

Final Study

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Chapter 1 Introduction

I. Background/policy context of the project

Since the late 1980s, the Member States of the European Union have witnessed a rapid growth of subcontracting as a method for firms and organisations to externalise certain tasks, encompassing increasingly long and sometimes parallel chains of interconnected companies. Due to the steadily evolving integration and enlargement of the internal market, leading to a greater movement of capital and labour across countries, subcontracting chains more and more often involve companies from different Member States. The phenomenon is particularly widespread in the construction sector, but it is also a common feature of other economic sectors such as transport, tourism or the cleaning industry. On the one hand, subcontracting has been encouraged by national and European policy makers and stakeholders because of the flexibility it creates for companies, which was deemed to benefit economic activity and job creation. On the other hand, the growing use of subcontracting especially in labour intensive industries led to concerns about the possible deterioration of workers' rights at the lower ends of long subcontracting chains, since the client and/or the principal contractor have no direct legal and social responsibility for the payment of wages, taxes and social security contributions on behalf of the employees of their subcontractors.

The European Commission has addressed this issue in the 2006 Green Paper on 'Modernising labour law to meet the challenges of the 21st century' and in its Communication of 2007 on the outcome of the EU-wide public consultation on the green paper. The latter reflected the conflicting opinions of various stakeholders about the systems of joint and several liability adopted by several Member States to tackle the problematic protection of workers' rights in subcontracting processes. The question whether such joint and several liability arrangements are in accordance with Community law, in particular the free provision of services in the internal market, was raised in two judgements of the European Court of Justice in 2004 and 2006. In the Wolff-Müller case (C-60/03), the Court ruled that the German liability scheme for wage payments could be assessed (under certain conditions) as a justified measure, whereas the Belgium scheme of joint liability for tax debts was deemed to be a disproportionate and thus an unjustified measure in the *Commission v Belgium* case (C-433/04).

Meanwhile, the issue of workers' rights protection in subcontracting processes also caused debate in the European Parliament, which adopted several resolutions on the issue. The last one, dating from 2009, called on the Commission to develop a legal instrument introducing joint and several liability for general or principal undertakings. Indeed, by adopting Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals, the EU legislator did for the first time introduce chain liability rules in the framework of subcontracting processes. Where the employer is a subcontractor, the Directive, under certain conditions, provides for a mechanism of joint and several liability with respect to financial sanctions as well as back payments relating to outstanding remuneration; liability may also be extended to those in the subcontracting chain who knew that the subcontractor employed illegally staying third-country nationals.

In its resolution of 2009, the European Parliament also asked the European Commission to launch a cross-sectoral impact assessment on the added value and feasibility of such an instrument at Community level, referring to the study carried out in 2008 by the European Foundation for the Improvement of Living and Working Conditions (Dublin) on 'Liability in subcontracting processes in the European construction sector' (hereinafter 'the Dublin study'). The Dublin study identified eight Member States where legislative and/or self-regulatory instruments on joint and several liability in subcontracting chains have been introduced. The study was limited to the construction sector and did therefore neither cover possible arrangements in other sectors nor protective measures which are neither part of nor linked to any liability scheme. One of the study's findings was that most of the liability arrangements did not seem to be very effective in the protection of workers' rights in cross-border subcontracting processes.

In this regard, Directive 1996/71¹ is of specific relevance. This so-called Posting of Workers Directive (hereinafter PWD) sets the employment conditions of workers who are temporarily posted to provide services in a Member State different from the one where they have their original employment contract. It establishes a hard core of clearly defined terms and conditions of work and employment for minimum protection of workers (laid down in Article 3 (1) a - g) that must be complied with by the service provider (for the purpose of this study: the subcontractor) in the host Member State. So, the PWD establishes for which subject matters mandatory (minimum) local labour standards must be fulfilled by the employer vis-à-vis the workers he posts in e.g. the framework of providing cross-border services in his capacity as a subcontractor.

Despite the protection offered by the PWD, the phenomenon of the posting of workers in the framework of the provision of services still raises complex issues that have made this one of the most controversial aspects of EU labour legislation. Especially after the 2004 enlargement, the difficulties with the application of the PWD have become more numerous, in particular in situations where transitional measures with respect to the free movement of workers were applied. Moreover, the judgements of the European Court of Justice in the Viking, Laval, Rüffert and Commission vs Luxembourg cases gave rise to an intense debate between EU and national policy makers, academics and social partners on the interpretation of the PWD, as well as more generally on their consequences for the protection of workers' rights and the right to take collective action by trade unions.

