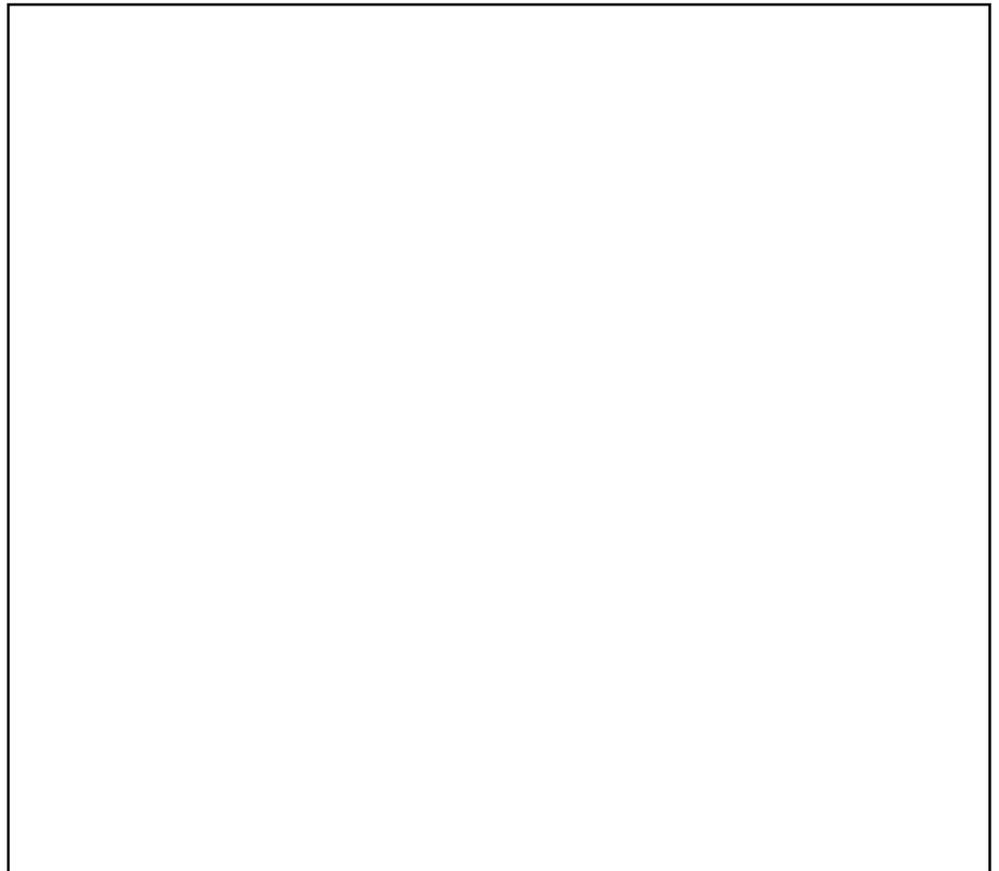




Liability in subcontracting processes in the European construction sector



Authors: Mijke Houwerzijl and Saskia Peters

Institute: Radboud University, Nijmegen, the Netherlands

Research managers: Gregorio de Castro, John Hurley and Stavroula Demetriades

Project: Liability in subcontracting

Contents

Executive summary	1
Introduction	4
1. Liability in subcontracting chains	7
2. Detailed review of relevant national laws on joint and several liability	10
3. Practical relevance and effective impact of rules	30
4. Conclusions	44
References	50
Annex: National summaries of liability arrangements	52

Executive summary

The unprecedented rate of economic activity in the European construction industry over the last quarter of a century has played a major role in raising employment levels across most economies of the European Union. This development has benefited large and small companies, as well as driven entrepreneurship, with self-employed people making up about 25% of the total labour force in the sector. As a result of the construction boom, the industry has witnessed a rapid spread of the practice of subcontracting, encompassing increasingly long chains of interconnected companies.

This scenario has redefined employment relations in the construction sector and, at the same time, reduced the direct social responsibility of the ‘principal contractor’, as labour has been externalised by the use of subcontractors and employment agencies.

Such changes have raised questions over the impact of subcontracting on employment conditions in the sector, more specifically in terms of: the legal implications of subcontracting for employers and workers; its impact on employee rights; the increased potential for ‘social dumping’ and a potential avoidance of fiscal responsibilities.

Against a backdrop of increased European and national policy attention regarding this highly sensitive issue, Eurofound set out to conduct a pioneering piece of research by analysing existing national legislation on liability in subcontracting processes.

Policy context

The steadily evolving integration and enlargement of the internal market, together with the free movement of capital, goods, services and workers, has led to a greater movement of labour across countries. This has been particularly noticeable at the lower ends of the subcontracting chains, where foreign companies and/or posted workers often operate. In response to this outsourcing of tasks, and in an attempt to guarantee decent employment conditions and security for workers, eight EU Member States have over the years introduced provisions relating to ultimate liability in the subcontracting chain – that is, Austria, Belgium, Finland, France, Germany, Italy, the Netherlands and Spain. In four of these countries – Belgium, Germany, Italy and Spain – liability legislation applies particularly and exclusively to the construction sector. In half of the countries, the Sectoral Social Partners have played a significant role in the law making processes.

At EU level, the European Commission has emphasised that employment conditions offered to posted workers must be in line with the minimum conditions established by law or negotiated under generally applicable national collective agreements. The issue of liability has also been addressed in a recent European Commission Communication on the posting of workers in the framework of the provision of services ([COM \(2007\) 0304 final](#)¹) and been the subject of discussion in the context of the debates on modernising labour law and combating undeclared work.

Key findings

Origins and aims of legislation

The research shows that legislation on liability in subcontracting processes in most of the countries dates back to the 1960s (Italy, the Netherlands) or 1970s (Belgium, Finland, France). Legislation was introduced at a later date in Spain (1980), Austria (1990s) and Germany (1999–2000). The regulations were introduced in order to prevent the abuse of employees’ rights and the evasion of the rules, as well as to combat undeclared work and illegal or unfair business competition.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0304:EN:NOT>

From this common background emerges the more indirect aim of securing social security schemes and tax payments, along with safeguarding the public interest. Furthermore, in three of the eight Member States – Austria, France and Italy – the rules were developed in a cross-border context, in order to prevent social dumping in the construction sector.

Nature of the liability

The study differentiates between two main types of liability:

- joint and several liability – this only applies at one level of the employment relationship, that is, when a subcontractor does not fulfil its obligations regarding payments, for example, to the Inland Revenue; in such instances, the contractor, together with the subcontractor, can be held liable by the Inland Revenue for the entire debt of the subcontractor;
- chain liability – this applies not only in relation to the contracting party, but also to the whole chain. In this case, the Inland Revenue may address all parties in the chain for the entire debt of a subcontractor.

Different variations of chain liability arrangements can be found in Finland, Germany, Italy, the Netherlands and Spain. Whereas, a purely contractual liability – restricted to the direct contracting party - is established in the regulations of five countries and joint liability in three of them.

Coverage of liability

Coverage of the liability laws contains a material, personal and territorial scope for all of the Member States under consideration. In relation to the material scope of the liability, three main categories of obligations covered by the liability arrangements can be distinguished: minimum wages, social security contributions and tax on wages. The research found that the liability schemes of all the Member States covered at least two of these categories of obligations. Concerning the personal scope, a differentiation is made between the employer and the workers. In the case of the former, the scope of the regulations varies greatly between the countries, while for the latter the scope of the liability is similar across the Member States. Territorially, the main part of the rules examined apply throughout the country, which in principle covers all parties established in other Member States when providing services in the country concerned.

Preventive tools

All of the eight Member States, except Belgium, were found to have preventive tools in place which seek to diminish the possibility of liability for the parties concerned. These may be divided into two categories: measures which aim to check the general reliability of the subcontracting party and/or temporary work agency; and measures which seek to guarantee the payment of wages, social security contributions and wage tax.

Sanctions

Sanctions for parties who do not abide the liability rules fall under three main categories across the eight Member States: back-payment obligations, fines and/or alternative additional penalties.

Enforcement

Similarly, all of the countries under consideration reported facing serious problems regarding the enforcement and application of their liability arrangements on foreign subcontractors and/or temporary work agencies. Regarding liability for wages, the main obstacles concerned problems with the language, non-transparent or inaccessible legislative information, difficulties in proving abuses and problems in cross-border judicial proceedings. Concerning liability for social security and taxes, the main problem cited was that foreign subcontractors and their foreign workers are most often covered by the regulations in their country of origin instead of those of the host country.

Role of social partners

In all but one of the countries examined, the national authorities play either a monitoring role and/or act as potential claimants involved in the liability regimes at stake. The social partner organisations play multiple roles – for example, acting as advisers, representatives and providers of legal aid to individual members, as well as being parties to Collective Labour Agreements, or providing assistance with monitoring and compliance tasks alongside the local or regional authorities.

Conclusions

The report underlines the significant differences that exist between the various national liability regulations in place in the eight Member States under consideration. The varying legal tradition and industrial relations cultures in the countries covered mean that research results are highly specific to each national situation and that few elements are transferable.

Overall, the liability rules were deemed to be effective in achieving the specified objectives. Preventive tools offering incentives to clients or principal contractors through the limitation of or exemption from liability were largely considered a positive element of successful liability regulations. Likewise, developing simple, accessible and understandable norms was identified as essential in the effective implementation of the regulations and in guaranteeing compliance. Moreover, the regulations should not be altered, amended or modified too frequently to avoid confusion.

The involvement of the social partners in the development and implementation of the arrangements has proved to be a salient feature of most of the measures categorised as ‘good practice’. One possible way to diminish abuses at the lower ends of the subcontracting chain might be to further develop corporate or sector-based social responsibility initiatives. These could easily be developed through the normal social partner channels of consultation and negotiation, thus leading to largely binding agreements.

The current study may serve to facilitate the exchange of experiences and good practice among Member States on the subject of liability in subcontracting processes. At the same time, it may enable social partners and legislators to become better informed in relation to an increasingly important policy debate.

Introduction

Over the last 25 years, the European construction sector has seen a rapid spread of the practice of subcontracting, with three main trends developing. The first trend concerns the concept of the ‘umbrella organisation’ – or ‘management contracting’ – where core activities are developed within the company and all other activities are realised through subcontracting. The second noticeable trend relates to companies that exclusively organise the sale of building works and subcontract the whole building process. The third main trend concerns the subcontracting of bulk work, such as the cleaning of a building site (see Hellsten, 2007, p. 36).

Furthermore, subcontracting chains in the construction industry are becoming increasingly long due to the structure of the construction sector, which is characterised by a considerable number of large companies and a big proportion of small and micro enterprises, with self-employed people making up about 25% of the total workforce (see Cremers, 2007). These one-person enterprises reflect the labour market tendencies: on the one hand, skilled workers recognise an opportunity to use their skills and experience as an enterprise rather than an employee; on the other hand, some people in the sector are working under questionable circumstances and for pay below that set by collective agreements – a situation that can be considered as ‘bogus’ self-employment. A recent example of the latter was revealed by the Union of Construction, Allied Trades and Technicians (UCATT) in the United Kingdom (UK), where a subcontracting company employed a dozen Lithuanian workers. The workers were paid below the agreed minimum wage for the site, did not receive payment for overtime and were charged excessive deductions for rent, tools and utility bills (see UCATT [press release](#)², 30 June 2008).

According to one researcher (Cremers, 2008):

‘The growing use of subcontracting for the labour intensive segments of the execution of construction projects does not necessarily lead to a deterioration of the working conditions, but it certainly has created a decrease of the direct social responsibility of the principal contractor. Labour has been “externalised” by the use of subcontractors and agencies.’

Mainly in reaction to this outsourcing of tasks and corresponding employers’ obligations, eight Member States of the European Union have introduced provisions relating to the ultimate liability in the subcontracting chain, which largely apply to the construction and building industry. Indeed, some of these countries – Belgium, Finland, France, Italy and the Netherlands – have had legal provisions in place for many years. Other countries – Austria, Germany and Spain – have more recently developed legislation to address this issue. The different laws introduced in these Member States reflect the different legal traditions of each country in the field of labour law and social policy and, as a result, introduce very diverse instruments to deal with the situation in each national territory.

The steadily evolving integration of the Member States’ economies in the internal market of capital, goods, services and persons – together with the recent EU enlargements – have also led to the greater movement of workers across countries, with the construction industry being particularly affected by this trend. It is at the lower ends of these subcontracting chains, in particular, that foreign companies and/or posted workers are operating. The European Commission recently emphasised in its [press release](#)³ of 3 April 2008 the importance of ensuring that the employment conditions offered to posted workers are in line with minimum conditions established by law or negotiated under generally applicable collective agreements (see for example Cremers, 2007; Cremers and Donders, 2004, pp. 48–51). For instance, in one

² <http://www.ucatt.info/content/view/515/30/2008/06>

³ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/514&format=HTML&aged=0&language=EN&guiLanguage=en>

case covered by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), the Polish company ZRE Katowicz Ireland Construction Ltd had been contracted by a German enterprise to carry out scaffolding work on a large contract which the German company had with the Irish power plant operator, the Electricity Supply Board (ESB), for the €380 million refurbishment of its plant. When the German company discovered that ZRE had not been complying with Irish employment law, it terminated its contract, forcing ZRE to dismiss 200 of its Polish employees (Eurofound, 2007, pp. 11–13).

In this context, when gaps in the enforcement of national and Community law were becoming increasingly visible, policymakers began to search for effective compliance tools. This also prompted a debate on the chain liability of principal contractors in subcontracting chains. At European level, this debate has been launched by the European Parliament and partly fuelled by the judgement of the European Court of Justice (ECJ) in the case of Wolff and Müller ([C-60/03](#)⁴). The liability issue was included by the European Commission (2007) in its Communication on the posting of workers in the framework of the provision of services (COM (2007) 0304 final) and in its questionnaire on European labour law in the Commission Green Paper ‘Modernising labour law to meet the challenges of the 21st century’ ([COM \(2006\) 708 final](#)⁵).

Against the backdrop of the European and national political attention given to this highly sensitive issue, the regulations on liability in subcontracting processes in the construction industry have been explored in the eight Member States under study – Austria, Belgium, Finland, France, Germany, Italy, the Netherlands and Spain. This research report, commissioned by Eurofound, is based on the material provided by the eight country reports and explains and compares the national liability arrangements. In particular, it highlights the similarities and differences between the systems, as well as the positive components, challenges and problems that they pose for the actors involved in the different Member States.

Methodology, aims and limitations of study

The material gathered for the eight country reports consists of a literature study analysing the regulations on joint and several liability in force, along with the case law, policy statements and publications by social partners and policymakers; it also examines the empirical research conducted on the practical relevance and effective impact of the laws, with particular emphasis on the construction sector where relevant. For the empirical part of the study, the national experts conducted face-to-face and telephone interviews with the relevant national authorities, social partners and other professional bodies involved. The country reports served as the basis for the present comparative report.

The aim of the combined literature study and empirical research was to create a methodological overview of the existing legislation and the way the laws are working in practice. The analysis sought to pinpoint best practice, shortcomings and common denominators in order to facilitate policy debates at national and European level on the liability issue.

For a proper interpretation of the present study and its results, it is important to acknowledge both its strengths and limitations. Since it is the first time that comparative research on the theme of liability in the context of subcontracting processes has been undertaken at European level, this study fills a knowledge gap. Thus, given the societal relevance of

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0060:EN:NOT>

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0708:EN:NOT>

the issue addressed, the added value of this study for policymakers and for future research is clear. Furthermore, the tripartite involvement and collaboration of social partners in each country and at European level in the construction sector, as well as of national government representatives, guarantees that different perspectives on the research theme are incorporated in all of the reports.

However, certain limitations may also arise given the uniqueness and political sensitivity of the research theme, on the one hand, and the fact that the research had to be conducted in a relatively short time frame and with a limited budget, on the other hand. In this respect, it is important to note that the comparative and the national reports are predominantly of an exploratory, descriptive and explanatory nature, and may only serve as an introductory overview in this context. It should also be highlighted that the circumstances for research were not the same in each country. Firstly, differences arose in relation to the ‘maturity’ and quantity of the regulations in force. Secondly, it proved to be more difficult in one country, especially Italy, than in others to gain access to the most relevant stakeholders.

Structure of report

This comparative report is divided into four chapters. Chapter 1 introduces the subject of liability in subcontracting processes, giving a brief account of the practice of subcontracting and joint liability, as well as the terminology used in this highly technical area of law.

Chapter 2 provides a detailed overview of the national laws and actors involved in the eight Member States in respect of liability arrangements and largely concerning wages, social security and financial matters. It also identifies the origin of the legislation, objectives, coverage, types of tools (preventive measures or sanctions), and common features and elements of the liability arrangements in the eight Member States.

Chapter 3 examines the practical implementation of the liability arrangements and the effectiveness of the instruments as regards the centre of responsibility for discharging employees’ entitlements and also in combating bogus subcontracting practices. The focus is partly on cross-border subcontracting, as this trend affects the application of the national instruments on liability in subcontracting chains. Here again, the similarities and differences are identified, while the overall difficulties and best practices encountered in the application of the national liability arrangements are assessed.

Finally, Chapter 4 makes some concluding remarks and gives an assessment of the recommendations and options for policymakers and social partners, based on the findings reported in Chapters 2 and 3.

Liability in subcontracting chains

1

Key actors and terminology

Liability in subcontracting chains is a highly complex matter and encompasses many different actors. In terms of the parties involved, the subcontracting chain usually features a ‘client’, ‘owner’ and ‘subcontractor’.⁶

The subcontracting chain starts with the client, who is defined as: ‘any natural or legal person, public or private, who orders and/or pays for the works that are the object of a contract’ (the term ‘customer’ is sometimes used but avoided in this study). Often, the client will also be the ‘owner’. The latter term refers to ‘any natural or legal person, public or private, who has for the time being, whether permanently or temporarily, legal title to the building or who is legally responsible for its care and maintenance’. In this study, the use of the term ‘client’ is preferred and shall be taken to include the term ‘owner’, except where the context would not permit this.

The client hires one or more ‘contractors’. A contractor may be defined as ‘any participant who agrees to carry out the physical execution of the works that are the object of a contract’. If the client only engages the services of one contractor to carry out all the work, then obviously no chain of subcontracting exists. However, the client may also employ the services of a single contractor which is responsible for the entire building project but which, in turn, outsources part of the work to other contractors. In this case, the first contractor is referred to as the ‘principal contractor’ (sometimes also referred to as the ‘main contractor’), while the contractors hired by the principal contractor are known as the ‘subcontractors’.

In their contractual relationship, the principal contractor and also the intermediary contractor in the chain are deemed the ‘recipient’ party, which orders and pays for the work or services.⁷ Meanwhile, the subcontractor – which may also be an intermediary contractor – is considered the ‘provider’, which carries out the work or services requested. Together, the principal contractor and all the subcontractors may be labelled as a ‘subcontracting chain’. In relation to ambitious building projects, the client may also attract several contractors for separate services. In such cases, multiple subcontracting chains may exist next to each other. It is also possible that the client itself carries out, or could have carried out, part of the physical execution of the works. In this instance, it may function in a double capacity as both the client and principal contractor towards (some of) the subcontractors.⁸

Apart from outsourcing work to specialised subcontractors – that may carry out the work themselves as self-employed operators or through their own employees – contractors may also engage external labour to perform some of the work to be done under their supervision. In the last decade, the practice of hiring workers from temporary work agencies has only gradually become accepted in the construction industry – although considerable differences still arise between the

⁶ The definitions of client, owner and contractor are drawn from the 1992 report by GAIPEC (*Groupe des Associations Interprofessionnelles Européennes de la Construction*) on product liability in the construction industry, coordinated by the European Construction Industry Federation (*Fédération de l’Industrie Européenne de la Construction*, FIEC).

⁷ The recipient party may also be labelled the ‘order provider’, since this party gives the order to carry out the work. However, in order to avoid confusion, this term is not used in this study.

⁸ This is the case in relation to the Dutch liability rules for social security contributions and wage tax. These rules do not apply to the client, but a specific client is considered equivalent to a principal contractor: the so-called ‘self-constructor’ (see section on coverage in Chapter 2).

Member States in this respect. In this study, the parties that only offer the services of their workers to a contractor are referred to as ‘temporary work agencies’ (the more general term ‘supplier’ may also be used but is avoided in this study). The term ‘agency worker’ is used to refer to those employed by temporary work agencies, while the terms ‘hirer’ or ‘user companies’ refer to the parties that hire the agency workers. Temporary work agencies may be functioning at the lowest levels of the subcontracting chain.

