed due to reasons lying on **employer's side** within last three months. Moreover, it would be prohibited to employ temporary worker in another establishment located on the territory of the same community.
- The new restriction will be the prohibition to entrust temporary worker a work that requires him to carry out guns (in practice temporary worker will not be allowed to perform activities of security agencies).
- introduces a duty of an employer undertaking to carry out register of temporary workers, both with regard to employment contract and civil law contract.
- The maximum period of temporary work will take into account all situations where the particular temporary worker is assigned to the particular user undertaking, for subsequent periods. The maximum period of employment of a particular temporary agency worker would amount to 18 months within 36 months, even where he is send by various agencies to the same user undertaking. Time limits would apply both to temporary workers employed under employment contract and civil law contract (art. 20 of the Law).

The main idea of the amendment is to restrict the possibilities to take recourse to temporary work, which was considered a widespread abusive practice on the Polish Labour Market.

In practice, there are situations where the TAW-worker is assigned to the particular user undertaking by various TAW-agencies, for the subsequent period(s), to perform the same work at the same position. Thus, the limit of 18th months can be avoided. It happens that the same entity creates several temporary work agencies in order to assign the same worker to the same user undertaking. Time will show if this was effectively tackled by the amendment.

In general Polish experts believed rules on temporary agency work are quite flexible and allow an extensive use of temporary work. It could happen that employers took recourse to temporary agency work, on regular basis, even where there is no genuine need for that.

Another problem is that temporary agency work can easily conclude civil law contracts instead of employment contracts.

Another problem is that the National Labor Inspectorate is obliged to supervise and control the observance of labor law by employment agencies but has no legal powers to do so in practice. The Inspection cannot request the registration authority to delete a temporary employment agency from the registry in case of violations of labor law.

The same physical person can establish and close the temporary agency many times. This way each time the agency has a different name and can start anew.

Therefore it has been proposed that the National Labor Inspectorate the right to request the registration authority to delete a temporary employment agency from the registry in case of violations of labor law.

### **4.3. Comparison of the different systems and concluding assessment of measures in place**

All the countries examined (now) possess a more or less elaborated registration or licensing scheme for TAW-Agencies. This shows the need for regulation in this sector.

TAW is of major importance in Germany and the Netherlands, but less important in Hungary and Italy with Poland in between.

While far reaching restrictions are imposed in Italy and Germany, Hungary imposes way less restrictions to the employment of TAW-workers. Poland has begun to regulate restriction more strictly from April 2017.

More than in the field of liability in subcontracting chains there are some similarities in the registration or licensing schemes between the examined member states, while restrictions to the use of TAW vary remarkably.

The Netherlands with their long history of TAW have a very elaborated system, which is influenced by collective bargaining and private certification schemes. On the opposite collective bargaining has almost no meaning in Hungary.

The Dutch NEN 4400-2 Certificate has been especially developed for TAW-agencies, who have their registered office outside the Netherlands. It includes requirements for checking and assessing any foreign undertaking that provides workers for the purpose

of working under the supervision or direction of a third party and for testing and assessing any foreign contractor or subcontractor in order to determine, if they are organised in such a way that it may be safely assumed that obligations from employment are complied with.

There is a high pressure on the parties involved in subcontracting chains to obey the rules and to contract reliable undertakings.

This certification process is an excellent example of stakeholders and social partners working together in order to provide for reliable contractors. This is due to the very far reaching, strictly enforced and elaborates liability schemes in subcontracting chains established in the Dutch legal framework also in terms of TAW.

The same applies for Germany and Italy, where liability schemes in subcontracting chains for TAW have also been established.

Germany has reformed regulations in 2017 closing the circumventive practices of "hidden supply of workers" as well "chain leasing". Furthermore, the rights of TAW-workers have been enhanced and more restrictions for the use of TAW have been imposed.

In Poland, the regulation of foreign TAW-Agencies was basically not in place until a reform in April 2017, which opened the door for abusive practices.

In order to effectively tackle fraud and abuse, licensing or registration schemes must be applicable to foreign TAW-agencies as well. Until April 2017, foreign TAW-Agencies from other member states were not subject to registration in Poland. Those entities were only required to notify the Polish authorities about commencing activities in Poland by providing information about their country of origin, the name and seat of the foreign employer, the approximate area and the types of activities to be carried out.

In Italy, the financial requirements are vast, while in Poland they are very little and do not pose any obstacle for the foundation of letter box companies.

In Poland, the description of status as worker or self-employed is subject to the will of the parties. It should be highlighted that it is very easy to take recourse to temporary agency work and civil law contractors enjoy very limited protection. Pseudo self-employment has been reported a widespread problem in connection with TAW.

The same physical person can establish and close the temporary agency many times. This way each time the agency has a different name and can start anew.

Workers were posted indefinitely to the same user undertaking by different TAW-agencies.

With recent reform of TAW, Poland is making reasonable progress in tackling these issues. Potentially these loopholes in the national legislation will be closed by the recent reform of the TAW provisions.