In this context, several research projects were launched by or supported by the EC, which are closely connected to the cross-border aspects of the topic covered by the present study.² The impression that posted workers may be vulnerable given their situation (temporary employment in a foreign country, difficulty to obtain proper representation, lack of knowledge of local laws, institutions and language) was clearly confirmed by the commissioned or supported research and recommendations that were made to address identified shortcomings. In the meantime, the EC's Single Market Action Plan adopted as one of its key actions "Legislation aimed at improving and reinforcing the transposition, implementation and enforcement in practice of the Posting of Workers Directive, which will include measures to prevent and sanction any abuse and circumvention of the applicable rules, together with legislation aimed at clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights."³ An impact assessment study is currently being undertaken.

For the situation of posted workers involved in subcontracting processes, the studies by Van Hoek and Houwerzijl on the implementation, application and enforcement of the Posting of Workers Directive in all 27 Member States are of particular relevance.⁴ In these two legal studies, firstly a detailed overview can be found of the obligations of the direct employer (for the purposes of the current study: the subcontractor) with regard to his cross-border posted workers. Where appropriate, explicit reference is made to these reports, under the abbreviation PWD1 and PWD2.⁵

¹ Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

² These projects resulted in the following studies: "Posted workers in the European Union", by EIRO October 2010; "The legal aspects of the posting of workers in the framework of the provision of services in the European Union", by Aukje van Hoek and Mijke Houwerzijl, March 2011; "Economic and social effects associated with the phenomenon of posting of workers in the EU", by IDEA consult/Ecorys, March 2011; "In search of cheap labour in Europe", by CLR/EFBWW, December 2010; "Information delivered as regards posted workers", by Fabienne Müller/ Strasbourg, October 2010; "Joining up in the fight against undeclared work in Europe. Feasibility study on establishing a European platform for cooperation between labour inspectorates, and other relevant monitoring and enforcement bodies, to prevent and fight undeclared work" by Regioplan, December 2010.

³ COM (2011) 206, April 2011.

⁴ See for the 'PWD1 study' of 31 March 2011: ec.europa.eu/social/BlobServlet?docId=6677&langId=en. This study concerns the following 12 EU Member States: BE, DE, DK, EE, FR, IT, LU, NL, PL, RO, SE, UK. The complementary PWD2 study of November 2011 on the other 15 Member States (AT, BG, CY, CZ, EL, ES, FI, HU, IE, LT, LV, MT, PT, SI, SK) is not yet published.

⁵ See in particular section 2.3 of PWD1 and section 2.3 of PWD2.

Norway is not included in the PWD1 and PWD2 studies. Therefore, we provide here a brief description of the extent to which labour standards in Norway as a host country apply to posted workers. In this country, the General Applicability Act (GAA) may be seen as a statutory machinery for fixing minimum standards, including minimum wages. The Act itself does not provide for any substantive rules, but grants devolved legislative power to issue regulations regarding terms and conditions of employment to *Tariffnemnda* – an independent administrative law body, with representation from the relevant social partners. These regulations apply to all employees, domestic and foreign, irrespective of whether they are posted workers or not and regardless of whether they are EU/EEA or third country nationals. The General Application Act was adopted in 1993 with a view to counteracting social dumping and safeguarding prevailing standards of wages and working conditions. The PWD was implemented in 2000 by, inter alia, separate Regulations on Posted Workers. These Regulations refer to the General Application Act with regard to pay. In case of cross-border posting *Tariffnemnda* may only extend minimum wage standards in collective agreements.

II. Aims, method and outline of the study

A. Aims and outline of the study

The overall objective of this project is to describe, analyse and assess the aims, objectives, functioning and effectiveness of existing mechanisms, notably joint and several liability and chain liability schemes, with respect to ensuring the protection of workers' rights in subcontracting processes in the EU and Norway, understood in the broadest possible way. Subcontracting refers to situations where an entity (B) contracts out to another entity (C) the provision of goods or services for its own needs. This includes cases commonly denoted "outsourcing", i.e. where B's contracting-out to C is not directly linked to A having ordered the provision of certain goods or services by B.