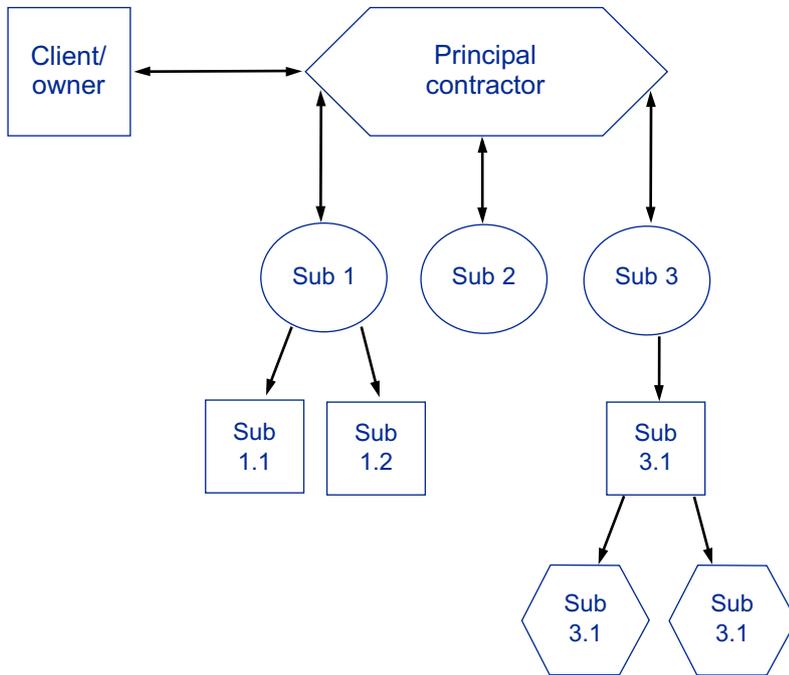
A subcontracting chain constitutes a logistical chain, as well as a value chain of an economic and productive nature – ‘from conception to completion’. Single specialities or tasks are often ‘externalised’ to small companies or self-employed workers. Over time, the subcontracting chains have tended to take the form of a multiple chain of production – a chain which has both lengthened and broadened. Arising from this practice are construction activities consisting of different parts of an overall project, executed by various contractors and subcontractors with problems arising in relation to coordination and efficiency.⁹ These activities are carried out simultaneously or in several, subsequent phases. The chain can be seen as a hierarchical, socioeconomic dependency network or triangle, based on a linked series of contracts and connections.

At the top of this triangle, regular and completely legal undertakings exist. In the positive sense, the whole chain would be based on, or could result in, healthy relationships between a main contractor and specialised, preferred subcontractors. However, companies at a lower level in the value chain – with the exception of specialised subcontractors with highly technical or other sophisticated activities – are not in a position to act on an equal footing with the main contractor. An imbalance of power in the lower parts of the chain can lead to questionable contracts that define the market transactions between the different levels (paragraph mainly extracted from Cremers, 2008). The problems at the lower ends of the chain have led to the liability arrangements in the Member States examined.

In the context of liability arrangements, relevant parties may include the ‘guarantor’, ‘debtor’ or ‘creditor’. A ‘guarantor’ is someone who is made liable for paying the debts of the subcontractor if the latter party defaults; in practice, this is usually the principal contractor and/or client. A ‘debtor’ in the context of this study is someone who is in debt regarding the obligation to pay wages, social security contributions and wage tax; in practice, this mostly concerns the subcontractor, being the employer of the employees involved. If the debtor does not fulfil the said obligations in respect of the ‘creditor’, it will therefore be indebted to this party – for instance, to the Inland Revenue, social security authorities or employees. Thus, the creditor can be a person, company or institution to whom or which the money is owed.

⁹ This has led to Directives on health and safety at work – that is, Directive 92/57 (temporary and mobile sites) and Directive 92/58 (safety signs at work). Moreover, the European Agency for Safety and Health at Work (OSHA) has established the European Forum for Safety in Construction in order to promote the exchange of experience between players in the sector and, in particular, among small and medium-sized enterprises (SMEs). The Senior Labour Inspectors Committee (SLIC) has also devised awareness-raising initiatives in the sector, including European inspection campaigns.

Figure 1: Example of chains of contractors in subcontracting processes



Source: Adapted from Figure 1 of report by International Labour Organization (ILO, 2008, p. 21)

Joint and several liability

The concept of joint and several liability in subcontracting processes can be explained as follows. If, for example, a subcontractor does not fulfil its obligations regarding wages in respect of the Inland Revenue, the contractor together with the subcontractor can be held liable by the Inland Revenue authorities for the entire tax debt of the subcontractor. Therefore, the creditor – in this case the Inland Revenue – can recover the whole indebtedness from either the contractor (guarantor) or the subcontractor (debtor). The contractor is made liable for the total tax debt, regardless of its degree of fault or responsibility. The guarantor (contractor) and debtor (subcontractor) are then left to sort out their respective contributions between themselves. The logic behind this concept is that it should enable the creditor to address the party with the best financial resources, which is usually a contractor higher up in the subcontracting chain – often the principal contractor. Sometimes, the liability is not only of a joint and several nature, but also a ‘chain liability’. This means that the joint and several liability applies not only to the contracting party, but also to the whole chain. In the example cited here, this would mean that the Inland Revenue can address all parties in the chain, which are all jointly and severally liable, for the entire debt. In other words, it could include not only the contractor but also, for instance, the principal contractor (see also Chapter 2).

2 Detailed review of relevant national laws on joint and several liability

Liability regulations

In all the Member States under consideration, most of the liability regulations are laid down in legislation. In Finland, it is noteworthy that part of the legislation – more specifically, that concerning the payment of unacceptably low wages to posted workers – is laid down in the country's Penal Code. In some Member States – Finland, the Netherlands and Spain – part of the relevant rules can be found in the countries' generally applicable collective agreements. In Italy, along with liability acts and decrees, a tripartite regulation concerning contribution payments in the construction sector exists; this system has been established by three parties – the national public institute for pensions, the national public institute for insurance against labour accidents and a private joint institute for holiday payments in construction.

It is also noteworthy that in some of the Member States – Austria, Belgium, Finland and Spain – social partners in the construction sector have played a significant role in the lawmaking process and/or the particular legislation is based on systems developed by the social partners. In the case of Austria, a new bill to this effect is expected to come into force on 1 January 2009.

In four of the Member States – Belgium, Germany, Italy and Spain – liability legislation is in force particularly and exclusively for the construction sector. In Belgium, the Liability Act on subcontracting is applicable to contractors carrying out 'certain work', which mainly covers the construction industry. In Germany, liability provisions for tax obligations are only applicable in the construction sector. In Italy, as mentioned, a tripartite regulation concerning contribution payments exists in the construction sector. In Spain, more stringent rules exist regarding subcontracting in the construction industry. Furthermore, in Austria, a bill which was recently put forward and which is set to tackle the problem of bogus or 'bubble' companies will only apply in the construction sector.

The liability arrangements of nearly all the Member States investigated include separate regulations for subcontracting and temporary employment through temporary work agencies. In the four Member States Austria, Belgium, France and Germany, these regulations on subcontracting and temporary employment are laid down in separate legislation; in the case of Germany, a special liability regime for temporary employment regarding social security contributions exists. In Finland, Italy, the Netherlands and Spain, these partly separate regulations are laid down in the same legislative act.

In Italy, the temporary work provisions are significantly more rigorous than the provisions regarding subcontracting. Meanwhile, in France, along with separate legislation on bogus subcontracting and temporary employment, a special liability regulation exists regarding undeclared or illegal work.

The liability arrangements of nearly all the Member States under consideration cover the payment of social security contributions, wages and tax on wages. Sometimes, the liability is limited to certain percentages or amounts relating to the contract concerned or to any outstanding debts (see section on 'Coverage of liability' in this chapter).

Origins and main objectives

The legislation on liability in subcontracting processes dates back to the 1960s in the case of Italy and the Netherlands, and to the 1970s in Belgium, Finland and France. The liability legislation was introduced at a later date in Spain (1980), Austria (1990s) and Germany (1999–2002).

A considerable number of similarities were found between the Member States with regard to the background and objectives of this legislation. Before examining these elements in more detail in each Member State, it is worth giving a short overview of the background and objectives which are common to these eight countries.

In all the Member States under consideration, the regulations were introduced mainly against a background of employers evading their obligations and of employees' rights being abused in subcontracting chains. In Austria, such regulations were specifically introduced in a cross-border context, while in Germany the rules sought to combat illegal activity in the building industry in particular. Therefore, the main objectives of the regulations in this context have been to prevent abuse of employees' rights and the evasion of the rules, as well as to combat undeclared work and illegal or unfair business competition. Alongside this common objective is the more indirect aim of securing social security schemes and tax payments – that is, collecting the relevant social and fiscal charges – or, in more general terms, of safeguarding the public interest (see for instance the case of Belgium).

In the three Member States Austria, France and Italy, the regulations have been developed also or mainly – in the case of Austria – in a cross-border context. In Austria, they have sought to prevent social dumping in the construction sector with foreign companies and workers. In France and Italy, the central aim has been to fight the abuse of posted workers by fraudulent employers in the context of cross-border subcontracting.

Despite certain similarities between the countries, the regulations have also arisen against the backdrop of the particular circumstances prevailing in each Member State. In Austria, the introduction of the Anti-Abuse Act (*Antimissbrauchsgesetz*) can be attributed to two factors. On the one hand, it is related to the situation in neighbouring Germany in the early 1990s, when a construction boom occurred following the fall of the Berlin Wall: during this period, social dumping with foreign companies and workers emerged as a significant problem in the construction sector; this, in turn, led Austria to establish in 1995 legislation aimed at preventing similar instances of social dumping. At the same time, Austria's specific geographical situation can be considered an influential factor: the country had to cope with a wide pay gap with the neighbouring countries of the Czech Republic, Hungary, Slovakia and Slovenia. As a result, it was attractive for companies from these countries – and indeed from all EU Member States – to work in Austria using their own workers, who might partly be remunerated at the level of their country of origin.¹⁰ This affected the level of wages and the Austria's labour market situation.

In Belgium, the liability rules were established in the 1970s in response to the appearance of so-called 'gangmasters', who declared workers to the social security and tax administration but never paid social security contributions and taxes on wages. This legislation was based on a system developed by the social partners in the construction sector and has undergone many changes since. Up until 1 January 2008, the liability rules were based on a registration system (which still exists): under this system, a contractor could be registered if it met certain reliability requirements. Under the old rules, principals and contractors that (sub)contracted with foreign partners not registered in Belgium had to withhold 15% of the sum payable for work carried out; non-compliance gave rise to a joint and several liability for the tax debts of such contracting partners. However, this system was abandoned following a ruling by the ECJ of 9 November 2006, which stated that this system violated the freedom to provide cross-border services within the EU as the obligatory nature of the registration system could have a deterrent effect on foreign companies (**Commission v. Belgium, C-433/04**¹¹).

¹⁰ Note that until 16 December 1999, the EU posted workers directive still had to be implemented in the Member States. Since then, while differences still exist between wages which might indeed constitute a pull factor, in practice the gap should at least have diminished as, according to Article 3, Paragraph 1 of the directive: the foreign service providers will have to comply with a 'nucleus' of mandatory rules applicable in the host country, among which are mandatory minimum wage levels stipulated in legislation and/or in generally applicable collective agreements.

¹¹ <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79938890C19040433&doc=T&ouvert=T&seance=ARRET>

In Finland in the 1970s, a liability clause was included in the national collective labour agreement (CLA) in the housing construction sector. Nowadays, other important national CLAs in the construction industry also include such a clause. Since May 2004, the country's Penal Code defines the payment of unacceptably low wages to posted workers as a criminal offence. In 2007, the Liability Act entered into force, which is based on the incomes policy agreement for the period 2005–2007, concluded by the central social partners. A tripartite governmental committee prepared the details in the system and the governmental bill reproduced it with only minor modifications.

In France, the first legal provisions – introduced in the mid 1970s – regarding liability in subcontracting processes sought to protect subcontractors rather than their workers if the principal contractor became insolvent. In 1990, a system of joint liability between a principal contractor and its subcontractor was introduced for the payment of wages and social security contributions. This legislation must be seen in the context of efforts to combat bogus subcontracting and the abuse of workers' rights. It seeks to stabilise employment and adapt precarious forms of work. In 1979, specific liability rules for temporary agency workers were introduced to enhance the protection of these workers. Subsequently, in 1992, liability provisions regarding illegal or undeclared work were introduced due to the inadequacy of previous provisions for combating undeclared work in the context of subcontracting chains. The rules provide an additional guarantee for the payment of wages, social security contributions and taxes in the case of a fraudulent or disappearing contractor. Mention should also be made of the French legislation regarding the cross-border posting of workers, based on EU [Directive 96/71/EC](#)¹² concerning the posting of workers in the framework of the provision of services; this legislation was amended in 2005 for the benefit of small and medium-sized enterprises (SMEs).

In Germany, the liability regulations were introduced in the period 1999–2001, mainly against the background of national and cross-border illegal activity in the construction industry – such as the fraudulent use of (sub)contracting arrangements. The opportunity for such activities increased after the removal of the internal EU frontiers and with the increasing permeability of its external borders. In 2001, the liability provisions for tax obligations in construction were substantially changed. Along with the main objectives, stated above, the liability provision for minimum wages also aims to protect German SMEs against unfair competition by subcontractors from 'cheap wage countries' and to combat unemployment in the German labour market.

Since 1960, Italian legislation has provided for a number of regulations regarding liability in subcontracting processes. Since 2004, this legislation has been affected by many profound changes and the liability has been extended. The background for the current legislation was the need to ensure greater protection for workers involved in subcontracting and to safeguard fair competition.

In the Netherlands, the legislation has provided for joint and several liability in subcontracting processes since 1960. Initially, this was limited to social security contributions and only applicable to agency workers. However, since 1982, the liability also embraces wage tax and applies to contracting for work. The main objectives of this legislation have been to deter unreliable temporary work agencies and subcontractors and the abuse of legal persons, as well as to combat unfair competition. Until 1998, the generally applicable CLA for the construction industry contained a real liability provision. Since 2000, this provision has been a mere social clause. From 2007 onwards, the social clause obliges both associated and non-associated employers (main contractors) to contract subcontractors only on the condition that they apply the provisions of the CLA to their employees. The objective is to ensure greater compliance with correct wage levels and other labour conditions, as stipulated in the CLA.

¹² http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31996L0071&model=guichett

In Spain, the legislation on joint liability dates back to 1980. The general aims of such legislation are to protect workers and ensure compliance with the regulations by all companies involved in the subcontracting process. A noteworthy objective is that the law on subcontracting in the construction industry also aims to improve health and safety conditions and to reduce accidents; at the same time, it seeks to promote the quality and solvency of companies and to introduce a mechanism of transparency in work sites by limiting the amount of subcontracting to three links in the chain – although it allows for some exceptions to this general rule, for example when specialised work is required, in the case of technical complications, or in *force majeure* circumstances – and by increasing control of this chain.

Coverage of liability

In terms of the coverage of the Member States' liability provisions, this can be further categorised according to: 1) the obligations which fall within the liability, that is, the 'material scope'; 2) the personal scope; and 3) the territorial scope.

Material scope

The material scope – or employers' obligations which are covered by the liability provisions – can be distinguished according to three main categories:

- (minimum) wages;
- social security contributions;
- tax on wages.

France, Germany, Italy¹³ and Spain have liability legislation in place regarding all these obligations. Finland has legislation that covers social security contributions and wage tax, while wages as well as holiday pay are covered by CLAs. Furthermore, the liability regime of Finland's Penal Code includes the payment of unacceptably low wages, or those below the relevant generally binding collective agreement, to posted workers. In the Netherlands, legislation is in place regarding social security contributions and wage tax, in addition to a generally applicable CLA for the construction industry that applies to all material obligations deriving from the CLA, such as wages and paid holidays. In Belgium, the liability regulations on subcontracting cover social security contributions, social fund payments and wage tax, while the liability law on agency work covers social security contributions and wages, as well as all work-related benefits. In Austria, the liability rules apply to social security contributions and wages.

In some of the Member States, as already mentioned, the liability is limited to certain percentages or amounts relating to the contract concerned or to any outstanding debts. In Belgium, for instance, regarding social debts, the liability extends to 100% of the value of the work. However, the share devoted to social debts is limited to 65% when the liability is also established for tax debts, the latter receiving 35%, excluding value-added tax (VAT). In Germany, one of the conditions for joint and several liability regarding social security contributions is that the total value of building services is above €500,000. In France, the liability regarding (bogus) subcontracting is limited to contracts for services worth more than €3,000.

¹³ The aforementioned tripartite regulation concerning contribution payments in Italy covers contributions for holiday payments, pensions and health insurance for occupational accidents in the construction sector.

Personal scope

The personal scope of the liability regulations differs between countries and also frequently between regulations within each country. Nevertheless, a considerable number of similarities are also evident, especially with regard to the regulations on temporary agency work. In this section, the personal scope of regulations on subcontracting will first be examined; this will be followed by an analysis of the personal scope of the rules on temporary agency work. For the purposes of this analysis, the study will distinguish between the employers' side and the workers' side. Finally, some specific conditions for the liability will be mentioned in the last part of this section.

Subcontracting

Employers' side

The liability provisions may apply to the principal contractor only or to all contractors that subcontract part of the work or services. Furthermore, the liability may also or exclusively apply to the client.

Principal contractor only

In Austria, liability for wages under the Anti-Abuse Act applies only to the principal contractor, under certain circumstances. The 'principal contractor' is defined as: 'someone who passes within his business at least a part of a service that he owes due to a contract to another company (subcontractor)' (Article 7c, subparagraph 2 of the Employment Contract Law Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz*, AVRAG)). In the Netherlands, the social clause of the CLA for the construction industry – for wages and other obligations deriving from the CLA – only applies to the principal contractor. In Spain, the liability for wages and social security contributions, as laid down in the Workers' Statute, covers the principal contractor, but only if the subcontracted work falls within the scope of the principal contractor's 'own activity' (see below). The liability also covers the developer if it is acting in the capacity of a contractor. In Finland, the liability for wages as laid down in several CLAs applies only to principal contractors – including user companies – bound by the collective agreement.

All contractors that subcontract part of the work/services

'All contractors' includes the principal contractor as well as (sub)contractors lower down in the chain (the degree of liability of the contractor, either in terms of liability for the whole chain or only for the direct subcontractor, will be discussed in the section on 'Nature of liability' in this chapter). At least part of the liability provisions in Belgium, Finland, France, Germany, Italy and Spain apply to all contractors. The same is true for the liability legislation in the Netherlands, as laid down in the country's Wages and Salaries Tax and Social Security Contributions Act (*Wet koppeling met afwijkingmogelijkheid*, WKA¹⁴).

In Belgium, the liability on wages and social security contributions under the country's Liability Act applies to all contractors carrying out certain work; this work mainly covers the construction sector. In Finland, the liability provisions of the Liability Act apply to contractors in whose Finnish premises the subcontractor's workers perform works that relate to the contractor's normal operations. In the building industry, the scope is broader: the provisions apply to all contractors contracting out part of the work at a shared workplace. Therefore, in subcontracting a link to the contractor's normal operations is needed, while in building this link is not a prerequisite for the application of the act, which means that all construction activities are covered. However, the liability provisions do not apply if the value of compensation is less than €7,500. Finally, the provisions of the Penal Code apply to all (sub)contractors.

¹⁴ <http://www.eurofound.europa.eu/emire/NETHERLANDS/CONDITIONALINDEXATIONACTWKA-NL.htm>

In France, the liability regarding (bogus) subcontracting applies to all (sub)contractors. The liability concerning undeclared or illegal work applies to the client together with the contractors, regarding the direct subcontracting relationship all along the subcontracting chain. This means that the liability is contractual in nature. In Germany, the liability for tax obligations in the construction sector applies to all contractors that subcontract part of the work or services; the liability for minimum wages also applies to principal and other contractors in the subcontracting chain, but with the exception of private individuals, building owners and administrative organs. In Spain, the liability for wages and social security contributions, as laid down in the Law on subcontracting in the construction industry, covers all contractors that subcontract part of the job to either companies or self-employed workers. The same is true for the liability regarding wage tax under general tax law, but on condition that the subcontracted work falls within the principal economic activity of the contractor (see below).

Client

The liability provisions concerning subcontracting also include the client¹⁵ in Finland and France. In Finland – in the case of building activities – the liability provisions of the Liability Act and the Penal Code also apply to clients acting as builders. In Germany, the liability for tax also applies to the client, except where it is the building owner. In Italy, the liability for wages and social security contributions – in accordance with Legislative Decree No. 276/2003 – applies to the client with regard to the contractor and any subcontractors. In the Netherlands, the liability rules for social security contributions and wage tax under the WKA do not apply to the client. However, a specific type of client is considered equivalent to a principal contractor: the so-called ‘self-constructor’ (*eigen-bouwer*). A characteristic feature of the ‘self-constructor’ is that the realisation of the subcontracted work belongs to its ordinary course of business, so that it could have carried out the work itself. A ‘self-constructor’ is, for instance, a manufacturer that subcontracts a part of the manufacturing process to another company. In this case, the manufacturer is considered to be both the client and the principal contractor.

Workers’ side

In general, the liability regulations of the eight Member States under consideration cover all workers employed by the subcontractor; this includes ‘flexible’ workers, such as those employed on fixed-term contracts or part-time workers. Therefore, freelance workers and other workers who do not have an employment contract with the subcontractor are not covered. Moreover, in Austria, employees in public services, that is, those who have a contract with the government, are excluded from the scope of the Anti-Abuse Act.

Temporary employment

Employers’ side

In all eight Member States, the liability regulations concerning temporary employment are applicable to the user company and the temporary work agency. The user company – which hires workers from the temporary work agency – is liable if the agency does not comply with certain obligations. In Finland, however, the Liability Act only applies to user companies if the duration of temporary work exceeds a total of 10 days.