In summary, the situation of TAW-workers has been further improved in 2017 with reformed rules in Germany and more importantly in Poland.

## **5. CHAPTER 5: POLICY RECOMMENDATIONS AND CONCLUSION**

### **5.1. Policy Recommendations**

Although important improvements have been made, there is always room for recommendations.

During the course of the study some practical issues were discovered, which may be addressed by future legislation:

- 1) Pseudo-self-employment remains an issue addressed by almost all country experts. The European Legislator should provide for a definition in order to provide legal certainty. The Administrative Commission has provided for excellent examples of demarcation criteria. The respective rulings of CJEU may be taken into consideration, too.
- 2) Although a direct liability in subcontracting chains has been established with the Enforcement Directive, the limited scope "one up in the chain" as well as the undefined requirements for a due diligence could seriously hamper the effectiveness
- 3) In that regard, we suggest to closely monitor if the flanking measures of the Enforcement Directive, which provide for notification, better cooperation and enforcement of rules, prove to back the direct liability in its effectiveness
- 4) If not and further action is required, we propose to establish for a "Sequential Liability" as practiced in the Netherlands, which could provide for a compromise for those member states, who are sceptic.
- 5) Beneath the construction sector other labour-intensive economic sectors are affected by subcontracting chains. Liability should apply regardless the economic sector. Extending it sector by sector takes too long
- 6) There are still inconsistencies between the different directives and regulations, which should be addressed
- 7) The European Legislator should try to define loose legal terms in order to provide for a level playing field in terms of interpretation of European Law
- 8) The European Legislator should figure out concrete numbers on posted workers
- 9) The level of Regulation on Labour market intermediaries differs among the examined countries. However, measures have been taken in those member states<sup>263</sup>, where a sufficient and efficient registration scheme for TAW did not exist. The effectiveness should be closely monitored.
- 10) Cross-border enforcement of rights and obtained titles is still an issue considered inefficient. This has been addressed by the Enforcement Directive and should be closely monitored.

As liability in subcontracting chains is a controversial topic, the study proposed a voluntary European system comparable to the Dutch NEN-4400-2 Certificate.

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<sup>263</sup> For instance Poland

A centralised “European Subcontractor Register” could be established, listing reliable subcontractors, who have undergone a voluntary European Certification Process.

It should also list such subcontractors, who have been reported as unreliable by either employees or employers, principal contractors, contractors and subcontractors by providing factual evidence.

This shall enable principal contractors and other parties to conduct a more efficient due diligence of their subcontractors. Further, it will hamper fraudulent subcontracting processes due the risk at stake for being on the list.

A certified inspection body would focus on the following aspects during a conformity assessment (inspection).

As soon as the inspection body establishes that a company complies with the requirements, it issues an inspection certificate.

The inspection certificate attests that at the time of inspection the assessed company meets the specifications and comply with the following laws:

- European directives and regulations including A1-Certificates
- social insurance
- payroll and sales taxes
- Minimum Wage and Minimum Holiday Allowance

**The above could result in the following “traffic light system”:**

RED = Company is not registered with any commercial register or has failed to comply with minimum working conditions in the past. The respective member state provides this information. Social Partners, employees and contractors should be enabled to report too. There must be legal remedy for affected companies

YELLOW = The Company is correctly registered in their member states according to available information

GREEN = Company has undergone a certification by an European Inspection Body. Financial as well as personal reliability has been checked positively. Contractors may contract without the fear of joint and several liability as contracting an green light company is considered a proper due diligence.

## **5.2. Should the European Union adopt legislation?**

This study aims at answering the question, if there is a need for a European legal framework concerning the liability in subcontracting chains.

Such a **European framework is already in place after the adoption of the Enforcement Directive**. The question remains, if this legal framework is effective or in need of replacement.

Considering the recent deadline for implementation of the Enforcement Directive and the upcoming reform of the PWD, which could further improve workers’ protection in subcontracting chains, **we recommend to wait and closely monitor and assess**, if the recent provisions are effectively enforced by the member states.

Member states seem to be realising, that subcontracting chains must be dealt with. Developments in Poland (renewing TAW) as well as Hungary (extending subcontracting liability on all economic sectors) are a good example of that.

Concerning **soft law measures**, the study proposes for a “traffic light system” on (sub) contractor, which would cover TAW agencies as well as posting employers alike.

The situation of posted as well as TAW-workers **has improved** from a legal point of view.

In the coming years, **the European legislator will be asked to closely monitor the framework in place.**

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**Links of webpages are provided within the individual footnotes.**

## **ANNEX II: LIST OF NATIONAL EXPERTS**

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This study was commissioned upon request by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, upon request of Committee on Legal Affairs. It provides a comprehensive update on recent developments on a European and national level concerning liability in subcontracting chains and the protection of workers involved in subcontracting chains. A strong focus lies on the existing European legal framework and recent developments in that regard. By assessing the country reports and the findings on a European level, the study closes with "Policy Recommendations" and answers the question from its authors view, if the European Legislator should adopt (further) legislation.

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