On the basis of this comparative study, the analysis will further focus on the degree of effectiveness of provisions aimed at ensuring the protection of workers' rights in subcontracting processes and identify features, which are common to several Member States, as well as to their interaction with other existing instruments and mechanisms.

Finally, this study will also formulate recommendations for possible improvements in the protection of workers' rights in the framework of subcontracting, including in cross-border situations.

To these ends:

In Chapter 2, a comparative survey is given of (legislative, administrative and conventional) measures currently applied in the EU Member States and Norway, which were identified as aiming, directly or indirectly, at making actors other than the direct employer co-responsible or liable for ensuring the social protection of workers employed by undertakings acting as subcontractors for a client undertaking.

In Chapter 3 and 4, a detailed review of relevant national law on responsibility and joint and several liability in (cross-border) subcontracting processes is presented. For this reason, the measures and mechanisms applicable in a representative sample of 'core' countries were explored more in detail than the situation in the other countries. The 'core countries' are : Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg , the Netherlands, Norway, Poland, Spain, Sweden and United Kingdom.

Chapter 3 deals with the details of the relevant protective measures regarding workers in subcontracting processes, predominantly concerning wages and other employment conditions. The origin of legislation, objectives, coverage, types of tools (preventive measures and sanctions) and common features and

elements between the liability arrangements in the Member States are identified. Subsequently, Chapter 4 describes and analyses their degree of relevance and effectiveness in practice. Here again, we identify commonalities and differences and we assess the overall difficulties and best practices encountered in the application and enforcement of the national liability arrangements.

In Chapter 5, conclusions are drawn and recommendations are made as to the ways and means to ensure and/or improve the protection of the employment conditions of workers in subcontracting processes, including in cross-border situations, as well as the formulation of relevant mechanisms.

B. Research method

In light of the exploratory nature of the study, the research in all the countries studied (the 27 Member States and Norway) was based on qualitative review and analysis of primary sources such as legislative and self-regulatory measures, as well as secondary sources such as existing literature, (case) studies, policy statements, reports and publications by social partners and policy makers, relevant statistical data –if any – and case law.

Although in this manner a systematic review has been undertaken with a view to measures and mechanisms that make actors other than the direct employer co-responsible or liable for ensuring the social protection of workers in subcontracting processes, it must be noted here that the findings in some country studies are more often highlighted than others. The reason for this rather uneven spread of attention is that in many of the countries reviewed, the kind of responsibility/liability measures looked for are virtually non-existent. Hence, we would like to emphasise that all the country studies have contributed to the comparative overview and analysis in this study, also the ones which are not highlighted because not (m)any relevant measures were found.

Next to the abovementioned method of qualitative review and analysis of primary and secondary sources, information for the representative sample of 14 core countries was also collected by approaching the competent authorities and/or offices of the countries covered by the study, employers' associations, businesses and trade unions, especially in sectors where subcontracting is widespread (e.g. construction). For this purpose, the national experts conducted, where appropriate, face-to-face or telephone interviews with the national authorities, such as labour inspectors, the relevant social partners and other professional bodies involved (for an overview see Annex II) , based on questionnaires drafted by the lead researchers of this research project.

III. Definitions of key terminology used⁶

Below, we introduce the key terminology used in this report.

The actors involved in subcontracting processes

In terms of the parties involved, subcontracting processes usually feature a 'client', 'owner', 'principal contractor' and one or more 'subcontractors'.

⁶ Mainly drawing from Chapter 1 of the 'Dublin report', where, in turn, the definitions of the client, owner and contractor were drawn from the GAIPEC report of 1992 coordinated by FIEC on product liability in the construction industry.

The client

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).

The owner

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 does not permit this.

The contractor

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’.

The principal contractor

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 who is responsible for the entire building project, but who, 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’).

The subcontractors

The contractors hired by the principal contractor are known as the ‘subcontractors’, sometimes also referred to as intermediary contractors (apart from the last contractor in a chain).

The recipient

In their contractual relationship, the principal contractor and also the intermediary contractor in the chain are deemed the ‘recipient’ parties, who order and pay for the work or services. 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.

The provider

The subcontractor – who may also be an intermediary contractor – is considered the ‘provider’, who carries out the work or services requested.