Workers’ side

In seven of the Member States, the liability regulations concerning temporary employment cover all the workers employed by the temporary work agency. Only in Belgium is the scope of these regulations less broad: the Law on

¹⁵ See Chapter 1 for the distinction between a client and a (principal) contractor. A client does not physically execute any part of the work which is the object of the contract.

agency work covers all agency workers, except posted workers from abroad. In Austria, on the other hand, the scope is broader than the general scope: the Law on agency work also covers ‘workers’ who are similar to employees and ‘workers’ who are not gainfully employed but economically dependent (*arbeitnehmerähnlich*).

Specific conditions

In some of the Member States’ legislation, the extent of the liability depends on the place where the work is carried out or the nature of the subcontracted work. In France, for example, the coverage of the liability provisions regarding subcontracting may be extended or limited, depending on whether the work is performed at the workplace or site of the principal contractor or client. In Spain, the liability on wages and social security contributions under the Workers’ Statute, along with the liability on wage tax under general tax law, only apply if the subcontracted work falls within the scope of the ‘core business’ activities of the contractor. In Finland, the Liability Act applies to any temporary agency work, whereas in subcontracting a link to the contractor’s normal operations is needed. However, such a link is not required in the case of building works; therefore, all (subcontracted) construction activities are covered, unless subject to specific derogations.

With regard to temporary employment, the German legislation is noteworthy. In this country, a liability regime for the user company exists regarding social security contributions. However, in the building industry, the supply of agency workers is only allowed by temporary work agencies that are subject to the same generally applicable framework agreements and collective agreements on the social fund scheme as the hiring party for at least three years. For temporary work agencies from other Member States of the European Economic Area (EEA¹⁶), it is sufficient if they predominantly perform activities that are covered by the scope of this framework for at least three years. Thus, in the building industry, temporary employment business is largely restricted to the so-called ‘colleague assistance’ (*Kollegenhilfe*) form.

Territorial scope

In all of the eight Member States under study, the liability regulations on subcontracting and temporary agency work apply throughout the country. In principle, this means that the regulations also cover contractors and temporary work agencies established in other Member States when providing services in the country concerned. However, the liability rules only come into effect if the cross-border subcontractor has obligations concerning wages, social fund payments, social security contributions and wage tax towards or on behalf of its posted workers in the Member State where it is temporarily carrying out its work in the framework of the provision of services. Whether this is the case depends primarily on the European and/or bilateral ‘conflict of law’ rules concerning the following:

- labour law – **Rome Convention 1980**¹⁷ and Directive 96/71/EC;
- social security law – **Regulation (EEC) No. 1408/71**¹⁸ on the application of social security schemes to employed persons and their families moving within the Community and/or, in the case of third country nationals, international bilateral agreements;
- tax law – bilateral treaties mainly based on the Organisation for Economic Co-operation and Development (OECD) model tax convention.¹⁹

¹⁶ http://ec.europa.eu/external_relations/eea/

¹⁷ http://www.rome-convention.org/instruments/i_conv_orig_en.htm

¹⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31971R1408:EN:HTML>

¹⁹ The OECD model tax convention serves as a model used by countries when negotiating bilateral tax agreements. These agreements are entered into by countries to clarify the situation when a taxpayer might find themselves subject to taxation in more than one country. The first OECD model tax convention was launched in 1963 and is regularly updated, most recently in 2005 (see OECD, 2004).

According to Article 3, Paragraph 1 of the EU posted workers directive, such workers are entitled to minimum wage levels in the host country, as laid down by national law and/or generally applicable CLAs, provided that these provide for more favourable wages than those owed on the basis of their employment contract. With regard to social security contributions, posted workers will generally be covered by the benefit schemes in their country of origin for the first year and, with the consent of the host country, also for the second year of posting. In terms of wage tax, depending on the specific bilateral agreement at stake, it may depend on the length and nature (whether or not as an agency worker) of the posting, whether the tax law of the host country applies from day one or only when the duration of the posting exceeds 183 days.

In certain Member States, some specific rules and exceptions apply in the case of cross-border contracting with the involvement of workers. In Austria, the Anti-Abuse Act has separate liability provisions for, on the one hand, EU companies, including Austrian companies; these provisions are applicable to domestic and cross-border posted employees within the EU. On the other hand, the Act also encompasses liability provisions that exclusively apply to non-EU companies; these provisions are applicable to cross-border posted employees from outside the EU.

In France, the liability regarding temporary agency work also applies to foreign agencies when active in France. However, these foreign agencies may be exonerated from certain obligations if they have already complied with formalities of the same or of an equivalent effect in their country of origin.

In Germany, the Law on the posting of workers (concerning minimum wages and leave fund contributions) provides for the following: if foreign posted workers are not taxed in Germany, the provider – subcontractor or temporary work agency – may apply for an exemption certificate. If the provider does not apply for an exemption certificate and the recipient – principal contractor or user company – withholds the tax on compensation for construction work, the provider can apply for a tax refund.

In Italy, all liability regulations also cover foreign contractors and agencies when active in Italy. Furthermore, they apply to activities abroad pursuant to Italian jurisdiction. In the case of cross-border contracting, foreign Inland Revenue and social security authorities can also demand payment by Italian clients of contributions and taxes owed in relation to subcontracted work or services supplied in Italy by staff who have retained the right to pay taxes and contributions in the country of origin. The same applies to the payment of taxes and contributions relating to subcontracted work and services supplied abroad, when the posting abroad cannot be considered temporary or no bilateral agreements exist between the foreign country and Italy.

In the Netherlands, the liability legislation on social security contributions and wage tax may also apply when the work is carried out abroad by Dutch subcontractors.

Nature of liability

Joint and several liability

The concept of joint and several liability in subcontracting processes has already been explained in Chapter 1.

The twin concepts ‘joint and several’ are defined in Italian legislation (Article 1292 of the Civil Code) as follows: ‘An obligation is considered joint and several when each of a number of debtors involved in a single operation can be forced to comply on behalf of all the others, and the compliance by one of the debtors frees the others from their obligation.’

In Italy, according to Legislative Decree No. 223/2006, the contractor is – in relation to the subcontractor – ‘jointly and severally’ liable for wage tax and social security contributions relative to the employees of the subcontractor.

According to the regulations of several Member States, the liability is not only of a joint and several nature, but is also a chain liability. This means that the joint and several liability applies to the whole chain, instead of only the direct contracting party.

Chain liability (including joint and several liability)

Various types of chain liability, as described here, were found in the liability arrangements of Finland, Germany, Italy, the Netherlands and Spain.

In Finland, according to the Penal Code, the payment of unacceptably low wages to (posted) workers is a criminal offence, which may lead to confiscation by the state of the illegal benefit gained by paying the illegally low wages. The confiscation claim may also be directed against a (principal) contractor or user company. Confiscation cannot be ordered if the (posted) workers concerned present their wage claims. This represents a kind of chain liability for the part of the confiscation possibility, but not with regard to real wage claims.

In Germany, the liability provision for minimum wages contains an unconditional chain liability, that is, joint and several liability; accordingly, the principal contractor, client, intermediary contractor or user company are jointly and severally liable. In addition, regarding social security contributions, a joint and several liability exists – under certain conditions; the conditions are, for instance, that the transaction must aim to circumvent the law and that the total value of the building services amount to €500,000 or over. If such conditions are fulfilled, the health insurers as collecting agencies have the right to choose to claim on the client, principal contractor, intermediary contractor or user company (the building owner is excluded); these parties are all jointly and severally liable.

In Italy, the liability for social security contributions, wage tax and wages (Legislative Decree No. 276/2003) is a chain liability. The client or contractor is liable with regard to the contractor and any subcontractor(s). The subcontractor's employees can bring a direct action against the contractor and the client. However, concerning wage tax, the liability of the client will be abolished in the near future under Legislative Decree No. 97/2008 of 3 June 2008.

In the Netherlands, the liability legislation under the WKA stipulates a joint and several liability for the user company, as well as for the (principal) contractor, for the whole chain of temporary work agencies and/or subcontractors that follow in line and that are working on the same project at the building site.

The Spanish Workers' Statute contains a joint and several chain liability with regard to the principal contractor only for social security contributions and wages; however, this liability only applies if the subcontracted work falls within the scope of the principal's 'own activity'. Principal contractors in the construction sector are, on the other hand, subject to an unconditional chain liability – that is, joint and several liability – regarding social security contributions and wages under the Law on subcontracting in the construction industry.

Contractual liability

'Contractual liability' means that the liability is restricted to the direct contracting party and therefore to one level of subcontracting. As a result, no chain liability arises. For instance, the principal contractor is liable only for its direct contractor, and that contractor only for its direct subcontractor in turn. This kind of liability can be found in Austria (Anti-Abuse Act); Finland (Liability Act), France (liability regarding (bogus) subcontracting and liability regarding illegal or undeclared work) and Germany (liability provisions for tax obligations in construction). In Austria, this liability is restricted to the highest level in the subcontracting chain – that is, to the principal contractor, according to the Anti-Abuse Act (Article 7c.3 of AVRAG). Finally, the Belgian Liability Act of 2008 contains mainly a contractual liability; nevertheless, under certain circumstances, this liability may acquire a joint nature.

Joint liability

In Belgium, the liability acquires a joint nature if the contracting party of the contractor with social security and tax debts has failed to meet its obligations after being formally pressed for payment by the administration. Only if these conditions are fulfilled will the next level in the chain be addressed. In France, the user company is jointly liable if the temporary work agency defaults and its insurance proves insufficient to pay the wages and social security contributions. The liability of the user company is proportional to the duration of the temporary employment contract. Regarding undeclared or illegal work, under certain conditions, a joint liability of the client together with the contractors arises regarding the direct subcontracting relationship. Finally, in Spain, the temporary employment provisions of the Workers' Statute provide for a subsidiary liability of the user company, which becomes a joint liability if certain provisions have been infringed.

Special types of liability

According to the Belgian Law on agency work, a liability arises if the employment agency transfers part of its authority to the user company. In this case, the employment contract of the agency worker with the agency will automatically be transformed into an open-ended contract with the user company.

In Finland, the CLA in the housing construction sector includes a clause which stipulates that the principal contractor is liable for the subcontractor's or temporary work agency's unpaid wages and holiday pay, under certain conditions. This obligation is, however, ultimately a moral obligation.

The CLA for the construction sector in the Netherlands does not contain a real liability, but only a social clause. This places an obligation on the principal contractor to monitor the compliance of the CLA's provisions in all individual employment contracts covered by the agreement; the principal contractor is obliged to agree on this in the subcontracting arrangement.

Finally, it should be mentioned that, in Austria, several types of liability can be found in one regulation. The Anti-Abuse Act contains three types of liability: joint and several liability (Article 7a, subparagraph 2); 'normal' liability, which means that the precondition for the liability is that the principal debtor received a warning but has still failed to pay (Article 7c, subparagraph 2); and 'secondary' liability, which means that the contractor is only liable if the subcontractor cannot pay the debt (Article 7c, subparagraph 3). Furthermore, the Law on agency work contains a normal liability (Article 14, subparagraph 1) and a secondary liability (Article 14, subparagraph 2). The secondary liability exists if the user company can prove that it has fulfilled its financial obligations deriving from the contract with the temporary work agency.

Preventive measures used in framework of liability arrangement

As part of, or in connection with, the liability arrangements in the different Member States, several tools have been developed to either prevent the possibility for liability among the relevant parties or to sanction the parties which did not follow the rules. An overview of the different sanctions will be provided in the next section of this chapter.

In terms of the preventive tools in place, these may be divided into two main categories:

- measures seeking to check the general reliability of the subcontracting party;
- measures aiming to guarantee the payment of wages, social security contributions and wage tax.

With regard to these preventive tools, three possible scenarios may occur in the eight Member States under consideration: no preventive tools may exist; the preventive tools may be optional; or they may be obligatory preventive tools. Moreover, when such measures are established, they may either be embedded in a self-regulatory framework or in a legal framework.

Before describing these measures, it is interesting to observe that, in Spain, a comparatively different preventive tool was introduced in 2006. In this particular country, the monitoring and surveillance obligations of Law 32/2006 aim to restrict the length of the subcontracting chain, with no more than three vertical levels allowed in the chain; some exceptions to this limitation are, nevertheless, foreseen in situations where specialised work is required, where technical complications arise or in *force majeure* circumstances. In addition, the certification of adequate training and organisation in the area of occupational hazard prevention are prescribed by the measures. The certificates issued by the relevant Register of Accredited Companies for this purpose are of special importance.

Checking reliability of subcontractor or temporary work agency

In five of the eight Member States – Austria, Belgium, Germany, Italy and the Netherlands – no general obligation exists for the client or the principal contractor to check the reliability of the subcontractor or temporary work agency. However, in practice, not checking can result in a higher chance of liability and/or sometimes failure to do so is sanctioned with a more strict liability regime. Private parties may therefore choose to voluntarily include a clause on reliability checks in their contract as a safeguard against liability. The Italian national report, in particular, refers to regular use of this possibility. Prior to entering into a contracting or subcontracting agreement with a contractor, the client must first verify that the contractor and any subcontractor(s) it chooses have their affairs in order regarding the payment of wages, social security contributions and taxes. Similar verifications may also be implemented during the execution of the contracting or subcontracting agreement.

Although not mentioned in most of the national reports, it may be safely assumed that the option to make such contractual clauses exists in all of the Member States under consideration. In the Netherlands, optional tools have been introduced by the legislator for the client and principal contractor to avoid becoming involved in the effects of joint and several liability and thus having to sustain high economic costs. The fact that no general obligation to check the reliability of the subcontractor exists in Germany is not very relevant, since the reliability check in this country is an integral part of the obligation to take due care of the payment behaviour of the subcontractor with respect to minimum wages, social security (optional) and tax debts (see next section). In Finland and France, legal obligations of a preventive nature do exist. This report will describe the optional and obligatory measures next. As in some Member States the possibilities or obligations to take preventive measures differ for contractors involved in public procurement and for contractors involved in a purely private building project, attention will also be paid to measures in the context of public procurement.

Optional reliability check

In the Netherlands, before the user company decides to hire workers, or before the principal contractor decides to contract the subcontractor, they may do the following: check the temporary work agency's or (sub)contractor's references; request proof that these parties possess a (Dutch) payroll tax number; and request proof that the supplier or (sub)contractor actually files a return. The incentive to do this is high because the liability clause will not apply if no-one in the chain, including the employer of the workers involved, can be blamed for the tax and contribution debt. The country's Inland Revenue issues leaflets with guidance on how to screen the supplier or subcontractor and offers possibilities to ask for declarations of good behaviour concerning payment of tax and social security contributions by the relevant temporary work agency or subcontractor in the past. One recommendation of the Inland Revenue is to include a clause in the contract with the supplier or subcontractor that they may not, in turn, outsource the work without prior acceptance of the user company or principal contractor.

Obligatory reliability check

In Finland, a legal obligation exists to investigate and assess the reliability of the subcontractors and temporary work agencies with regard to social security and fiscal law, as laid down in the Liability Act. In terms of conformity with the labour law, the obligations of a client or subscriber are limited to gathering information on the collective agreement applicable or, if such an agreement is exceptionally lacking, on the principal conditions of work.

The French liability arrangement in the context of illegal work includes the provision that everyone, including individuals and private companies, local authorities and the state, is under a legal obligation to verify that the other party has accomplished all declaration formalities required in order to provide services as an independent contractor or to employ others. Compliance with this obligation is required on the conclusion of a contract for services or a subcontracting agreement worth a minimum of €3,000 and then periodically, every six months, until the end of the contract. In other words, the client or principal contractor are legally bound to request and obtain proof from their principal or (sub)contractor that its activities are regular with regard to the declaration provisions stipulated.

Reliability checks regarding public contracts

In Austria, the principal contractor may check the reliability of the candidate subcontractor by looking at a special register of subcontractors (the so-called *Auftragnehmerkataster*). The aim of this register is to make available for the public authority and the contractors involved in public procurement information about the reliability of potential contractors and subcontractors.

In Germany, regarding the awarding of public contracts, the principal contractor has to prove its reliability. This reliability requirement includes proof of the payment of social insurance contributions, tax charges and wages (see in context of ECJ Ruling of 3 April 2008, case **C-346/06, Rüffert vs Land**²⁰). Concerning wages, holiday and social funds payments, the registration in the publicly accessible list of the association for the pre-qualification of building companies (*Verein für Präqualifizierung eV*) can offer proof of this reliability.

According to the Italian trade unions, in public contracting agreements, the so-called ‘5/6’ preventive measure may be used; under this system, a proportion of the amount due on completion of the work remains unpaid until the (sub)contractor has paid all wages and contributions due to or on behalf of its employees. In Italy’s construction industry, the Single Insurance Contribution Payment Certificate (*Documento Unico di Regolarità Contributiva*, DURC), a document proving the correct payment of social security and national insurance contributions, is obligatorily requested for participation in all public contracting agreements. All contracting and subcontracting construction companies are required to furnish a DURC prior to commencement of any work that is the purpose of a construction contract.

In the context of the French Law of 1975 establishing the joint liability of the client to protect subcontractors from unreliable principal contractors²¹, the principal contractor must fulfil more stringent requirements (mainly of an informational nature) if the client is a public authority than in relation to private clients. In addition, special rules apply for public authorities with regard to the client’s liability in the context of the Law on illegal/undeclared work of 1992. This liability applies when the public client has not taken appropriate measures – even though it has been informed by the appropriate agents (labour inspectors), trade unions, professional associations or worker representatives that one or more subcontractors are working on the site in violation of declaration formalities. Appropriate measures involve inviting the principal contractor to ensure that the subcontractors’ activity becomes regular. The control agent will

²⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0346:EN:HTML>

²¹ Note that this liability regime will only indirectly benefit the employees of the subcontractor of an unreliable principal contractor.

undertake a new enquiry in due time to ascertain that the client has required compliance. If this is not the case, the agent will establish a written document (*procès verbal*) certifying the offence. On the basis of this document, creditors can engage the joint liability of the client. Public authorities are therefore required to ensure that their contractors proceed to the requisite declarations without delay. If they fail to do so, public authorities are freed from their contractual obligations without having to pay compensation.

Measures seeking to guarantee payment

In Austria and Belgium, neither obligatory nor optional preventive measures apply regarding the guaranteeing of payment of wages, social security contributions or fiscal charges. The following section will examine the rules in this respect in the other six Member States under consideration.

Wages

Optional tools

In Italy and Spain, no legally established mechanism exists to enforce wage obligations. Nevertheless, the client may request proof of payment by the contractor and any subcontractor(s) of all remuneration due to its employees. Another measure may involve introducing a clause that enables the client to withdraw from a contract if the regulations regarding wage obligations have not been respected. In Italy, the fulfilment of wage obligations deriving from the application of the national CLA is ensured through the preventative measures implemented under the Construction Workers' Fund (*Casse Edili*²²). The client may also apply to the Construction Workers' Fund in order to ascertain whether a chosen contractor and/or subcontractor have ever failed to fulfil wage obligations due to and on behalf of employees. In Spain, the common practice is for the principal contractor to carry out regular and effective checks to ensure compliance with legal obligations on the part of contractors and subcontractors – for example, by requesting copies of the relevant payslips or bank transfer documents.

Obligatory tools

In Finland, France, Germany and the Netherlands, obligatory measures have been established. In the Dutch and Finnish collective agreements, relevant contractual provisions are stipulated. For instance, the Dutch CLA for the construction industry stipulates that contractors may only contract subcontractors on condition that they apply the CLA provisions to their employees. In Finland, the CLA for the housing construction industry states that every subcontracting agreement – including those pertaining to temporary agency workers – must include a provision obliging the subcontractor (and temporary work agency) to respect the sector's national collective agreement regarding the terms and conditions of employment.

In Germany and France, the obligatory measures are laid down in law. When concluding the contract, the principal contractor established in Germany regularly fulfils its duty to take due care, if it has a written confirmation from its subcontractor to apply the conditions of employment and to require this also from potential subcontractors. However, this written confirmation may not be interpreted as a sufficiently thorough check. The principal contractor has to make further investigations if, during the contract, objective suspicion arises that its contractual partner or any of the subcontractors are breaching their legal obligations.²³ In France, the client and/or principal contractor are also subject to

²² <http://www.eurofound.europa.eu/emire/ITALY/SPECIALCONSTRUCTIONWORKERSFUNDS-IT.htm>

²³ In this context, the recent judgement of 3 April 2008 of the European Court of Justice in the case C-346/06 (Rüffert) is noteworthy since it has restricted the scope of a social clause in public work contracts stipulating that the prevailing wages, and thus not only the minimum wages, laid down in local collective labour agreements have to be applied by all contractors in the chain. According to the ECJ, this social clause does not apply to foreign subcontractors that post workers to carry out the work in the framework of the free provision of services within the EU.

a number of obligations in respect of the subcontractor's workers. All contractors that employ workers for the execution of a contract for services in France must provide, on the date of the contract and then every six months, a written declaration, certifying that their workers receive a statement of written particulars (*bulletin de paie*) – including normal conditions of work. However, in order to ascertain this, verifications should take place. In contrast to the controls on domestic companies, these verifications require international cooperation between the equivalent authorities when foreign contractors are involved.

Social security contributions

Optional and indirect tools

Regarding private contracts, in Germany no direct legal obligations exist to prevent the non-payment of social security contributions by subcontractors. Indirectly, the provision that the main contractor acts illegally if it has not at all, not correctly or not completely fulfilled its obligations concerning social security contributions may be considered as a preventive measure. Regarding the awarding of public contracts, the principal contractor has to submit, at the request of the competent health insurance authority as a collecting agency of social security contributions, the names and addresses of all its subcontractors. Moreover, the principal contractor is afforded a possibility to avoid the liability for social security contributions by proving that it could assume without own fault on the basis of careful consideration that its subcontractors have fulfilled their payment obligations.

In Italy and the Netherlands, no legal obligation exists either. In Italy, the client may request proof of payment by the contractor and any subcontractor(s) of all contributions due to the social security office. As far as social security contributions are concerned, the client may also request proof of the DURC to verify payment of insurance contributions. Indeed, in the construction industry, it is obligatory to show this certificate. Furthermore, the fulfilment of social security obligations deriving from the application of the national CLA is ensured through the preventive measures implemented by the Construction Workers' Fund. The client may also apply to this fund to ascertain whether a chosen contractor and/or subcontractor have ever failed to fulfil social security obligations due to and on behalf of employees.

In the Netherlands, in order to limit the risk of liability for social security contributions, user companies or contractors may use the following self-regulatory tools: screen the supplier or (sub)contractor; use a so-called guarantee account or 'G-account'; or pay directly into an account of the Inland Revenue. Furthermore, the recipient/user company may choose an accredited temporary work agency. User companies and contractors that use the G-account for the payment of social security contributions are protected against liability for the portion paid, provided that they observe the rules pertaining to G-account transfers. The same is largely true for direct transfers. The screening beforehand of the (sub)contractor or supplier of staff and the choice of an accredited temporary work agency will obviously limit the risk of liability, but does not legally limit or prevent the liability of the (principal) contractor or user company.

In France, an optional tool exists in the context of agency work, where the user company may require from the temporary work agency a certificate attesting payment of social security contributions. However, there is no incentive, such as exoneration of the user company's responsibility. This means the user company remains liable for social security contributions if the temporary work agency defaults.

Obligatory tools

In France and Spain, the client or (principal) contractor (recipient party) is obliged to check its contractors regarding the payment of social security contributions. In the framework of the French liability regime against illegal work, where the subcontractor is French, periodical verifications include submission to the principal contractor of certificates attesting payment of compulsory contributions to social security authorities and making compulsory declarations to the Inland Revenue. Where the subcontractor is foreign or established abroad, verifications include submission by the subcontractor

or independent contractor of a document citing the identification number which it has been assigned, in accordance with Article 286 of the Revenue Code. If the foreign contractor is not under any legal obligation to have a revenue identification number, it must provide a document mentioning its identity and address, as well as its temporary revenue representative in France.

In Spain, the client or principal contractor must check the situation regarding any outstanding debts belonging to the subcontracted company. To this end, the client or principal contractor must request a clearance certificate for the relevant company from the Social Security General Treasury. This body has an obligation to issue the certificate within 30 days of the request. Upon expiry of this 30-day period, the entrepreneur applying for the certificate is exempted from any further liability in this regard. It is also common practice for the contractor or subcontractor to certify, on a monthly basis, compliance with these obligations, by submitting documentary proof of payment of the social security contributions.

Wage tax

Optional tools

In the Netherlands, legal obligations do not exist either for principal contractors and/or clients in order to prevent the non-payment of fiscal charges by subcontractors. However, in order to limit the risk of liability for fiscal charges, recipient or user companies or contractors may use the same self-regulatory tools as described under the previous section on social security contributions, with the same effect of protection against liability or limitation of the risk of liability. In Spain, liability for wage tax does not apply where the (sub)contractor provides the payer with a specific clearance certificate stating that the contractor or subcontractor is up-to-date with tax payments; this statement is issued by the relevant tax authorities during the 12 months preceding the payment of each invoice in respect of the contracted or subcontracted activities. Liability is limited to the amounts paid without the contractor or subcontractor having provided the said tax clearance certificate, or paid after expiry of the 12-month period covered by the previous tax clearance certificate.

Obligatory tools

In Germany, at the conclusion of the contract, the principal contractor regularly fulfils its duty to take due care if its contracting partner has submitted a current exemption certificate issued by the competent Inland Revenue office. If an exemption certificate has been submitted, the principal contractor is only liable if it could not trust in the legitimacy of the exemption certificate, because it was obtained by unfair means or false statements and the contractor knew about this or did not know about it due to gross negligence. If no certificate has been submitted, the client or principal contractor (recipient of building services) should withhold 15% of the remuneration paid. The recipient has to ensure the careful implementation of the withholding tax procedure. This legal settlement of the withholding tax procedure can be seen as a preventive measure to avoid tax liabilities, as withholding the tax and transferring it to the Inland Revenue office by the principal contractor avoids the non-payment of tax by the subcontractor. The principal contractor has no obligation to check whether previous tax debts exist. It is only responsible for tax liabilities resulting from its order. The withholding tax procedure does not cause a chain liability, because the recipient of the building services withholds tax directly from the remuneration.

Sanctions

Parties that do not abide by the rules regarding the liability arrangement in place may be sanctioned through a number of means, namely: back-payment obligations, fines and/or alternative or additional penalties. This section distinguishes between these three categories when describing the situation in the eight Member States.

Back-payment obligations

In Austria and Belgium, no back-payment obligations exist for the liable contractors and/or clients. However, in the latter country, failing to meet the withholding obligation is sanctioned by a surcharge equal to the amount of withholding that should have been made – in addition to the withholding itself. In Finland, back-payment obligations only exist in certain collective agreements and are of a moral nature with regard to the principal contractor. Furthermore, it is interesting to note that the so-called confiscation regime (penal law) applies if a worker has not presented their wage compensation claims; in that case, forfeiture should be ordered. This provision may, in practice, have a real meaning when posted workers have returned to their home country and do not want to present any wage claims.

In the context of illegal and undeclared work in France, the client, principal contractor and contractor in France are jointly liable for the payment of salaries and social contributions, when found guilty of having had deliberate recourse directly or through another to undeclared work. In this instance, liability results directly from the court (guilty) decision and is proportional – in other words, determined by taking into account the price of work or services carried out and the remuneration applying to the relevant profession. In Germany, the principal contractor or the subcontractor that forwarded building services to another subcontractor is liable for the minimum wages and for the back-payment or payment of contributions to a joint institution of the social partners in addition to the employer. The worker may lodge a direct claim regarding the minimum wages against the principal contractor or the client. Regarding leave contributions, the Leave and Wage Equalisation Fund of the Building Industry (*Urlaubskassenverfahren*, ULAK) may launch litigation proceedings against the liable contractors in the process of collecting outstanding claims.

The client and/or principal contractor (recipient of the building service) is liable for delays in withholding tax, while the principal contractor is liable for the social security contributions. Moreover, the latter is liable for delay surcharges and interest for the deferment of payment.

In Italy, the client is jointly and severally answerable for up to two years after the termination of the contracting or subcontracting arrangement. According to one of the interviewees for this study, an obligation exists for the payment of interest on delays to the Construction Workers' Fund, in accordance with the provisions of the CLA. This obligation also pertains to the payment of administrative sanctions and interest in respect of the additional provisions of the various social security and national insurance authorities. In Spain, non-compliance with the obligations of Law 32/2006 produces joint liability for the subcontractor and its contractor in relation to labour law and social security obligations in the event of the non-payment of wages during the term of the contract.

Finally, in the Netherlands, no real joint liability for wages is established in the CLA for the construction industry. Moreover, no sanctions are stated in the case of non-compliance by the principal contractor. However, the employee of the subcontractor may start judicial proceedings against the principal contractor, although it is uncertain if the claim against the latter can be based on the provision in the CLA. In some situations, the principal contractor may be held liable through tort law.

Fines

Fines are not applied in Austria, Italy, the Netherlands or Spain.

In Belgium, a penalty for non-compliance with the liability regime is imposed in the form of a fine. This fine can be imposed by the social security and tax administration but is very small compared with the amount that has to be paid as a result of the withholding and liability. There is debate over whether this additional penalty is of a criminal nature. The Finnish Liability Act establishes a system of negligence fees according to which the principal contractor or other

subscriber²⁴ shall be obliged to pay such a fee if the evidence obligation concerning certificates and accounts has been neglected. The amount of the negligence fee is prescribed as being no less than €1,500 and no more than €15,000, depending on the degree, type and extent of the negligence, and the value of the contract. Efforts to prevent or eliminate the effect of the negligence may lower the fee, while repeated or systematic negligence may raise it. In the event of minor negligence, the fee can be lower than the normal minimum, or the authorities may refrain from imposing the fee. The fee is of an administrative nature and therefore payable to the state.

In France, the offence of bogus subcontracting (*marchandage*) is punishable by two years' imprisonment and a fine of up to €30,000. The client or principal contractor having had recourse to trafficking through another is also punishable by one year's imprisonment and a fine of up to €12,000. Recourse to illegal or undeclared work is punishable by three years' imprisonment and a fine of €45,000.

Alongside their liability for delays in withholding tax, the German client and/or principal contractor may be charged for the endangerment of withholding tax with a fine of up to €25,000. This is an administrative offence, just as the contraventions against the obligations regarding wages and social fund payments are in the Posted Workers' Act (*Arbeitnehmer-Entsendegesetz*, **AEntG**²⁵), which is punishable by fines of up to €500,000. The violation by the principal contractor of the preventive obligation to give information concerning social security obligations may be sanctioned with an administrative fine of up to €50,000. In this provision, it is stated that the principal contractor has to submit, at the request of the competent health insurance authority, the names and addresses of all its subcontractors.

Additional or alternative penalties

In Austria, a provision exists in the public procurement law of the federal government (*Bundesvergabe-gesetz*) that a company should be excluded from the procurement procedure, if provable severe offences are committed against labour law or social security law. In Italy, failure to possess a DURC can result in exclusion from all future public tender calls.

In Finland, the proceeds of crime must be forfeited to the state. Anyone benefiting from a criminal offence, such as work discrimination or discrimination on the grounds of national origin for profiteering purposes, both due to illegally low wages, may become subject to forfeiture (confiscation).

In France, if a temporary work agency exercises this activity – without making the necessary declarations required by law (having recourse to illegal or undeclared work) and/or without providing the formal guarantee for the payment of salaries and social security contributions – then the courts may order the temporary closure of the agency for a period of up to two months. In addition, where the guilty party is an individual, legal provisions allow for penalties, such as the following:

- a temporary ban for up to five years on exercising directly or through another the profession in the course of which the recourse to illegal or undeclared work took place;
- exclusion from public tendering for a period of up to five years;
- confiscation of the material directly or indirectly used for the commission of the offence, on the occasion of it or produced by it and belonging to the guilty party;

²⁴ The 'Finnish' term subscriber includes both the 'user company' and any contractor which has subcontracted – hence also the principal contractor and, in construction activities, the clients acting as builders.

²⁵ <http://bundesrecht.juris.de/aentg/index.html>

- publication of the court decision in newspapers designated by the court;
- prohibition of political, civil or family rights.

Where the guilty party is a foreigner, they can be subject to an expulsion sentence for up to five years. On top of these criminal sanctions, when the administrative authority is informed of the existence of a written certificate attesting the commission of the illegal work offence, it can refuse public subsidies for employment and training purposes for a period of up to five years. Once the labour inspector has established a written document certifying the commission of the offence, the client and/or principal contractor may be denied public subsidies, even though they have not committed the offence directly but through another.

Mechanisms for workers to lodge complaints

Judicial tools

In the case of the non-payment of wages during the term of the contract, in all of the Member States examined, with the exception of Finland, workers are entitled to take legal action against their own employer and, depending on the liability regime at stake, jointly against their corresponding contractor. The procedure to facilitate payment involves addressing a formal request to the company first before starting a lawsuit. Trade unions in all of the Member States examined offer legal aid and/or assistance to their members. The unions are sometimes entitled to start legal proceedings on behalf of their members on the basis of their own capacity as parties to the CLA; in France, this is allowed unless workers explicitly oppose the trade union's initiative. In this capacity, they may be protecting their own interest in the enforcement of the CLA, as seen in the case of the Netherlands. In Austria, alongside the trade unions, the Chamber of Labour (*Arbeiterkammer*, AK) also gives legal protection to its members. Although nearly all employees in Austria's private sector are members of the AK, this is not the case with regard to employees who do not work regularly in Austria. If an employee is not a member of the AK, the latter may give them legal protection only if this is in the interest of its members – for example, to prevent social dumping.

Posted and other foreign workers

With regard to posted workers, in all of the Member States, there is or should be a provision in the transposition of Article 6 of Directive 96/71/EC which makes it possible for a posted employee to sue, without prejudice to the right to institute proceedings in another state. In Germany, a specific trade union exists for migrant workers: the European Migrant Workers' Association, Munich (*Europäische Verein der Wanderarbeitnehmer*, EVW); this association places a particular focus on the needs and claims of posted workers. The main trade union in Germany's construction sector, the Trade Union for Building, Forestry, Agriculture and the Environment (*Industriegewerkschaft Bauen-Agrar-Umwelt*, IG BAU), is also involved in supporting and informing posted workers and – in particular cases – does enforce the minimum working conditions.

In the French report, mention is made of specific workers' rights regarding undeclared and illegal foreign workers under the liability regime for illegal or undeclared work. Where foreign workers have not been declared and have no requisite work permits, they are entitled to receive wages for the period they have provided irregular work, as well as to a lump sum equivalent to one month's salary if their contract has been terminated. Foreign workers' rights with respect to undeclared work provisions can be exercised by representative trade unions, without having to justify a formal authorisation.

Other tools

In Finland, under the Finnish Liability Act, any interested party may notify the safety and health districts of a suspicion that the act has been breached, leading to an urgent treatment by the authorities. The liability schemes in the collective agreements can be realised only through the dispute settlement activities of the social partners that are parties to the

agreements. In addition to this, the chief shop steward of a construction company is entitled to obtain information on any subcontracting agreement within the company. With regard to the housing construction CLA, social partners have agreed that the trade unions have the right to supervise the compliance with the collective agreement for both domestic and posted workers. The liability linked to the Penal Code (confiscation regime) is a matter for the public prosecutor.

In Belgium and the Netherlands, workers may also lodge a complaint about unpaid or unacceptably low wages to the labour inspectorate. In Spain, works councils are entitled to monitor ‘compliance with the labour, employment and social security regulations in force as well as with the agreements, conditions and company practices in force’; to this end, they can lodge complaints through appropriate legal channels ‘with the employer and the competent bodies or courts’.

Involvement of national authorities and social partners

In all of the Member States examined, with the exception of Austria, national authorities either play a monitoring role and/or act as a potential claimant involved in the liability regimes at stake. The social partners play multiple roles – for example, acting as advisers, representatives and providers of legal aid to individual members, as parties to a CLA, or overseeing monitoring and compliance tasks alongside the local or national authorities. The traditions in the various Member States are too diverse to make a distinction according to different categories. Therefore, the following section gives an overview for each country (in alphabetical order).

In Austria, as the provisions at stake are of a private law nature, no competency exists for supervision or monitoring by public bodies. Thus, it is solely the parties that are engaged in legal proceedings that are involved: that is, the employee and their representatives (sometimes construction workers’ and woodworkers’ representative trade union, or in other instances the AK or an advocate) on the one side; on the other side are the employer, the principal contractor and its representatives (usually advocates, sometimes the Economic Chamber); finally, the judges constitute a third actor. The social partners give information, advice and, sometimes, legal protection. The Federal Economic Chamber (*Wirtschaftskammer Österreich*, WKO) offers its members (employers) advice and services pertaining to legal matters. Legal protection is offered only in individual cases. Members of the WKO are nearly all companies established in Austria. Companies not established in Austria cannot become members of the WKO.

In Belgium, the Federal Public Service Social Security (*Federale Overheidsdienst Sociale Zekerheid/Service public fédérale Sécurité sociale*) and the Federal Public Service Finance (*Federale Overheidsdienst Financiën/Service Public Fédérale Finances*) are responsible for recovering or collecting the payments resulting from the withholdings and for invoking the liability. Under past legislation, the registration commission is an important federal instrument, comprising representatives from the Federal Public Service Employment, Labour and Social Dialogue (*Federale Overheidsdienst Werkgelegenheid, Arbeid en Sociaal Overleg/Service public fédérale Emploi, travail et concertation sociale*), the Federal Public Service Social Security and the Federal Public Service Finance. The social partners are also represented. Liability regarding temporary agency workers is controlled by the Federal Public Service Employment, Labour and Social Dialogue and the Federal Public Service Social Security.

In Finland, the occupational safety and health authorities are entrusted with supervising the Liability Act, with the Great Helsinki Region (*Uusimaa*) Safety and Health District having the supervision responsibility over the whole country. Posted workers are also subject to supervision by the country’s Labour Inspectorate and even by the special investigation unit of the National Bureau of Investigation of Finland’s central criminal police force.

In France, many of the authorities and institutions are involved in the liability arrangements. The application and enforcement of the provisions related to illegal work are entrusted to the labour and maritime inspection authorities, to police officers and to customs and social security agents, subject to the legal limitations of their respective powers.

Bilateral agreements may provide for the conditions of document and information exchange, with foreign agents entrusted with the same duties in their respective countries. The social partners also have an important part to play in preventing the offences related to illegal work and in implementing the other relevant legislation. Institutional coordination on the issue of illegal work was, until recently, organised through the Interministerial Delegation for Combating Illegal Work (*Délégation interministérielle à la lutte contre le travail illégal*, DILTI). The latter organisation had been assigned tasks such as compiling research and statistics, overseeing training for the control agents, as well as administrative cooperation with equivalent EU authorities. However, in April 2008, DILTI was replaced by the National Delegation for Combating Fraud (*Délégation nationale de lutte contre la fraude*, DNLF), which has equivalent competencies that focus not only on the issue of illegal work but also on fraud in a broader context.

In Germany, regarding the liability for minimum wages, holiday payment and social fund payments, only the parties engaged in legal proceeding are involved, that is: the employee and their representatives (trade union or an advocate) and the joint institutions of the social partners (the Leave Fund of the German Building Industry (*Urlaubs- und Lohnausgleichskasse der Bauwirtschaft*, ULAK)) on the one side; the employer (subcontractor), the principal contractor and its representatives (usually advocates) on the other side; and as a third actor, the labour courts. Thus, the only institution that is involved in this context is the ULAK. Its function is to ensure that workers receive their holiday entitlements, by raising contributions from the employers and granting benefits to employers and workers. The Inland Revenue offices are responsible for the withholding tax procedure and have established certain key responsibilities for the taxation of foreign building service providers. The collecting agencies of the competent health insurance authority are in charge of applying the provisions on the main contractor liable for social security contributions. Health insurers in Germany are corporations under public law that are organised on a regional or federal level.

In Italy, the public authorities most directly involved are the Inland Revenue and social security inspectorates – that is, the Provincial Labour Office (*Direzione Provinciale del Lavoro*), the National Social Security Institute (*Istituto Nazionale Previdenza Sociale*, INPS) and the National Insurance Institute for Industrial Accidents (*Istituto Nazionale per l'assicurazione contro gli infortuni sul lavoro*, INAIL). Also involved is the Construction Workers' Fund, which controls the correct allocation of payments benefiting construction workers, and, in public contracting arrangements, the public supervisory authorities. In public contracting arrangements, both sides of industry are notified of the names of the companies to which subcontracting agreements are awarded. This is not necessary in the private sector. Trade unions have no official power to ensure implementation of the regulations in force, other than the contractual power deriving from their institutional remit.

In the Netherlands, the Inland Revenue is involved in the application and practical implementation of the rules in force. Revenue pursues an active liability policy and is assisted in this task by the Ministry of Social Affairs and Employment (*Ministerie van Sociale Zaken en Werkgelegenheid*, SZW), according to the Ministry of Finance (*Ministerie van Financiën*, FZ). Under Article 96 of the CLA for the country's construction industry, no supervisory authorities are involved. It is the responsibility of the employee involved and/or their representative trade union to start judicial proceedings.

In Spain, it is mainly the responsibility of the Labour and Social Security Inspectorate (*Inspección de Trabajo y Seguridad Social*, ITSS) to identify labour law infringements – in other words, the surveillance function is fulfilled by the public administration. Subsequently, the decision to apply a penalty is taken by the administration itself or by court order. Complaints can be communicated to the social partners but the latter have no disciplinary powers. Through the works council, the trade unions are entitled to monitor working conditions.

3 Practical relevance and effective impact of rules

Whereas Chapter 2 is primarily based on an analysis of the national regulations in place, the information for this chapter derives mainly from interviews conducted with representatives of the relevant national authorities and social partners in the eight countries under study. Such methodology is in line with the focus of this chapter, which is not on the aims, nature and content of the rules themselves, but on the effective impact of the legislation in practice and its success, and/or the problems which are encountered by the actors involved.