Temporary work agencies (labour-only subcontracting)

Apart from outsourcing work to specialised subcontractors – who 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 under their supervision. In some sectors and/or countries, the practice of hiring workers from temporary work agencies is less accepted than in others. 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).

Agency worker

The term ‘agency worker’ is used to refer to those employed by temporary work agencies

Hirer/user company

The terms ‘hirer’ and ‘user company’ refer to the parties that hire the agency workers.

The subcontracting chain

Together, the principal contractor and all the subcontractors may be labelled as a 'subcontracting chain'. It is also possible that the client himself carries out, or could have carried out, part of the physical works. In this case, he may function in a double capacity as both the client and principal contractor towards (some of) the subcontractors.

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. Subcontracting chains may sometimes take the form of a multiple chain of production – a chain which has both lengthened and broadened.

These activities are carried out simultaneously or in several, subsequent phases. The chain can be seen as a hierarchical, socioeconomic dependency network, based on a linked series of contract and connections.

Liability

From the Dublin study it is known that the problems at the lower ends of a subcontracting chain have led to so-called liability arrangements in the eight Member States examined in that study. In the context of liability arrangements, relevant parties may include the 'guarantor', 'debtor' and 'creditor'.

Guarantor

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.

Debtor

A 'debtor' in the context of this study is someone who is in debt regarding the obligation to pay wages (social security contributions and income tax). In practice, this mostly concerns the subcontractor, being the employer of the employees involved.

Creditor

If the debtor does not fulfil the said obligations in respect of the 'creditor', he will therefore be indebted to this party – for instance to the employee, the social fund, the Inland Revenue, social security authorities. Thus, the creditor can be a person, company or institution to whom or which the money is owed.

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 in the subcontracting chain – often the principal contractor.

Chain liability

Sometimes, the liability is not only of a joint and several nature, but is a 'chain liability' as well. This means that the joint and several liability not only applies to the contracting party, but also to the whole chain. In the example cited above, 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.

Preventive measures

Several (soft and/or hard law) tools have been developed to either prevent the possibility for liability/responsibility among the relevant parties or to sanction the parties which did not follow the rules. Preventive tools may be divided into two main categories:

- measures seeking to check the general reliability of the subcontracting party;
- measures aiming to guarantee working conditions such as the payment of wages.

Sanctions

Parties who do not abide by the rules in place for the protection of workers' rights in subcontracting processes may be sanctioned through a number of means, notably back payment obligations, fines and/or alternative or additional penalties.

(Corporate) social responsibility

At several levels of governance actions are taken which may be labelled as (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. Contractor selection is of crucial importance in chain responsibility arrangements. For example, in the context of public procurement, Directive 2004/18/EC and Directive 2004/17/EC as well as Convention No. 94 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 clients, such as low pricing policies or tight deadlines, do not undermine the capacity of subcontractors to comply with relevant labour and social standards.

Effectiveness / effective impact / practical impact

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 regulation/mechanism 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 will be tackled in two ways: firstly, the interviews will be conducted with 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 will be used and referred to, such as case law or policy reports.

Chapter 2 Setting the scene

I. Introduction

This chapter consists of an overview of measures currently applied in the 27 EU Member States and Norway which were identified as aiming directly or indirectly at making actors other than the direct employer co-responsible or liable for ensuring the social protection of workers employed by undertakings acting as subcontractors for a client undertaking. For a more detailed perspective on existing responsibility/liability arrangements concerning employment law protection, we refer to Chapters 3 and 4.

For the purpose of the current Chapter, the 28 country experts gathered and analysed information on a wide range of protective measures, not only limited to wages and other working conditions, but also including social security contributions and income tax. The results of this exploration of relevant measures and mechanisms currently applied in the Member States and Norway are compiled below.

Although in this manner a representative picture is given with a view to measures and mechanisms that make actors other than the direct employer co-responsible or liable for ensuring the social protection of workers in subcontracting processes, it must be noted from the outset that the findings in some country studies are much more often highlighted than others. The reason for this rather uneven spread of attention is that in many of the countries reviewed, the kind of responsibility/liability measures we looked for are virtually non-existent.⁷ Hence, as already emphasised in Chapter 1-II B, it is important to note that all the country studies have contributed to the comparative analysis in this chapter, also the ones which are not (often) highlighted because not (m)any relevant measures were found.