In this respect, it is important that no misunderstandings arise from the use of terms such as ‘effectiveness’ and ‘effective impact’ or ‘practical impact’. For this study, these terms refer to whether a specific liability regulation in operation produces the intended result. In other words, the report examines whether the objectives of a regulation are fulfilled in practice. An important indication for the effectiveness of a regulation is its level of compliance. However, the extent to which a regulation is effective may only be estimated in an approximate manner, since – up until now – no standard, quantifiable indicators exist in this field. When purely based on interviews, the assessment of the practical impact or effectiveness of a regulation may inevitably involve some subjective elements. In the national reports, this problem was tackled in two ways: firstly, the interviews were conducted among all of the most important stakeholders which represent different and sometimes opposing views on the issue addressed – the government, employer organisations and trade unions. Secondly, wherever possible, other sources of factual evidence were used and referred to, such as case law or policy reports.

This chapter first considers the practical impact and effectiveness of the national laws from a domestic perspective. It then highlights positive issues and/or good practices. Since all of the country reports share a critical assessment of cross-border subcontracting processes, the effectiveness of the national arrangements is examined separately from a cross-border perspective. The chapter then focuses on two issues in turn, which arose in some of the national reports: the level of awareness and the suitability of the rules for SMEs, and the use of soft law mechanisms. Finally, this chapter outlines the most recent information about national developments in the near future concerning the liability arrangements at stake.

Domestic impact of rules

This section summarises the remarks in the national reports on the effectiveness of the systems. It first outlines the liability arrangements and/or preventive measures and sanctions assessed mostly positively, followed by the more ineffective ones; the section concludes with a summary of recently adopted measures which were judged more neutrally.

Rather effective tools

With regard to the wage liability arrangements in the Finnish CLAs, the joint assessment of the social partners is that they work reasonably well, and also have a prominent preventive effect. However, the conditioned liability in the collective agreements for the economic activities of building engineering and earth and water construction is too new to be assessed.

In Germany, the current regulation of liability for wage tax is based on an initiative of the three social partners in the building sector: IG BAU, the Central Association of German Building Trades (*Zentralverband des deutschen Baugewerbes*, ZDB) and the Employers’ Association of the construction industry (*Hauptverband der Deutschen Bauindustrie*, HDB). The arrangement offers two methods to ensure the tax claim: the (sub)contractor should submit either an exemption certificate or, if this is not possible, the recipient party (client or principal contractor) should withhold tax to the amount of 15% of the remuneration and pay this to the Inland Revenue. An evaluation by the German Federal Audit Office in 2003 showed that the cases where taxes are withheld were in a clear minority. The exemption

route has become standard and covers in practice about 95% of all cases. Nevertheless, another report, written in 2007 on behalf of the Federal Ministry of Finance, suggested retaining the withholding tax procedure.

Regarding the German liability arrangement on wages, holidays and social fund payments in the AEntG, several cases were pending at the time of writing, initiated by the ULAK, concerning holiday payments. The ULAK uses the legal instrument of guarantor's liability to a considerable extent. Frequently, the principal contractors pay the contributions or back payments voluntarily after being informed of their debt as a guarantor. SOKA-BAU – that is, the ULAK and the Supplementary Pension Fund of the Construction Sector (*Zusatzversorgungskasse des Baugewerbes AG, ZVK*) – asserted that, in the period 2004–2007, debts amounted to a total of €18 million. The guarantors paid about €10 million voluntarily, while legal cases were necessary to collect €7.5 million. Trade unions are also active in this regard. Between 2004 and 2007, EVW claimed minimum net wages amounting to about €1 million against appointing contractors. In the same period, IG BAU secured €200,000; thus, overall €1.2 million has been paid out to mainly posted workers. All of the interviewees deemed the chain liability regulation effective, although this does not imply that all stakeholders are satisfied with the rules in place.

In fact, the AEntG is the subject of continuous debates with sharply opposing views: the employer organisations ZDB and HDB do not agree with the system, since they consider it unjust that the guarantor should face liability without any blameworthy behaviour. They believe that the liability of the guarantor should depend on fault and negligence. In contrast, the trade unions highlight the effectiveness and flexibility of the current liability arrangement exactly because it is not limited to blameworthy guarantors alone. The social partners agree that a liability should prevail if construction service contracts are appointed by public institutions. Moreover, IG BAU argues that a liability should exist for all undertakings rather than only for those in the construction sector. In its view, at least all undertakings that sometimes appoint building services should be liable.

The Italian verification measures concerning the reliability of contractors seem rather effective. The Inland Revenue and social security office are authorised to implement specific controls and inspections in order to verify the compliance of the contractor and any subcontractor. Should the outcome of these controls and inspections prove negative, the institutions are authorised to proceed with certain sanctions following the serving of notice of the violations found during the verification. Over the last few years, the number of verifications has significantly increased, leading to higher fiscal and social security revenues.

For the Netherlands, the G-account or deposit system was assessed by all of the interviewees as a relatively effective tool to prevent social security and tax debts with regard to subcontracting practices in the building industry. In particular, the sanction of withdrawing the G-account or deposit of the (sub)contractor in case of abuse works as a deterrent. Clients and contractors do not want to do business with (sub)contractors that do not possess a G-account or deposit because then they lack the possibility of limiting their liability. However, this positive judgement does not include the area of temporary agency work (see below).

Regarding Spain, in general terms, the existing laws provide an effective and adequate regulatory framework. However, in practice, disputes may arise about the interpretation of such concepts as 'own activity' and the 'workplace of the principal entrepreneur', or about the scope of the various obligations subsumed under joint liability. In general, when reference is made to the 'same' or 'own activity', the 'core business activities' of the contractor are meant, according to case law.

In the opinion of one of the trade union organisations concerned – the National Federation of Construction, Wood and Allied Workers, affiliated to the Trade Union Confederation of Workers' Commissions (*Federación Estatal de Construcción, Madera y Afines de Comisiones Obreras, FECOMA-CC.OO*) – when the general legislation on liability

was drafted in 1980, the organisation of production was not as decentralised as it is today. According to the same source, this explains the adoption of the concept of 'own activity'. Furthermore, the term has generally been interpreted in a narrow sense, as referring exclusively to the 'core activities' of the contractor. As subcontracting has become an increasingly widespread form of work organisation, leading to the involvement of more companies which carry out different activities from those of the principal contractor, the scope of liability has been significantly restricted since it no longer affects certain subcontractors and this in turn has led to a curtailment of workers' rights. Therefore, according to the trade unions, joint liability should be extended to subcontracting companies that do not operate in the main field of activity of the contractor. Furthermore, the trade unions emphasise that – although the existing regulations seem adequate – the scope of liability should be broadened to include aspects concerning employment and job protection. Another trade union demand is that the principal company should be more involved at a practical level in the entire subcontracting process.

The employers note that, although joint liability concerns – where appropriate – the entire subcontracting process, in practice responsibility falls on the company most capable of assuming it – in other words, the largest companies in the subcontracting chain.

Ineffective or less effective tools

According to the persons interviewed in Austria, the least effective liability provision concerns liability in subcontracting processes for wages applying to EU-based and domestic contractors. At best, this provision could still have a modest general preventive effect. General prevention means that the principal contractor pays attention to which subcontractor they award the contract. The specific reasons why this norm is not effective are the following. The provision states in its fifth subparagraph that the liability is not applicable if the subcontractor is insolvent. Regarding the nature of the liability, which is only a secondary liability (see previous chapter), this means that even in theory the liability will hardly ever be applicable. Thus, if the principal debtor cannot pay the debt, they are almost always insolvent. Furthermore, according to the dominant interpretation, the liability arrangement is restricted to the highest level of the chain.

Regarding the Austrian liability arrangement concerning temporary work agencies, the situation is similar. This liability is not applicable if the temporary work agency is insolvent and the employee may claim the outstanding remuneration and other demands – usually the wage – from the fund relating to the protection of employees in the event of the insolvency of their employer (*Insolvenzausfallgeldfonds*).

Furthermore, the liability is only a secondary liability if the user company has demonstrably fulfilled its financial obligations deriving from the contract between the temporary work agency and the user company. This means, even in theory, that the liability will hardly ever be applicable from the moment that the user company has paid its financial obligations. Because the employee almost never knows in advance whether the user company has paid its financial obligations stemming from the contract between the temporary work agency and user company, a high risk arises that the employee could lose the court proceedings.

For France, the interviewees questioned the effectiveness of the liability arrangement concerning illegal work. The principal weakness of the provision is that it is rather narrow in scope. In effect, joint liability for the absence of necessary verifications is limited to those contractors directly connected to the client. As a result, without having been subject to criminal sanctions, the client has no liability for those subcontractors contracted by the principal contractor or for any further subcontractors in the chain. This weakness has been highlighted not only by the trade unions but also by the senate during its examination of an information report in 2006 on the French construction sector.

However, the French Building Federation (*Fédération Française du Bâtiment*, FFB) considers the current responsibility system satisfactory in the context of domestic subcontracting, provided that liability remains limited to direct contractors

as well as subsidiary ones. According to the National Federation of Public Works (*Fédération Nationale des Travaux Publics*, FNTP), the advantage of the current system is that it guarantees a certain degree of security. In effect, once verifications take place, no further concern arises that the employer's liability will be engaged.

The General Confederation of Labour (*Confédération générale du travail*, CGT) argues instead that employers should be placed under a legal obligation to verify the effective cost of the work or services, including materials and workforce, and that the client should be automatically liable for the payment of salaries, tax and social security contributions. By contrast, according to the spokesperson of the French Democratic Confederation of Labour (*Confédération française démocratique du travail*, CFDT), this trade union organisation does not favour the limitation of recourse to subcontracting to one level. CFDT would claim equality of treatment, including wages and working hours, between the subcontractors' workers and those of the main contractor; the confederation recognises that businesses may need to externalise part of their activity.

In Germany, the liability concerning social security contributions, which was introduced in mid 2002, had resulted in only eight imposed fines by 1 August 2004. The total sum of the fines amounted to about €13,000 a year. One of these administrative orders imposing a fine of over €2,000 was legally enforced. Apart from these modest results, the liability causes considerable administrative overheads. A measurement of bureaucratic costs in 2007 revealed that the liability for social security contributions burdens construction companies with costs totalling more than €11 million a year. Therefore, the gains and burdens of this liability arrangement are disproportionate towards each other.

Although the social partners share the view that this liability arrangement should be urgently changed, they propose different solutions. Highlighting the heavy administrative burden, the employer organisations argue that the contested regulation should be abolished. Subcontractors in particular emphasise the substantial administrative effort to obtain certificates of good payment behaviour from the health insurers. Such effort is due to the fact that the subcontractor has to request these certificates every three months for each of its workers at the different health insurance agencies where at least one of the workers is insured. The responsible health insurance agencies may change frequently, as it is common for workers to change their health insurance to avail of cheaper or better insurance conditions.

Trade unions contend that the most important reasons for the ineffective regulation are competition between the collecting agencies and the limitation of the liability to building contracts with a value of more than €500,000. A further reason is the limitation of the liability to the immediate subcontractor, which could facilitate its evasion, for example by splitting the construction contract. In the context of their analysis, the trade unions advocate a revised liability regime similar to the wage liability regulation. Moreover, they recommend a transfer of the role of enforcement and monitoring to one collecting agency, the German Pension Insurance (*Deutsche Rentenversicherung*), which does not compete against other institutions.

The German government recapitulated to the parliament the statements of the collecting agencies and they agreed that the liability as a matter of principle has positive effects. Nevertheless, they articulated substantive practical problems, recognising the considerable administrative effort of applying for certificates of good payment behaviour.

For Italy, so far the greatest difficulties encountered in implementing the system of joint and several liability have been the result of the continuous transformation and amendment of the regulations in force. This state of flux has frequently left the inspectorate authorities nonplussed and ill-prepared.

Furthermore, the labour inspectorate often finds it difficult to obtain the employee registers of less diligent employers – documents which are fundamental to its verifications. Thus, it can be difficult to prove the failure of a contractor or subcontractor to comply with social security or tax obligations, particularly when such failure is only partial and the

employees do not intend to file legal action. Another problem is that the municipal police are generally reluctant to control the way in which works are completed in the territory of their municipal authorities of reference. Although private contracting agreements are also inspected by INPS, INAIL and the labour inspectorates, more direct controls by the municipal police would undoubtedly be more effective and immediate.

The Italian trade unions believe that it is necessary to implement the existing regulations, many of which still have to be fully enacted. They also believe that the means of disciplining the private sector should be strengthened, and that the law should ensure that not only the client or contracting company is responsible for the regularity of fulfilling wage and social security obligations – as currently established in the recent regulations on joint and several liability. At present, the commitment of those companies which conscientiously verify the fulfilment of social security and wage obligations by their subcontractors is not sufficiently rewarded, due to the inefficiency of the current control procedures.

With regard to temporary work agencies, the effectiveness of the Dutch G-account or deposit system to prevent social security and tax debts is assessed as being considerably less effective than its counterpart for subcontractors: the Ministry of Finance, acting as the Directorate for Taxes, calculates that, in the field of temporary agency work, about €150 to €160 million in wage tax is left unpaid on an annual basis. Furthermore, the ministry estimates that about two thirds of the temporary work agencies which operate in the Netherlands are fraudulent. Therefore, the certification of these agencies with a quality mark known as NEN-norm 4400, granted by the National Standardisation Institute (*Nederlands centrum van normalisatie*, NEN) and established by the agencies themselves, is important. The trade unions and employer organisations of the temporary work agencies have urged the government to require this certification by law, and this strategy is currently being proposed by members of the Lower House of the Dutch national parliament (*Tweede Kamer der Staten-Generaal*).

Recently adopted measures

In Belgium, under the previous system of registration, a withholding obligation and joint liability seem to have successfully contributed to reducing fraud in the construction sector. Although doubts exist as to whether the liability factor can be singled out as the greatest deterrent against gangmasters, in the context of domestic subcontracting practices the implemented norms and instruments were seen as effective. It is difficult to evaluate the new, recently adopted, legislation but social partners from both sides have expressed concern that it will be more difficult to establish the liability and to generate income.

The two ministries involved in the application of the old and new liability regulations disagree on their respective capabilities to effectively enforce the law. The Federal Public Service Finance believes that it has greater opportunity to obtain the payments resulting from the withholding obligation, so situations where they would have to invoke liability will be rare. This opinion is contested by the Federal Public Service Social Security and indeed no legal basis supports it; the latter concedes only that the Federal Public Service Finance has more possibilities for acting against contractors before they go bankrupt. Since no databank has been set up yet, the Federal Public Service Finance cannot invoke liability under the new legislation. Unlike the Federal Public Service Social Security, the Federal Public Service Finance has hardly any people working exclusively on this legislation.

The trade unions fear that, under the new legislation, employers will no longer have an incentive to be registered. They regret that there is no longer any correlation with the registration commission. Employer organisations share this view. One employer organisation is in favour of attributing more importance to the registration system, but without returning to the old legislation. Although the trade unions admit that the old legislation was too complicated, they are not satisfied with the new rules. Firstly, they want the liability arrangement to be applied to the entire subcontracting chain. Secondly, together with one employer organisation, they urge the government to set up a tax databank and emphasise the need for the labour inspectorate to carry out more checks. Nowadays, it is difficult to know whether a company is using fraudulent subcontracting arrangements or, for instance, bogus self-employed workers.

It is also too early to give any final evaluation on the effect of the Finnish Liability Act. However, the act is of limited effect while it does not include a back-payment obligation of the principal contractor or other subscriber concerning wages, taxes and social security premiums. According to a report of the regional labour inspection authority (Uusimaa Safety and Health District), which is coordinating the inspection throughout the country since February 2008, a number of defects arise with regard to compliance with the Liability Act. During 2007, a total of 1,611 subcontracting contracts – including those on temporary agency work – were checked: 796 or about a half of them came under the evidence obligation of the principal contractor or subscriber, given the derogations in Section 5, Paragraphs 1 to 5. Of these 796 contracts, defects were found in relation to the following: the account of entering tax registers in 127 cases (16%), the trade register extract in 335 cases (42%), the tax account in 194 cases (24%), the pension premiums account in 225 cases (28.3%) and the applicable collective agreement in 393 cases (49%). Practical orders were given in 431 cases. However, given the recent enactment of the law, only 47 negligence fees were charged to 33 different principal contractors or subscribers, totalling €124,300.

In this context, the Confederation of Finnish Construction Industries (*Rakennusteollisuus*, RT) emphasises the need to focus the supervision on potentially abusive activities instead of an overly strict scrutiny of every single document. To this end, RT is in discussions with the Uusimaa Safety and Health District.

Regarding Spain, it is too early to evaluate the implementation of Law 32/2006 on regulating subcontracting in the construction sector, as it has only recently been enacted and come into force. In general, this law is expected to be effective, both because it is backed by all social partners and because, given that it applies to the sector as a whole, it has the force of law. Moreover, the Royal Decree 1109/2007 provides for a review of the law's provisions within three years of the decree coming into force. Furthermore, the implementation of Law 32/2006 – following the enactment of the relevant implementing regulations and the creation of a Register of Accredited Companies – should enable a higher degree of specialisation of companies, more investment in new technologies and a better-qualified workforce. It was also noted that this form of organisation facilitates the participation of SMEs in the sector, and this in turn will contribute to job creation.

Positive assessments and practices

As became clear when examining the views of the actors on the effectiveness of the rules in place, effective tools are not necessarily supported by all of the stakeholders. A reason for this paradox may be that most employers are in principle not in favour of the chain liability instrument because it burdens them with responsibilities which, from their perspective, should be left within the domain of public authorities. Therefore, they often tend to view liability arrangements at best as a 'necessary evil'. In this respect, the historical background of the Belgian liability arrangement is interesting: the former regulation came into force after the Federal Public Service Finance had proposed imposing a ban on subcontracting. This proposal was a result of a scandal in which a subcontracting company employing 1,000 workers did not pay social security contributions and tax on their wages. In response to the proposal, the social partners developed an alternative system, including a liability arrangement.

Nevertheless, the national reports outline a series of positive practices, as mutually identified by both sets of social partners. In general, a positive practice may be defined as a technique, method or process which is effective at delivering a particular outcome. In the context of this study, the term 'positive practice' is reserved for those liability arrangements or elements of them which were assessed positively by both the trade unions and the employers. In addition, certain liability arrangements were assessed as positive by only one of the social partners, while their counterpart did not share this opinion. This section focus on practices whose effectiveness is agreed by both of the social partners; it also includes measures considered positive by more than one stakeholder, for example, either the trade unions and the government, or the employer organisations and the government.

In Belgium, the social partners mentioned the following elements of the liability arrangement that may be identified and promoted as good practice:

- the legislation makes it possible to impose withholdings and invoke liability;
- the employer organisations and trade unions are involved in the registration commission and thus, indirectly, in the application of the liability arrangement – under the old legislation.

Regarding Finland, the Confederation of Finnish Industries (*Elinkeinoelämän keskusliitto*, EK), which also represents SMEs, is satisfied with the Liability Act, emphasising how the act puts in practice the principle that no pecuniary back-payment liability arises for the principal contractors and other subscribers. The Federation of Finnish Enterprises (*Suomen Yrittäjät*), which mainly represents SMEs, was involved in the state committee that drafted the unanimous proposal for the Liability Act and has not subsequently expressed any critical view on the legislation. The act has raised awareness of the risks associated with subcontracting and temporary agency work, and helps in combating the illegal economy. Therefore, trade unions also consider the act as a workable compromise, although they regret the absence of a monetary liability of the principal contractors and clients –this provision remains a long-term trade union aim. In the unions' view, a salient deficit in the current legal structure is the lack of responsibility throughout a subcontracting chain.

In a joint assessment, the Finnish social partners consider the provisions in the CLA for the housing construction sector as good practice since these measures have shown their worth for decades. The Construction Trade Union highlights the possibilities offered by the collective agreements to tackle the non-payment of adequate wages by subcontractors and temporary work agencies.

In Germany, all of the stakeholders expressed their satisfaction with the fiscal liability regime outlined earlier.

All interviewees in Italy agreed that, with regard to the management of the labour market, it is important that both sides of labour are involved in developing and implementing measures to replace the many existing provisions which are now of little use. The DURC, which was developed by the social partners during the negotiation of the CLA for the construction sector prior to being received into legislation, is a good example of best practice. In 2007 alone, it enabled the regularisation of over 160,000 workers. It is nevertheless a measure that still needs to be perfected, although the introduction of a so-called congruity index will facilitate identification of the correct fulfilment of wage obligations; this index verifies the congruity of the incidence of the labour supplied to the workplace during the work. However, the trade unions consider that it is time to move on from the question of whether an obligation has been fulfilled to the issue of how much has been paid. The unions would favour the extension of the obligatory DURC to the private sector.

With regard to the Netherlands, in general all relevant stakeholders are satisfied with the current liability arrangement for social security contributions and wage tax as far as domestic situations are concerned, apart from the situation with regard to temporary work agencies. Despite the general agreement that the current G-account works well, the Ministry of Finance is preparing a modification of it aiming to replace this system in the Netherlands.

For Spain, all respondents highlighted as a positive development the fact that labour legislation in general and Law 32/2006 in particular have been largely developed through social dialogue between the employer organisations and trade unions. Law 32/2006 embodies a commitment to sectoral collective bargaining at national level.

Impact of rules in cross-border subcontracting practices

From all of the national reports, the picture emerges that the liability rules in the eight Member States under study largely fail to have an effective impact on fraudulent situations and abuses of posted workers in cross-border situations of subcontracting and temporary agency work. In fact, the much contested German liability arrangement on wages, holiday and social fund payments may be the only exception in this respect (see above). According to IG BAU, since this liability arrangement was implemented, large companies and their organisations are much more interested in information regarding the provisions of the law in place and the possibilities of urging their subcontractors to observe this law.

This section outlines the problems mentioned in the national reports concerning liability in relation to cross-border subcontractors, followed by a few suggestions from the people interviewed regarding possible solutions. A distinction is made between problems connected to the specific socioeconomic and societal position of the posted worker, issues related to the legal context and difficulties with regard to enforcement of the rules.

Position of posted worker

The Austrian and French country reports in particular emphasise the precarious socioeconomic and/or societal position of many posted construction workers in the framework of subcontracting processes.²⁶ In the Austrian report, the theoretical possibility is given that posted workers from outside the EU – known as third-country nationals – may have to prove, in the framework of the wage liability regulation in place, that the principal contractor passed on the contract to another party, despite the fact that such subcontracting was not allowed. Furthermore, the report observes that the practical obstacles to initiating legal action for illegally posted workers in Austria from a country outside the EU are high.

Since 2002, an EU-cofinanced project exists between Austria and Hungary. The project aims to improve cross-border cooperation between the trade unions in the two Member States. One part of this project included legal advice in Hungarian for employees from Hungary – at that time not yet an EU Member State – who were working in Austria. The demands for this legal advice increased greatly in the period from March 2004 to October 2005: almost 4,000 Hungarian employees sought advice. It became evident that employers did not apply the same employment conditions and wages as specified by the law to these employees. Regrettably, it also became clear that one effect of the legal advice was that employers aimed to recruit less well-informed employees.

Even if a posted worker were to try to pursue their demands and could manage the challenges of language, information about the legal situation and the problem of a cross-border judicial proceeding, they would still not be armed against questionable practices of the employer, such as deducting costs for accommodation and food supply from wages. Unfortunately, it is not sufficiently clear whether it is legally permitted in Austria to make such deductions. The Austrian interpretation of Article 3, Paragraph 7, subparagraph 2 of the EU posted workers directive is that allowances specific to the posting that are paid in reimbursement of expenditure actually incurred on account of the posting are not part of the minimum wage. So far, the general interpretation does not forbid the employer to deduct the costs for accommodation or food supply from the minimum wage.

²⁶ As has been shown in other studies, most of these comments are also true for posted workers in the other host countries. See in particular Cremers and Donders, 2004.

Other reasons why little incentive exists for posted employees from within and outside the EU to pursue their rights are highlighted in the Austrian and/or French reports. They include the following:

- the workers fear that they will get no future work from their current employer or perhaps even from other employers;
- they are afraid because they are irregularly residing in the host country and therefore at risk of deportation;
- in the construction sector, it is often difficult to produce evidence of fraudulent practices regarding the pay level and working hours, because of non-transparent circumstances and often varying sites and workmates;
- trade unions in the host country are sometimes disinclined to exercise legal action on behalf of foreign workers, who are mostly not members;
- the temporary presence of posted workers in the host country complicates the matter of introducing their claims before the courts of the state;
- illegal work and bogus subcontracting are to a certain extent socially and economically accepted. As a consequence, few workers are inclined to pursue legal action to regularise their working relations or recover due wages;
- due to the large wage gap between sending and receiving countries, the wage is – even if it is far below the minimum wage level of the host country – usually higher than the wage that the employees earn in their countries of origin.

Finally, the position of posted workers is also influenced by particular aspects of the construction sector in a specific country, as was pointed out by one Italian trade union representative. In Italy, self-employed workers without employees account for 47% of the labour force in the construction sector. This has a considerably destabilising effect on the entrepreneurial system, especially in light of the lower cost of labour which such workers are expected to accept. The majority of these self-employed workers without employees are migrants. Indeed, it is much easier for self-employed workers who are registered with the trade register to renew their immigration permit than it is for employees. If the latter lose their job, they have only six months to find a new job before their immigration permit expires.

Legal context

Another reason why, in the context of cross-border subcontracting practices, the implemented norms and instruments on liability may be much less effective is of a legal nature.

In Belgium, the client or principal contractor does not have to withhold money and the liability cannot be invoked if the foreign subcontractor has no ‘social debts’ in Belgium and if all of its workers possess a valid transfer certificate (E101 form). In such cases, these workers do not fall under the scope of the Belgian social security system at all, provided that they do not exceed the prescribed length of posting in Article 14, Paragraphs 1a and 1b of Regulation (EEC) No. 1408/71.

The report on Finland notes that the Liability Act faces shortcomings in cross-border situations. With regard to wages, the only statutory guarantee in respect of the workers is the employer insolvency procedure in the home country. As for taxes, posted workers of a foreign subcontractor staying in Finland longer than six months are taxpayers in Finland, while since 2007, workers posted by a temporary work agency from Estonia, Latvia, Lithuania, the Nordic countries and from states without a tax treaty with Finland are also considered taxpayers in Finland. According to the information given to the general public by the tax authorities, tax negligence is common when foreign employers without a fixed place of business in Finland are not covered by the payroll tax procedure.

Regarding the Netherlands, the national findings are that the system works in a cross-border context if foreign service providers are covered by the Dutch tax law and laws on social security contributions. This is only the case for a minor

group of service providers in specific situations explained in more detail in Chapter 2 of the national report. Therefore, all of the Dutch interviewees agree that the system is in general not effective regarding subcontractors from abroad who are only temporarily carrying out services in the Netherlands and are not established on Dutch territory.

Although this problem of non-coverage by the liability rules was specifically reported in these three countries, it occurs in all Member States in respect of social security contributions since it originates from the exclusion of posted workers from the state-of-employment principle in Regulation (EEC) No. 1408/71 (see, for example, Pennings, 2005). For taxes, the coverage depends on the bilateral treaties of Member States, but most of them are based on the OECD model tax convention, which stipulates that for posted workers staying no longer than 183 days taxes are due in the country of origin.

Enforcement of rules

In France, enforcement of the rules is complicated. One problem that was mentioned concerns the internal organisation of the labour inspectorate. In effect, the French labour inspectorate is extremely decentralised. As a result, each of the relevant actors in the construction process – client, principal contractor or subcontractors – may be covered by a different inspector. Therefore, in order to establish an offence, different inspectors need to cooperate. However, they have an institutional freedom to decide whether an enquiry is necessary. Consequently, they need to be convinced of the interest of the case before they engage in such a time-consuming process. Thus, many enquiries cease before they reach a formal conclusion.

In addition to this internal problem at the labour inspectorate, cooperation between different administrations – social security, Inland Revenue and the labour inspectorate – is also a delicate matter because each of them tends to evaluate the situation according to their own criteria. For instance, Inland Revenue might decline assistance to the labour inspectorate if it considers that the sum of money it might accrue as a result of an in-depth enquiry might not be worth the trouble. This is why it was important to establish and maintain an interministerial delegation to coordinate the activities of different administrative departments. DILTI used to act as this authority, but has now been replaced by a similar institution – DNLF – acting against fraud in a broader context than illegal work only.

The CGT representative stated that controls by labour inspectors seem unsatisfactory as they tend to take place during office and normal working hours while offences predominately occur outside these time slots. The CGT official also complained about the fact that trade unions are denied the necessary prerequisites to track down offences. For instance, trade union representatives have very little time – 15 hours a month – to make enquiries on their own. In addition, most of the subcontractors are small businesses and therefore do not satisfy the thresholds required by law for the existence of trade union representatives.

Research by DILTI (2005) revealed that controls of foreign contractors have not kept pace with the increased activities of these cross-border service providers on French territory. According to the DILTI report, the number of foreign contractors undertaking the required declaration formalities has increased by 79.9% in one year: from 3,426 companies in 2003 to 6,163 companies in 2004. Meanwhile, posted workers included in the declaration procedure have increased from 16,545 persons in 2003 to 23,101 persons in 2004 (39.6%). However, the estimated numbers of posted workers are much higher, ranging from 94,732 to 118,415 persons in 2003 and from 126,109 to 157,636 persons in 2004. An additional difficulty arises from the fact that, although the declaration numbers have risen substantially, they are still insignificant in comparison to the estimated actual number of posted workers. As a result, both DILTI and the French Ministry of Labour, Social Relations, Family Affairs and Solidarity (*Ministère du Travail, des Relations Sociales, de la Famille et de la Solidarité*) recognise that controls of foreign contractors need to be intensified. The ministry also recognises that, although the social partners have done much to spread information on the requirement of declaration formalities to foreign contractors, much more remains to be done.

Apart from enforcement problems related to a lack of domestic cooperation within and among authorities, it is – as was stated in the Belgian report – more difficult for national institutions to check whether a foreign company has ‘social and tax debts’ compared with a domestic enterprise. Such checks cannot be done properly without cooperation with foreign authorities, which is only slowly progressing.

The representatives of the French employer organisation FFB consider that the current French liability system is inappropriate in the context of cross-border subcontracting as it encourages foreign contractors to avoid their responsibilities – to the detriment of the local client or (sub)contractor. In effect, once the foreign subcontractors have returned to their country of origin, it is difficult to contact them and therefore easier to engage the liability of the local party.

The German report focuses on deficiencies in the system of legal enforcement of decisions and other enforceable titles concerning the employer established abroad. Cross-border enforcement is barely possible and in practice represents a significant obstacle. This problem does not occur in respect of domestic employers. Under the German minimum wages liability regime, usually domestic employers are subject to the liability; therefore, in practice the enforcement of titles abroad is not often necessary. However, if it is necessary to enforce a judgement abroad, usually the foreign court does not recognise the judgement.

Suggestions for possible solutions

In Belgium, trade unions favour a liability on wages for clients and principal contractors. On the other hand, employer organisations consider that a wage liability is not realistic because their members cannot ask a subcontractor to disclose the salaries which it is paying to its employees. They believe that it is the authorities’ duty to check whether their subcontractors comply with the laws relating to wages and working conditions. Employers are also concerned about how it would be possible to avoid this liability. Nevertheless, if such a system were developed, they believe that it would be important to plan it in detail. In fact, a government initiative has sought to link the adoption of a joint liability for clients and principal contractors concerning the wages of posted workers with the lifting of restrictions on the free movement of workers from the new EU Member States that joined the EU on 1 May 2004. However, the government did not reach a consensus on this matter before the most recent elections of June 2007. If no agreement is reached before 1 May 2009, the free movement of workers will probably enter into effect on that date without liability on wages being established.

Now the actors have the impression that what they do may violate the free movement of services. In this context, one employer organisation emphasised the need for a European framework on bogus self-employed workers. More specifically, the Federal Public Service Social Security is in favour of a European databank on companies or a linking of national databanks.

In France, recognising the fact that the European enlargement of 2004 has had a special impact on the construction industry – including risks of social dumping – a senate report from 2006 made 14 proposals for improving the current system. The most important of these recommendations concern control and liability enhancement; the first proposal underlines the need for mandatory declaration requirements prior to posting workers. Although declaration requirements should not be used as a means of restricting service provision, such requirements should still be met in order to identify the workers, making sure that they remain protected under national and European legislation.

In the context of the ineffective liability arrangements on social security contributions and tax charges in cross-border situations, in the Netherlands trade unions are in favour of the introduction of a legislative system of liability for wages. This system should include the mandatory minimum wage level by law and by generally binding CLAs. The unions envisage a system similar to the German liability arrangement on wages, holidays and social fund payments. However, employer organisations do not favour a legislative liability arrangement for wages. Neither do they support a

transformation of the present social clause in Article 96 of the CLA for the construction industry into a real liability arrangement. In the view of the main association of building contractors, Constructing Netherlands (*Bouwend Nederland*), the old provision was abolished almost 10 years ago not only because employers disliked the liability clause, but also because employees of subcontractors that comply with the CLA provisions resented the intrusion on their privacy caused by this provision. To be sure of correct payment, the main contractor could ask the subcontractor to supply details regarding wage slips, employment contracts and identity cards of the employees.

A legislative chain liability arrangement for wages has been the subject of political debate but has so far been rejected by the Ministry of Social Affairs and Employment. However, in a press release of 19 June 2008, Minister Jan Piet Hein Donner announced the preparation of a bill on liability for the wages of temporary agency workers in user companies which make use of non-certified temporary work agencies. The liability will be limited to the statutory minimum wage level. This legislative proposal is meant to encourage the use of NEN-certified temporary work agencies.

Impact of rules on SMEs

Given the fact that the majority of contractors operating in the construction industry belong to the category of small and medium-sized enterprises (SMEs), this section pay special attention to the findings of five of the national reports. For Finland, Germany and Italy, no specific details could be reported on this issue.

Level of awareness

The situation in the Member States differs with regard to the level of awareness of SMEs concerning the existence of liability rules. In Austria, awareness of the liability rules is low, which may be explained by the extremely low practical relevance of these rules. Regarding the Spanish construction sector, SMEs are less well-informed than larger companies about legislation in the area of liability and subcontracting. More information needs to be disseminated on this aspect. In contrast, in Belgium, France and the Netherlands, SMEs seem to be well aware of the liability rules that apply to them. French employer organisations maintain that, thanks to their assistance, their members know their legal obligations and abide by them. For the Dutch SMEs, this awareness is inherent to the system: the main contractor, which is generally a large-scale enterprise, will demand all necessary data from the subcontractor, usually an SME. If the information supplied by the subcontractor is incomplete, it will not get paid by the main contractor.

Suitability of rules

Regarding the suitability of the rules for SMEs, in Austria employer representatives call for special attention for this group and emphasise the need for clear and manageable rules. In general, SMEs – particularly small enterprises – do not have a structure to deal with complex legal matters, such as a legal department. Belgian employer organisations believe that their previous legislation was too complicated for SMEs. Even now the system is still complicated, especially for certain clients. Under the old legislation, a client could check if a contractor was registered; now it has to be aware that it must check the Federal Public Service website to see if a contractor has debts. From France, it is reported that, according to the relevant employer organisations – FNTP and FFB – legal provisions on liability do not seem to have adversely affected SMEs. However, it is more difficult for them to comply with legal provisions as they do not have legal advisors.

In the Netherlands, a bill by the Dutch Ministry of Finance, proposing to change the preventive G-account system into a deposit system, aims to improve the situation for SMEs. The ministry explains that an outstanding amount of about €3.5 to €4 billion is lodged in G-accounts, which is a considerable, blocked sum. The enterprises cannot invest this money, for example, which means a loss of working capital. The Building Contractors' Federation Netherlands, mainly representing SMEs, confirms this view. According to this organisation, the main contractors try to pay a large part of the invoice on the G-account of the subcontractor, because for this sum they are indemnified against liability. Unblocking

the G-account takes time and administrative effort. However, the spokesperson of the employer organisation Bouwend Nederland – which mainly represents principal contractors – reports that its members are satisfied with the current G-account system because their main interest is in preventing liability.

Soft law and related initiatives

In three Member States, the use of soft law tools or related initiatives was mentioned in the context of liability rules in subcontracting processes.

In France, in 2005, seven employer organisations for the construction sector and five trade unions signed a non-legally binding document (*Charte de bonne conduite*) aiming to combat illegal work. This document includes advice for clients, principal contractors and subcontractors in order to ensure that they comply with legislation and avoid criminal sanction and civil liability. According to the most recent report on this subject from the French Ministry of Labour, Social Relations, Family Affairs and Solidarity, similar agreements exist in the activity of temporary agency work, in the security industry and – as of 29 February 2008 – in the agricultural sector.

To enhance the compliance of temporary work agencies operating in the Netherlands, in 2006 the industry introduced a self-regulatory measure. This is the NEN-norm for preventing liability of user companies in relation to labour from temporary work agencies. The first NEN-norm applies to agencies established in the Netherlands, but a second norm regarding temporary work agencies established abroad will also be issued in 2008.

To encourage the use of accredited temporary work agencies, some generally applicable CLAs oblige the employer to contract a qualified agency. However, the CLA for the construction industry does not contain such an obligation.

Regarding Finland, the employer organisation RT highlights the need to replace paper copies of certificates and accounts by electronic versions. RT has sponsored a private internet service designed by the software company Aspida Oy that is already operational in Finnish but is still subject to development in two dimensions. Firstly, RT wants to increase the availability of electronic data and, secondly, to facilitate data collection from abroad, especially from Estonia and Poland. RT would like tax and pension insurance data to be more broadly available on the Internet through an electronic proxy or ‘eproxy’ issued by the companies using the web service. The ‘eproxy’ would empower the web service to gather and distribute the data.

Future developments

The national reports include numerous suggestions by the interviewees on possible solutions to the shortcomings identified in the domestic or cross-border context. Some of these have been outlined in the previous sections. Below, specific attention is given to legislative developments in Austria since this entails an initiative which has already been adopted.

Recently, in Austria an Act for a liability arrangement regarding social security contributions was adopted with the aim of diminishing the problem of bogus or ‘bubble’ companies. This act is based on a government initiative, which was further developed by the social partners; it should come into force on 1 January 2009. The new bill covers social security contributions and will only apply in the construction sector. It has some elements of the Austrian ‘reverse charge’ system regarding turnover tax: ‘reverse charge’ means that the taxes are paid by the contractor and not by the subcontractor. The new act also includes certain aspects of the German provisions on liability in subcontracting process – especially Article 28e of the Fourth Book of the Social Security Code (*Viertes Buch des Sozialgesetzbuches*, SGB IV) providing for a liability of the principal contractor – as well as the Dutch system.

The key elements of the provisions are as follows. In general, the contractor is liable for the social security contributions of the subcontractor, but this liability is limited to 20% of the payment to the subcontractor. This means, on the one hand, that if the subcontractor goes bankrupt and the unpaid social security contributions amount to more than 20% of the payment to the subcontractor, the Regional Fund for Sickness Insurance will receive this 20% at most. On the other hand, the liability is not limited to the specific contract. The advantage for the contractor is that it can calculate costs more easily. The advantage for the Regional Fund for Sickness Insurance is that it does not have to prove that the outstanding social security contributions have resulted from the specific contract between the subcontractor and contractor. Due to the non-transparent division of labour within the construction sector and the usual lack of information of the regional sick fund, the system could not function otherwise.

The contractor is not liable in the following two instances:

- The first case is if the subcontractor is on a certain list. This register is compiled by the regional sick fund and a company can be added to the list if it has a clean record.
- The second case is when the contractor pays 20% of the payment directly to the regional sick fund. This means that it pays 80% to the subcontractor and 20% to the Regional Fund for Sickness Insurance. The contractor therefore has no further obligations to the subcontractor; the situation is as if it has paid 100% to the subcontractor. Afterwards, the subcontractor can request its 20% from the sick fund and, if no outstanding contributions apply, it will receive the full 20%. If some contributions are outstanding, it will get no payment at all or the remaining sum after deduction of the outstanding debts.

For example, the full amount of the payment is €100,000. The contractor pays €80,000 directly to the subcontractor and €20,000 to the Regional Fund for Sickness Insurance. Afterwards, the subcontractor can request €20,000 from the fund. However, due to the fact that the subcontractor owes €15,000 in outstanding social security contributions, it will get €5,000.

The proposed provisions are somewhat more detailed than explained above and will perhaps not prove to be a perfect solution. Nevertheless – according to the actors involved – they present the best solution that is currently possible.

This final chapter presents some concluding observations and elements for consideration for governments and social partner organisations as the main interest groups concerned by the current debate on liability in subcontracting processes in the construction sector. It also serves to highlight the similarities and differences between the national systems analysed, as well as the positive components, shortcomings and problems which these represent for the actors involved in the different Member States.

Similarities and differences of national regulations

The central findings of the report reveal the significant differences that exist between the various national subcontracting liability regulations in place. Due to the different traditions of legislation and industrial relations in the countries concerned, research results in this matter are highly specific to the national situation. Nonetheless, findings across the eight countries were similar in relation to the objectives of the regulations, the substantive and territorial scope, the mainly legislative form of the instruments and the involvement of social partners in one way or another. The similarities found can be useful as a source of comparative information for national policymakers and social partners in order to help them to make more informed choices on this subject. The most notable differences among the national laws were found in relation to the personal scope and nature of the liability, the actors involved in the process and the preventive measures and sanctions that exist. Regulations may be based on chain liability, on liability limited to a part of the chain or on purely contractual liability. Liability may or may not involve the client of a building project, in addition to the principal contractor.

Assessment of regulations at national level

Substantial differences were identified in relation to the effectiveness of the liability instruments with regard to their objectives and the level of compliance. In all of the eight Member States under study, monitoring compliance is a complex issue involving multiple actors. Each Member State strikes a different balance between preventive measures, sanctions, and enforcement efforts and possibilities. In purely domestic situations, some Member States face serious problems regarding the effectiveness of their liability rules, while in others no structural enforcement problems appear to exist. However, regarding cross-border subcontracting, considerable enforcement difficulties were reported in all Member States.

Domestic context

For Belgium and Finland, the national reports conclude that the legislation was too recently implemented to give a proper evaluation concerning its impact. Nonetheless, in Finland, the stakeholders interviewed were positive about the long-established arrangements in the Collective Labour Agreement. Regarding Spain, the same inability to assess the recently adopted Law 32/2006 was reported as in Belgium and Finland, but the general package of laws on liability was assessed rather positively by all the stakeholders.

In general, the German and Dutch reports are positive about the effectiveness of at least the majority of their rules, although this does not imply that all stakeholders are satisfied with the rules in place. A clear exception to this broadly positive picture was made for the German liability arrangement concerning social security contributions, which was pinpointed as ineffective as well as causing considerable bureaucracy. In the Netherlands, the social clause on wages in the CLAs was assessed as symbolic rather than effective.

The Austrian report was clear about the ineffectiveness of the rules in place, while the regulations in France and Italy were also predominantly assessed as not very effective. However, this negative view did not apply to all elements and mainly concerned foreign subcontractors. In Italy, the 'Single Insurance Contribution Payment Certificate' (DURC) in particular was judged positively by all of the actors involved. Moreover, in Austria new rules are underway which are expected to have a positive impact on the problems encountered (see previous chapter).

Cross-border context

Despite all of the differences regarding the domestic effectiveness of the rules, a clear similarity between all of the Member States studied refers to the serious enforcement problems with regard to cross-border subcontracting. One important reason behind this is the fact that liability rules for social security contributions and tax charges generally do not apply to foreign contractors providing temporary services in another Member State. Rules of conflict stipulate that foreign subcontractors are mainly not covered by the substantive social security schemes and tax laws in the host state. This implies that, from a cross-border perspective, national liability regulations for wages are in fact the only option which might be effective, since for labour law issues the EU posted workers directive (Directive 96/71/EC) requires foreign contractors to abide by certain minimum mandatory employment conditions in the host state. Nevertheless, liability for wages is not only a politically sensitive issue but also poses some problems especially with regard to the cross-border execution of back payments.

Elements affecting effectiveness

Detailed analysis of the interviews conducted with the relevant stakeholders for the national reports revealed that certain elements were clearly salient and frequently identified by these parties as either increasing or diminishing the chances of an effective liability arrangement in a domestic context.

However, before listing them, the limitations of the present study – as outlined at the start of the report – should be recalled. Given the exploratory and mainly fact-finding and descriptive nature of this report, further more in-depth and case-study based research on this topic would be a prerequisite before any definite conclusions on what works or not could be drawn. Even then, it will still be difficult to extrapolate research results from one country to another, given the different traditions of legislation and industrial relations in the particular countries.

Enhancing components

Taking into account these caveats, two main elements were often identified by parties as being potential building blocks of an effective liability arrangement:

- preventive tools which reward the clients or principal contractors with limitation or exemption from liability;
- involvement of the social partners in the development, implementation and application of the arrangements. This is a feature of most of the measures categorised as good practice.

In relation to chain liability, the European social partners of the construction sector and their member organisations have opposing views as to its pertinence and effectiveness. Trade unions consider that unconditioned chain liability presents the most effective tool for a well-functioning system. Meanwhile employers argue that unconditioned chain liability is economically and contractually inadequate.

Addressing shortcomings

With regard to regulations that were considered ineffective or less effective, a distinction should be made between a) problems inherent to the nature of the regulation; and b) problems related to the implementation of the regulation. Again, it must be emphasised that the findings are not meant to prescribe or recommend anything. Rather, they should be seen as a starting point for further debate and research.

Concerning inherent problems, a narrow scope of the liability, such as limitation to only one level of the chain, was often cited by some of the stakeholders interviewed as a reason for ineffective arrangements. Furthermore, exceptions – such as inapplicability of the rules if the subcontractor is insolvent – or complex and/or burdensome administrative preventive obligations were mentioned as contributing factors to a low practical impact of the rules concerned.

Regarding implementation problems, some of the main challenges identified by those interviewed included too many and/or competing monitoring institutions with different priorities. Moreover, continuous transformation and amendment of regulations in force and/or delay in implementation also adversely affects the monitoring power of inspectorates.

A further inherent problem faced in all of the eight countries under study concerns the fact that the regulations examined concentrate particularly on national circumstances. It is therefore not surprising that the most striking gaps are to be found in cross-border situations; implementation of the rules in cross-border subcontracting processes is especially difficult.

Exchanging knowledge and experience

The bill recently put forward in Austria aiming to tackle the problem of bogus or ‘bubble’ companies in the construction sector is an example of how Member States might seek inspiration from one another’s good practices. In this context, the Austrian bill contains a liability arrangement regarding social security contributions and resembles part of the Dutch and German liability provisions.

Further elements for discussion

Considerations for national legislators

On the basis of the research results – and bearing in mind the limitations of the present study – the following ideas could be further explored by national policymakers striving for a well-functioning liability arrangement.

Domestic context

Lawmaking process

- Include social partners (in the construction industry) in the development, implementation and application of the regulations.

Content of regulation

- In the case of new regulation being developed, this should be kept simple and be accessible and comprehensible.
- It is important to reduce costs linked to bureaucracy and to avoid creating an administrative burden for users.

Enforcement of regulation

- Create tools that prevent the possibility of liability on the contracting parties and at the same time guarantee the payment of social security contributions, wage taxes and/or minimum wages at least.

- Consider in particular possibly optional tools that prevent the chance of liability for the contractor:
 - in such a way that if a contractor observes these preventive measures – which should ideally be possible without the cooperation of the subcontractor – it will not be liable or at least will limit its liability;²⁷
 - possibly combined with other preventive tools such as a general reliability check of the subcontracting party, at best supported by a register or list of reliable subcontractors.²⁸
- Combine preventive measures where necessary with other sanctions such as back-payment obligations, fines and/or alternative or additional penalties.
- Provide an effective enforcement of the regulation. Important conditions to guarantee this are:
 - one monitoring institution or several monitoring institutions that work in cooperation with each other;
 - a steady regulation that is not continuously being transformed.

Cross-border context

Useful tools to improve the enforcement and application of the liability arrangements of the Member States on foreign subcontractors and/or temporary work agencies within the current legal context could include the following.

- Make registers or lists of reliable subcontractors of the different Member States accessible throughout the EU.²⁹
- Ideally, this should be supported by the set-up of an easily accessible EU website for recipient parties, such as the client, principal contractor or intermediary contractor, with general information on cross-border outsourcing of work and links to the national registers or lists of reliable subcontractors.
- Promote further cross-border cooperation and coordination between the relevant authorities of the different Member States with regard to the enforcement of each other's liability regulations, the exchange of information and other measures.

²⁷ At the same time, these measures should secure the collection of social security and tax debt. Examples of such preventive regulations are:

- the German obligatory tool regarding wage tax: the (sub)contractor should submit either an exemption certificate or, if this is not possible, the recipient party – the (principal) contractor – should withhold tax to the amount of 15% of the remuneration and pay this to the Inland Revenue;
- the Dutch G-account or direct transfer system regarding social security contributions and wage tax: the (principal) contractor pays the (sub)contractor exclusive of the wage tax and social security contributions owed, which are transferred directly to the G-account or deposit, and is then protected against liability for the portion paid;
- the new bill in Austria regarding social security contributions in the construction sector: the contractor is not liable in two cases: firstly, if the subcontractor is on a certain approved list and, secondly, if the contractor pays 20% of the payment directly to the Regional Fund for Sickness Insurance.

²⁸ See the German and proposed Austrian regulation as briefly described in the previous footnote.

²⁹ See the proposal of the Finnish Confederation of Finnish Construction Industries (RT) outlined in the previous chapter.

Wages and legal advice

- Make one institution in every Member State responsible for the legal aid of posted workers, including the supply of legal information in different languages; setting up a comprehensible website would be helpful in this regard.
- Ideally, this should be supported by the establishment of an easily accessible EU information service, such as a website – available in all EU languages – with general information on posted work and links to other posted worker websites of the Member States.³⁰
- Examine ways to avoid cross-border judicial proceedings – for instance, the possible payment of the wage debt to the worker by the above institution and the transfer of the wage claim to the institution, which would then act in accordance.

Social security and wage tax obligations

- Enhance the enforcement of the rules of the host country, as well as of the country of origin, by improving the transparency and monitoring of the rules. This may involve for instance:
 - registration of posted workers;³¹
 - designation of one monitoring authority in each Member State or several, closely cooperating authorities;
 - if necessary, a limitation of the subcontracting chain to a maximum number of vertical levels.³²

All of the tools mentioned in the cross-border context should ideally be reinforced by an enhanced administrative and practical cooperation between the Member States in the context of the posting of workers (see also European Commission, 2008a and 2008b).

Considerations for social partners

One of the principal research findings was that social partner organisations do not always agree on the desirability of liability rules in place and consequently do not agree either as to what may be considered a good practice. A rather obvious reason for this divergence of views may be that clients and/or contractors see the government as being responsible for enforcing these rules, and increasing the liability of the main contractor would burden them with monitoring and compliance responsibilities. However, sometimes employer organisations are positive about having wider liability rules in place, since such regulation can help to promote fair competition and a level playing field in favour of fair and law-abiding companies.³³

An important element worth highlighting is that of guaranteeing social partner involvement in the negotiating and adoption process, as well as in the implementation of liability arrangements. This aspect emerged as an essential ingredient for the good practices mentioned in the eight country reports. However, in many other EU Member States liability is not – or not yet – a politically feasible option, as it is not regarded as a priority issue by the parties concerned.

³⁰ Consider the Austrian-Hungarian cross-border cooperation between the trade unions.

³¹ As in France.

³² As in Spain, where – for example – the subcontracting chain in building projects is limited to no more than three vertical levels. However, such a limitation will also limit the outsourcing possibilities of companies.

³³ This positive view is apparent in the Netherlands, where this is the case for both employer organisations representing SMEs and principal contractors. To a lesser extent, it is also true in Finland, France and Italy in respect of employer organisations representing principal contractors.

In such a context, a possible alternative strategy aiming to diminish problems in the lower ends of subcontracting chains – especially where posted workers are involved – might be to encourage corporate or sector-based social responsibility initiatives in subcontracting processes. These actions can be seen as a voluntary commitment by clients or contractors to manage their relationships with subcontractors in a responsible way. Such initiatives might be developed through the normal social partner channels of consultation and negotiation.

Finally, it is important to mention that contractor selection is of crucial importance in chain responsibility arrangements. In the context of procurement, cost cannot be the only factor to take into consideration when selecting contracting parties for a building project. **Directive 2004/18/EC**³⁴ on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and **Convention No. 94**³⁵ of the International Labour Organization (ILO) on labour clauses in public contracts respectively enable and require provisions or social clauses in government procurement contracts to ensure the compliance of subcontractors with labour standards. The objective is to ensure that conditions imposed by public authorities in their role as client, such as low pricing policies or tight deadlines, do not undermine the capacity of subcontractors to comply with relevant labour and social standards.

The aim of this comparative report is to facilitate the exchange of experience and good practice among Member States on the subject of liability in subcontracting processes, and to enable social partners and legislators to be better informed in relation to this subject.

³⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:HTML>

³⁵ <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C094>

References

Asshoff, G., European Foundation for the Improvement of Living and Working Conditions (Eurofound), *Liability in subcontracting processes in European construction sector: Germany*, Dublin, Eurofound, 2008.

Buelens, J., Eurofound, *Liability in subcontracting processes in European construction sector: Belgium*, Dublin, Eurofound, 2008.

Cremers, J., *Changing employment patterns and collective bargaining: the case of construction*, Brussels, European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS), forthcoming Autumn 2008.

Cremers, J., 'Self-employed and the free provision of services', *CLR-News*, 2/2007, Brussels, European Institute for Construction Labour Research, 2007, p. 34, available online at:

<http://www.clr-news.org/CLR-News/CLR%20News%202-2007%20ISSN.pdf>

Cremers, J. and Donders, P. (eds), *The free movement of workers in the European Union*, CLR Studies 4, Brussels, European Institute for Construction Labour Research, 2004.

Délégation Interministérielle à la lutte contre le travail illégal (DILTI), *Intervention en France des entreprises étrangères prestataires de services, Rapport d'enquête*, Paris, DILTI, 2005.

European Commission, *Commission Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services*, Official Journal of the European Union, Luxembourg, Office for Official Publications of the European Communities, 2008a, available online at:

http://ec.europa.eu/employment_social/labour Law/docs/2008/recommendations_085_en.pdf

European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers*, COM(2007) 0304 final, Brussels, 2007, available online at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0304:EN:NOT>

European Commission, *EU calls for urgent action to improve working conditions for 1 million posted workers*, Press release, IP/08/514, Brussels, 3 April 2008, 2008b, available online at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/514>

European Commission, *Green Paper – Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708 final, Brussels, 2006, available online at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0708:EN:NOT>

European Construction Industry Federation (*Fédération de l'Industrie Européenne de la Construction*, FIEC), *GAIPEC report on product liability in the construction industry*, Brussels, FIEC, 1992. GAIPEC is a group of European professional and trade associations for the construction industry (*Groupe des Associations Interprofessionnelles Européennes de la Construction*, GAIPEC).

European Foundation for the Improvement of Living and Working Conditions (Eurofound), 'Restructuring at ZRE Katowice', in: *European Restructuring Monitor quarterly*, Issue 4 – winter 2007, Dublin, Eurofound, 2008, available online at: <http://www.eurofound.europa.eu/emcc/erm/templates/displaydoc.php?docID=45>

Gagawczuk, W., Eurofound, *Liability in subcontracting processes in European construction sector: Austria*, Dublin, Eurofound, 2008.

Hellsten, J., Eurofound, *Liability in subcontracting processes in European construction sector: Finland*, Dublin, Eurofound, 2008.

Hellsten, J., 'On the social dimension in posting of workers. Reasoning on posted workers directive, wage liability, minimum wages and right to industrial action', in: *From internal market regulation to European labour law*, PhD dissertation, University of Helsinki, Helsinki University Print, 2007.

Houwerzijl, M. and Peters, S., Eurofound, *Liability in subcontracting processes in European construction sector: Netherlands*, Dublin, Eurofound, 2008.

International Chamber of Commerce (ICC), Commission on Business in Society, *ICC guidance on supply chain responsibility*, Paris, ICC, 2007, available online at:

http://www.iccwbo.org/uploadedFiles/ICC/policy/business_in_society/Statements/141-75%20int%20rev6%20FINAL.pdf

International Labour Organization (ILO), *Labour clauses in public contracts. Integrating the social dimension into procurement policies and practices*, Report 97 III (Part 1B), General Survey concerning the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84), Geneva, ILO, 2008.

Organisation for Economic Co-operation and Development (OECD), *The 2005 update to the model tax convention*, Paris, OECD, 15 March 2004, available online at: <http://www.oecd.org/dataoecd/54/24/34576874.pdf>

Palli, B., Eurofound, *Liability in subcontracting processes in European construction sector: France*, Dublin, Eurofound, 2008.

Pennings, F.J.L., 'Coordination of social security on the basis of the state-of-employment principle: Time for an alternative?', *Common Market Law Review*, Vol. 42, No. 1, 2005, pp. 67–89.

Salonia, R. and Emanuele, M., Eurofound, *Liability in subcontracting processes in European construction sector: Italy*, Dublin, Eurofound, 2008.

Union of Construction Allied Trades and Technicians (UCATT), *UCATT uncovers appalling systematic abuse of vulnerable workers on [private finance initiative] PFI Hospital*, Press Release, 30 June 2008, available online at: <http://www.ucatt.info/content/view/515/30/2008/06>

Vargas Llave, O., Eurofound, *Liability in subcontracting processes in European construction sector: Spain*, Dublin, Eurofound, 2008.

Annex: National summaries of liability arrangements

Austria ³⁶		
<i>Regulation</i>	Anti Abuse Act	Law on agency work
<i>Nature of the liability</i>	Liability is restricted to the direct contracting party of the subcontractor, in other words, to one level of subcontracting. Furthermore, the liability of Article 7c.3 AVRAG is restricted to the highest level in the subcontracting chain	'Normal' liability and secondary liability – if the user company can prove that it has fulfilled its financial obligations deriving from the contract between the temporary work agency and the user company
<i>Objectives</i>	Combating non-payment and abuse of employees in the context of (cross-border) subcontracting practices and thus avoiding potential cases of social dumping and illegal business competition	
<i>Liability covers</i>	<ul style="list-style-type: none"> • Wages 	<ul style="list-style-type: none"> • Wages • Social security contributions
<i>Personal scope</i>	<ul style="list-style-type: none"> • Principal contractor and user company • All employees, except employees in public services, namely those who have a contract with the government. 'All employees' also includes 'flexible' workers such as those with fixed-term contracts or working part time 	<ul style="list-style-type: none"> • User company • Temporary work agency • All employees and also people who are economically dependent (arbeitnehmerähnlich). The latter are similar to employees, as their work is dependent on one employer. However, they are not officially employed by the employer
<i>Territorial scope</i>	Any contractor providing services in Austria	Applies throughout the country
<i>Preventive measures</i>	<ul style="list-style-type: none"> • No specific legal obligations exist to make certain checks • No specific procedural arrangements are made to guarantee payment by subcontractors • Not applicable if the subcontractor is insolvent 	<ul style="list-style-type: none"> • No specific legal obligations exist to make certain checks • No specific procedural arrangements are made to guarantee payment • Not applicable if the temporary work agency is insolvent
<i>Sanctions</i>	No back-payment obligations or – in practice – additional penalties exist for the liable contractors. However, in theory, a provision in the Federal Public Procurement Law (BVergG) states that a company must be excluded from the procurement procedure if it is found to have committed severe offences against labour law or social security law	-
<i>Complaint mechanism for workers</i>	Trade unions act on behalf of the employee not only out of court, but also in court proceedings, with no financial risk for the employee. The Chamber of Labour also provides legal assistance	Liability will rarely be applicable from the moment the user company has paid its financial obligations. Therefore, the risk of losing the proceedings is high for employees
<i>Actors involved</i>	<ul style="list-style-type: none"> • Employees and their representatives • Principal contractor and employer representatives • Judges 	<ul style="list-style-type: none"> • Employees and their representatives • User company and temporary work agency • Judges

³⁶ A new law is planned, based on tripartite negotiations. Decision making was expected by the summer of 2008.

Belgium		
<i>Regulation</i>	Liability Act	Law on agency work
<i>Nature of the liability</i>	Mainly a contractual liability. The liability will acquire a joint nature if the contracting party of the contractor with social security and tax debts has failed to meet its obligations after being formally pressed for payment. Only if these conditions are fulfilled will the next level in the chain be addressed	Liability arises if the employer (temporary work agency) transfers part of its authority to the user company
<i>Objective of liability</i>	The objective of the law is to combat so-called gangmasters and bogus subcontracting practices and to safeguard the public interest in the collection of social and fiscal charges on wages. For the social partners, the objective is also to prevent unfair competition	
<i>Scope of liability</i>	<ul style="list-style-type: none"> • Wage tax, limited to 35% of the total amount of work • Social security contributions and social fund payments, in combination with tax liability limited to 65% of the total amount of work, otherwise 100% 	<ul style="list-style-type: none"> • Social security contributions • Wages and all work-related benefits
<i>Personal scope</i>	<ul style="list-style-type: none"> • All contractors carrying out certain work; this work mainly covers the construction sector • All employees of said contractors 	<ul style="list-style-type: none"> • User company • All temporary agency workers except posted workers from abroad
<i>Territorial scope</i>	<ul style="list-style-type: none"> • Any contractor performing work on Belgian territory 	<ul style="list-style-type: none"> • Applies throughout the country
<i>Preventive measures</i>	<ul style="list-style-type: none"> • No specific legal obligations exist to make certain checks • No specific procedural arrangements are made to guarantee payment by subcontractors 	<ul style="list-style-type: none"> • No specific legal obligations exist to prevent liability
<i>Sanctions</i>	No back-payment obligations exist for the liable contractors; however, a penalty does exist in the form of a small fine, along with a surcharge equal to the amount of withholding that should have been made – in addition to the withholding itself	If part of the authority is transferred to the user company, the employment contract of the agency worker with the temporary work agency will be automatically transformed into an open-ended contract with the user company
<i>Complaint mechanism for workers</i>	<ul style="list-style-type: none"> • Workers can go directly to the Labour Tribunal or they may be represented by their trade union, if they have been a member for at least six months. In other cases – especially important for cross-border posted workers – the trade union will decide on a case-by-case basis whether the worker will get legal assistance • Workers can also lodge a complaint through the labour inspectorate 	Liability will hardly ever be applicable, because it is difficult to prove that part of the authority has been transferred
<i>Actors involved</i>	<ul style="list-style-type: none"> • Federal Public Service Social Security • Federal Public Service Finance • Registration committee and their stakeholders 	<ul style="list-style-type: none"> • Federal Public Service Employment, Labour and Social Dialogue • Federal Public Service Social Security

Liability in subcontracting processes in the European construction sector

Finland			
<i>Regulation</i>	Liability Act	Penal code	Collective agreements
<i>Nature of the liability</i>	Liability only in relation to the contracting partner – no chain liability	Partly a chain liability, for the part of the confiscation possibility	Liability as a guarantor that has kept the benefit of execution
<i>Objectives</i>	The general objectives of the liability regulations – and especially of the Liability Act – are: promoting equal competition between companies, ensuring observance of the terms of employment and, indirectly, combating abuse of workers and enhancing the collection of social and fiscal charges		
<i>Scope of liability</i>	<ul style="list-style-type: none"> • Wage tax • Social security contributions 	Payment of too low wages in case of posted workers	Wages and holiday payment
<i>Personal scope</i>	<ul style="list-style-type: none"> • User companies, unless the work does not exceed 10 days • Subcontracting in building: clients acting as builders and contractors contracting out part of the work at a shared workplace, unless the compensation is less than €7,500 excluding VAT 	Principal contractor or other subscriber of labour, including the client	Principal contractors, including user companies, bound by the collective agreement
<i>Territorial scope</i>	Applies throughout the country; also covers foreign contractors or temporary work agencies when active in Finland	Applies throughout the country; also covers foreign contractors or temporary work agencies when posting workers in Finland	Agreements apply nationwide
<i>Preventive measures</i>	Evidence obligation: the contractor must require from the contracting partner certain information on the reliability of the subcontractor or temporary work agency. This obligation is waived if the contractor has 'good reason to trust' that the contracting partner will fulfil the obligations, for example, if it is a public institution or public limited company	-	<p>Housing construction agreement: any subcontracting agreement must include a provision which obliges the subcontractor and temporary work agency to respect the terms and conditions of employment in the sector's nationwide CLA</p> <p>Agreements of 2007 and 2008: the principal contractor is not liable if it has fulfilled the evidence obligation of the Liability Act</p>
<i>Repressive measures</i>	Negligence fee of €1,500–€15,000 in case of neglecting evidence obligation	<ul style="list-style-type: none"> • Criminal offence as discrimination based on nationality • Confiscation of the illegal benefit gained by paying illegally low wages; this claim can also be directed against a principal contractor or other subscriber; confiscation is not possible if the worker presents their wage claim 	Moral obligation to pay outstanding wages and holiday pay of the subcontractor's or temporary work agency's workers, if wages are earned on the principal contractor's site and declared within seven days after the due date
<i>Complaint mechanism for workers</i>	No	No	No
<i>Actors involved</i>	<ul style="list-style-type: none"> • Occupational safety and health authorities • Uusimaa Safety and Health District • Social partners, taxation and pension insurance authorities 	Public prosecutor for confiscation claims	Social partners who are parties to the agreements

France			
<i>Regulation</i> ³⁷	Liability regarding (bogus) subcontracting	Liability regarding temporary agency work	Liability regarding undeclared / illegal work
<i>Nature of the liability</i>	Joint liability of the client together with the contractors, only in relation to the contracting partner – no chain liability	User company is jointly liable if the temporary work agency defaults and its insurance is insufficient to pay the outstanding wages to the agency workers, as well as the social security contributions on their behalf	Joint liability of the client, together with the contractors, regarding the direct subcontracting relationship for all contracts for services worth more than €3,000, if these parties did not verify the requisite documents of their contractor. No chain liability applies
<i>Objectives</i>	Stabilising employment and regularising precarious forms of work	Strengthening the protection of temporary agency workers	Providing an additional guarantee for payment of wages, social security contributions and taxes in case of a fraudulent or missing contractor
<i>Scope of liability</i>	<ul style="list-style-type: none"> • Wages and related benefits such as holiday payments • Social security contributions • Coverage may be extended or limited depending on whether the work is performed at the workplace or worksite of principal contractor or client 	<ul style="list-style-type: none"> • Wages • Social security contributions 	<ul style="list-style-type: none"> • Taxes • Social security contributions • Penalties owed to workers
<i>Personal scope</i>	<ul style="list-style-type: none"> • Client, principal contractor or intermediary contractor • Workers of the subcontractor 	<ul style="list-style-type: none"> • User company • Temporary agency workers 	<ul style="list-style-type: none"> • Client – including individuals, local authorities and the state – together with the principal or only contractor • Workers, Inland Revenue, social security collecting authorities
<i>Territorial scope</i>	Applies throughout the country; also covers foreign contractors when active in France	Applies throughout the country; also covers temporary agency workers from foreign agencies when posting workers in France; however, to some extent foreign agencies may have fewer obligations	Applies throughout the country; also covers foreign contractors when active in France
<i>Preventive measures</i>	Obligation to screen the (sub)contractor: the recipient party – client or principal/intermediary contractor – must ensure that the subcontractor complies with employment law	<ul style="list-style-type: none"> • Temporary work agencies need to provide a guarantee of insurance that their workers' related obligations will be fulfilled even if the agency defaults • No legal obligation but possibility for the user company to require from the temporary work agency a certificate attesting the payment of social security contributions in order to diminish its chances of liability 	<ul style="list-style-type: none"> • Obligation for the recipient party to verify every six months whether the (sub)contractor has accomplished all declaration formalities required in order to provide services as an independent contractor or to employ others • Obligation for the foreign (sub)contractor or temporary work agency and/or recipient party or user company to deliver a declaration with information on posted workers to the competent regional labour inspectorate or employment director before the workers start to carry out their work

³⁷ In addition to the three arrangements outlined here, a liability of the client exists towards the subcontractors of an insolvent principal contractor. Indirectly, this may also benefit the workers of the subcontractor.

France (cont'd)			
<i>Regulation</i>	Liability regarding (bogus) subcontracting	Liability regarding temporary agency work	Liability regarding undeclared / illegal work
<i>Sanctions</i>	<ul style="list-style-type: none"> • The offence of taking recourse to bogus subcontracting is punishable by two years imprisonment and a fine of €30,000 • Taking recourse to trafficking through another is punishable by one year of imprisonment and a fine of €12,000 	Temporary closure of temporary work agency may be ordered by Court for a period of up to two months	<ul style="list-style-type: none"> • Recourse to illegal or undeclared work is punishable with three years of imprisonment and a fine of €45,000 • For specific categories, additional penal and administrative sanctions apply
<i>Complaint mechanism for workers /workers rights</i>	<ul style="list-style-type: none"> • Workers can directly sue the contracting party of their employer, or leave this to the trade unions • Trade unions may start law suit themselves on behalf of or for the benefit of the worker unless the worker opposes this action within two weeks after notification of the trade union's intentions 	No	<ul style="list-style-type: none"> • In case of termination of the undeclared worker's contract of employment, they are entitled to a lump sum equivalent to six months of salary • Illegal foreign workers are entitled to their wages for the time they have worked irregularly and to a lump sum equivalent to one month of salary • Trade unions may exercise foreign workers' rights, unless the worker is explicitly opposed to it
<i>Actors involved</i>	<ul style="list-style-type: none"> • Employees and their representatives • Employer, client or principal contractor and their representatives • Judges • Social security collecting authorities 	<ul style="list-style-type: none"> • Employees and their representatives • User company and temporary work agency • Judges • Social security collecting authorities 	<ul style="list-style-type: none"> • National Commission for the fight against fraud (DNLF) • Interministerial delegation for the fight against fraud • Several inspectorates • Concerning the declaration of posted workers, bilaterally agreed cooperation with authorities of some other Member States • Social partners

Germany			
<i>Regulation</i>	Liability provisions for tax obligations in construction	Liability provision for social security contributions	Liability provision for minimum wages, holiday payments and social funds payments
<i>Nature of the liability</i>	<p>No real chain liability but only in relation to the contracting partner – in other words, contractual liability – irrespective of whether the parties are part of, and on which level they are part of, a subcontracting chain</p> <p>The recipient of the service is not liable if the provider has shown an exemption certificate the legitimacy of which can be trusted</p>	<p>Joint and several liability under certain conditions, such as when the transaction aims to circumvent the law, and only from a total value of building services of €500,000 or more</p> <p>A special liability regime exists for user companies of temporary work agencies</p>	<p>Unconditional chain liability, that is, joint and several liability. Hence, no need arises to first sue and try execution of rights against the direct contracting party</p>
<i>Objectives</i>	<p>Preventing distortions of competition through undeclared work and securing tax payments, including by foreign service providers</p>	<p>Combating undeclared work, including in relation to foreign service providers</p>	<p>Improving the carefulness of principal contractors when choosing their subcontractors, protecting German SMEs against unfair competition by subcontractors from ‘cheap-wage countries’ and combating unemployment in German labour market</p>
<i>Scope of liability</i>	<p>Tax on compensation for construction work, including wage tax</p>	<p>Social security contributions, limited to building contracts with a value above €500,000</p>	<p>Minimum wages and social funds payments, including holiday payments</p>
<i>Personal scope</i>	<ul style="list-style-type: none"> • Recipients or clients of the building work or service carried out by the provider or contracting party, in relation to the wage tax of the provider’s employees • All workers employed by provider • Inland Revenue 	<ul style="list-style-type: none"> • Principal and, under certain conditions, other contractors in the subcontracting chain • All workers employed by provider • Competent health insurance collecting agencies 	<ul style="list-style-type: none"> • Principal and other contractors in the subcontracting chain except private individuals, building owners and administrative bodies • Workers, including posted workers, employed by the subcontractor • Joint institution of social partners regarding social funds and holiday payments (ULAK)
<i>Territorial scope</i>	<p>Applies throughout the country; also covers foreign contractors when active in Germany</p>	<p>Applies throughout the country; also covers foreign contractors or agencies when active in Germany</p>	<p>Applies throughout the country; also covers foreign contractors when active in Germany</p>
<i>Preventive measures</i>	<p>Obligation to take due care:</p> <p>The recipient contractor may require from the contracting partner a valid exemption certificate. Moreover, the recipient must verify whether it can trust that the certificate is not obtained by unfair means or false statements</p> <p>If no certificate is submitted, the recipient party has to withhold 15% of the remuneration paid to the provider and is responsible for the tax withholding and transferring it to Inland Revenue</p>	<p>Principal contractor may be exempted from liability if it shows to the competent authority proof of the reliability of the contracting party, for instance, by submitting valid certificates of good payment behaviour, contractual commitments or own statements of the provider</p> <p>Principal contractor has an information obligation at the request of the competent authority</p>	<p>Obligation to take due care:</p> <p>The principal contractor should ask for written confirmation from the subcontractor that it and any other subcontractors in the chain will respect the terms and conditions of employment in the sector’s generally applicable collective agreement</p> <p>In case of irregularities, the principal contractor is obliged to make further investigations</p> <p>Specific rules arise regarding public procurement</p> <p>Several self-regulatory instruments exist to limit liability, such as retaining the remuneration and declarations from the workers concerned as evidence that the subcontractor has paid their wages</p>

Germany (cont'd)			
<i>Regulation</i>	Liability provisions for tax obligations in construction	Liability provision for social security contributions	Liability provision for minimum wages, holiday payments and social funds payments
<i>Sanctions</i>	The recipient party is liable for arrears of withholding taxes. This is seen as an administrative offence incurring a fine of up to €25,000	Recipient is liable for social security debts of the provider as subcontractor or temporary work agency, and also for delay surcharges and interest	<ul style="list-style-type: none"> • Principal contractor and any intermediary contractor above the defaulting subcontractor in the chain are jointly liable for back payments to the workers concerned and/or to the ULAK • Penal sanction in case of negligent ignorance of the principal contractor or client • Administrative fine of up to €500,000 for ignoring obligation to take due care
<i>Complaint mechanism for workers</i>	No	No, but the worker may inform the competent authority about the non-payment of social security contributions by their employer	<ul style="list-style-type: none"> • The workers can sue directly the principal contractor or other contractors above the employer in the chain • Trade unions and German labour court may provide legal aid or assistance • Work council of principal contractor has the right to inform workers of the subcontractor about their rights
<i>Actors involved</i>	<ul style="list-style-type: none"> • Inland Revenue office with competence for the service recipient • Contracting parties 	<ul style="list-style-type: none"> • Collecting agencies of the competent health insurance • Cooperation with other authorities to combat undeclared work • Contractors 	<ul style="list-style-type: none"> • Workers and their representatives • Joint institution of social partners (ULAK) • Work council of principal contractor • Principal and subcontractors in the chain • Labour Court

Liability in subcontracting processes in the European construction sector

Italy

<i>Regulation</i>	Liability Acts/decrees	Tripartite regulation of contribution payment
<i>Nature of the liability</i>	Liability in contracting and subcontracting arrangements	Single Insurance Contribution Payment Certificate (DURC); mandatory in construction
<i>Objectives</i>	Safeguarding workers' rights and free competition between companies, ensuring transparency of the labour market and combating abuse of posted workers in the context of cross-border subcontracting	Enhancing the effectiveness of the legal liability framework in practice
<i>Scope of liability</i>	<ul style="list-style-type: none"> • Wage tax (only regarding subcontracts) • Social security contributions • Wages • Holiday payments • Social fund payments • Injuries 	Contributions for holiday payments, pensions and health insurance against occupational accidents in the construction sector
<i>Personal scope</i>	<ul style="list-style-type: none"> • Client • Contractor is jointly and severally liable, together with the subcontractor, with regard to the employees of the subcontractor 	Principal contractors
<i>Territorial scope</i>	Applies throughout the country and activities abroad pursuant to Italian jurisdiction; also covers foreign contractors or agencies active in Italy	Registration applies nationwide
<i>Preventive measures</i>	It is up to the client to complete all the operations and implement all the verifications necessary to avoid being involved in the effects of joint and several liability and thus having to sustain high economic costs. This applies even in the case of the preparation, drafting and signing of contracting or subcontracting agreements	<p>In public contracting arrangements, the DURC is one of the documents necessary for awarding the contract. Companies that are unable to furnish this certificate are excluded from participating in public calls for tender</p> <p>In construction, all contracting and subcontracting construction companies are required to furnish a DURC prior to commencement of any work subject to a contract</p>
<i>Sanctions</i>	With the exception of the DURC in the construction sector, no other penalties or sanctions aiming to expose the failure to pay wages, social security contributions and taxes by participants in the subcontracting chain seem to have been legally regulated	An obligation exists to pay interest on arrears to the Construction Workers' Fund, according to the provisions of the CLA. Payment of administrative sanctions and interest is also required in respect of the additional provisions of the various social security and national insurance authorities
<i>Complaint mechanism for workers</i>	The subcontractor's employees can take action against the contractor and client, independently of the relationship between the subcontractor(s) and client. It is obligatory to attempt reconciliation at the Provincial Labour Office prior to commencing legal action	-
<i>Actors involved</i>	<ul style="list-style-type: none"> • Labour inspectorate • Inland Revenue • Social security authorities 	<ul style="list-style-type: none"> • Joint social fund • National Social Security Institute • National Insurance Institute for Industrial Accidents

Liability in subcontracting processes in the European construction sector

Netherlands		
<i>Regulation</i>	Wages and Salaries Tax and Social Security Contributions Act³⁸	Generally applicable collective labour agreement for the construction industry (CLA)
<i>Nature of the liability</i>	Joint and several liability, that is, chain liability	No real liability, but only a social clause
<i>Objectives</i>	Combating unreliable temporary work agencies and subcontractors, the abuse of legal persons and unfair competition	Extending compliance to the correct wage levels and other labour conditions as stipulated in the CLA
<i>Scope of liability</i>	<ul style="list-style-type: none"> • Wage tax • Social security contributions 	All material obligations deriving from the CLA, such as wages and paid holidays
<i>Personal scope</i>	<ul style="list-style-type: none"> • Subcontracting: (principal) contractor • Temporary work: user company 	<ul style="list-style-type: none"> • Subcontracting: principal contractors in construction sector ('employer') • Temporary work: user companies in construction sector ('employer')
<i>Territorial scope</i>	<ul style="list-style-type: none"> • Applies partly to foreign (sub)contractors or temporary work agencies when active in the Netherlands, but only when Dutch social security or tax law applies to the foreign or Dutch employees involved • Rules may also apply when the work is carried out abroad by Dutch subcontractors 	Generally applicable, which means that it must be observed by all undertakings employing workers in the Netherlands in the construction sector. This includes foreign employers that, with their own employees, carry out work in the Netherlands
<i>Preventive measures</i>	No legal obligations, but several self-regulatory instruments for the user companies and contractors: <ul style="list-style-type: none"> • screening of the supplier or (sub)contractor • use of a guarantee account (G-account) or direct payment into an account of the Inland Revenue (deposit) • selection of an accredited temporary work agency 	<ul style="list-style-type: none"> • Employer is obliged to monitor compliance of the CLA provisions in all individual employment contracts covered by the agreement • Employer may only contract subcontractors on condition that they apply the CLA provisions to their employees
<i>Sanctions</i>	<ul style="list-style-type: none"> • No fines • Transfers from one G-account to another which are not based on any subcontracting or hiring of workers must be refunded by the receiving G-account holder • In case of abuse, the Inland Revenue can withdraw the G-account or deposit of the (sub)contractor or temporary work agency 	<ul style="list-style-type: none"> • No sanctions are stated in case of non-compliance by the principal contractor • Employee of the subcontractor may start judicial proceedings; it is uncertain if a claim against the principal contractor can be based on the CLA • In some situations, the user company might be held liable through tort law
<i>Complaint mechanism for workers</i>	No	<ul style="list-style-type: none"> • Employee may start judicial proceedings; it is uncertain whether a claim is possible on the basis of the CLA social clause • Trade unions may offer legal aid, represent the employee, and/or start judicial proceedings in their own interest as party to the CLA • Employee may lodge complaint at the Labour Inspectorate
<i>Actors involved</i>	The Inland Revenue, as a public actor, is involved in the application and practical implementation of the rules, assisted by the Ministry of Social Affairs and Employment, acting as the Directorate for the Labour Market	<ul style="list-style-type: none"> • No supervising authorities involved • Trade unions are entitled to defend the individual rights of the employees of the subcontractors, as well as to start judicial proceedings on the basis of their own capacity as CLA parties

³⁸ The provisions are laid down in Articles 34 and 35 of the Collection of State Taxes Act 1990.

Spain

<i>Regulation</i>	Workers' Statute	Law on subcontracting in construction industry	General tax law
<i>Nature of the liability</i>	<ul style="list-style-type: none"> • Subcontracting: joint and several liability; chain liability • Temporary employment: subsidiary liability, which becomes a joint liability if certain provisions has been infringed, such as the illegal posting of workers 	Joint and several liability; chain liability; applies only to subcontracting in the construction sector	Subsidiary liability
<i>Objectives</i>	General objectives are protecting workers and ensuring compliance with the regulations by all companies involved in the subcontracting process. Furthermore, the Law on subcontracting in construction industry aims to improve working conditions, reduce accidents, promote quality and solvency of companies in construction, and introduce a mechanism of transparency on worksites – as a result of limiting the amount of subcontracting and increasing the control of it		
<i>Scope of liability</i>	<ul style="list-style-type: none"> • Wages • Social security contributions 	<ul style="list-style-type: none"> • Wages • Social security contributions 	Tax debt regarding workers of subcontractor
<i>Personal scope</i>	<ul style="list-style-type: none"> • Principal contractor, but only if the subcontracted work falls within the scope of the principal's 'own activity' • Developer if acting in the capacity of a contractor • User company 	(Principal) contractor must monitor compliance with its provisions by the subcontracted companies or self-employed persons	(Principal) contractors which (sub)contract works or services, falling within the scope of their principal economic activity
<i>Territorial scope</i>	<ul style="list-style-type: none"> • Also covers foreign contractors and temporary work agencies when active in Spain, but only when Spanish social security or tax law applies to the foreign and Spanish employees involved • Principal contractors and user companies established in Spain have the same obligations towards posted workers as towards domestic workers, according to Law 45/1995 on the posting of workers 		
<i>Preventive measures</i>	<ul style="list-style-type: none"> • Temporary employment is not allowed for work particularly hazardous to health and safety, so most of the construction work is excluded • Social security contributions: the contractor requests a tax clearance certificate; it is common practice for the contractor to certify compliance with obligations on a monthly basis • Wages: no legal mechanism; it is common practice for the contractor to carry out regular compliance checks on subcontractors 	<ul style="list-style-type: none"> • Monitoring and surveillance obligations: certification of adequate training and organisation in the area of occupational risk prevention, issued by the Register of Accredited Companies • No more than three vertical levels in the chain 	No liability if the (sub)contractor provides the payer with a clearance certificate issued by the relevant tax authorities during the 12 months preceding payment of each invoice
<i>Sanctions</i>	<ul style="list-style-type: none"> • Financial penalties (fines) • Wages: if, after a formal request, payment is not forthcoming, workers may take legal action jointly against their own company and the corresponding contractor • Temporary employment: in case of illegal posting of workers, the transferred workers are entitled to demand permanent employment with either company 	<ul style="list-style-type: none"> • Financial penalties (fines) • Wages: see left column • According to the 4th General collective agreement for the construction sector, non-wage compensation in the event of death or serious forms of disability resulting from an occupational accident or illness 	Financial penalties (fines)

Spain (cont'd)

<i>Regulation</i>	Workers' Statute	Law on subcontracting in construction industry	General tax law
<i>Complaint mechanism for workers /workers rights</i>	<ul style="list-style-type: none"> • Works Council is entitled to monitor compliance with labour and social security regulations, and to lodge complaints through legal channels with the employer and the competent bodies or courts • Extrajudicial settlement of disputes, managed by the autonomous Communities competent to deal with cases of joint liability 	-	
<i>Actors involved</i>	<ul style="list-style-type: none"> • Labour and Social Security Inspectorate • Complaints can be communicated to the social partners • Through the Works Council, the trade unions are entitled to monitor working conditions • Penalty decisions are taken by the administration or court order 		<ul style="list-style-type: none"> • Public administration • Penalty decisions are taken by the administration or court order