The chapter is organised as follows. Since the national mechanisms are partly based on existing EU instruments, in the next section (Chapter 2-II) we identify relevant EU law in the context of responsibility/liability for employee protection in subcontracting processes. For the rest of this chapter we focus on applicable rules at the national level. One way to categorise the different measures and mechanisms is by their material scope. We did this in Chapter 2-III, where we subsequently present an overview of tools related to (minimum) wages, social funds, health & safety, social security premiums and income tax, as well as a category of functional equivalents/alternatives including corporate social responsibility. Next, in Chapter 2-IV, we provide an overview of measures from a different angle. Here, the measures are classified per group of workers or the client they aim at (illegal workers; temporary agency workers; procuring public entities). In Chapter 2-V, we take yet another point of view: here, we look at the (non-)existence of said measures from a country perspective. As some liability systems were the subject of review by the European Court of Justice, Chapter 2-VI consists of an analysis of this rather succinct case law, with the aim to find out what guidance the ECJ gives with respect to the possible benefits and drawbacks of such measures in place in the Member States. This may also be useful knowledge with respect to a possible introduction of an EU-wide liability system. The chapter ends with some concluding remarks (Chapter 2-VI).

II. Relevant measures at EU level

As was confirmed in the country reports, several provisions that directly or (more often) indirectly benefit workers involved in subcontracting processes are based on EU law. In particular the following Directives are relevant: Directive 89/391 (general framework on health & safety) and Directive 92/57 (regarding health

⁷ For more details see Chapter 2-V A, where the (non-)existence of responsibility/liability measures is looked at from a country perspective and also Chapter 2-VI and the schematic overview in Chapter 5-I.

&safety on temporary and mobile construction sites);⁸ Directive 2004/18 and 2004/17 (on public procurement);⁹ Directive 2008/104 (on temporary agency work, to be implemented before 5 December 2011)¹⁰ and Directive 2009/52 (sanctions on employment of illegally staying third-country national workers, including as an option joint & several liability, to be implemented before 19 June 2011).¹¹

Few country reports also mention legislation implementing Directive 80/987 (now repealed and replaced by Directive 2008/94 on employee rights in the event of insolvency of their employer) (IE),¹² legislation

⁸ Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work – OJ L 183, 29 June 1989, pp. 1-8. Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) – OJ L 245, 26 August 1992, pp. 6-22. In particular, article 6 of Directive 89/391/EEC states “4. Without prejudice to the other provisions of this Directive, where several undertakings share a work place, the employers shall cooperate in implementing the safety, health and occupational hygiene provisions and, taking into account the nature of the activities, shall coordinate their actions in matters of the protection and prevention of occupational risks, and shall inform one another and their respective workers and/or workers' representatives of these risks”. Furthermore, Article 8 of said Directive states:

“3. The employer shall:

(a) as soon as possible, inform all workers who are, or may be, exposed to serious and imminent danger of the risk involved and of the steps taken or to be taken as regards protection;

(b) take action and give instructions to enable workers in the event of serious, imminent and unavoidable danger to stop work and/or immediately to leave the work place and proceed to a place of safety;

(c) save in exceptional cases for reasons duly substantiated, refrain from asking workers to resume work in a working situation where there is still a serious and imminent danger.”.

Moreover, Article 10 of this Directive stipulates:

“2. The employer shall take appropriate measures so that employers of workers from any outside undertakings and/or establishments engaged in work in his undertaking and/or establishment receive, in accordance with national laws and/or practices, adequate information concerning the points referred to in paragraph 1 (a) and (b) which is to be provided to the workers in question.” Article 12 of Directive 89/391/EEC provides: “2. The employer shall ensure that workers from outside undertakings and/or establishments engaged in work in his undertaking and/or establishment have in fact received appropriate instructions regarding health and safety risks during their activities in his undertaking and/or establishment.”

Article 7 of Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) clearly states the responsibilities of clients, project supervisors and employers: “1. Where a client or project supervisor has appointed a coordinator or coordinators to perform the duties referred to in Articles 5 and 6 [regarding the duties of the coordinators for safety and health matters], this does not relieve the client or project supervisor of his responsibilities in that respect. 2. The implementation of Articles 5 and 6, and of paragraph 1 of this Article shall not affect the principle of employers' responsibility as provided for in Directive 89/391/EEC.”.

⁹ Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors – OJ L 134, 30 April 2004, pp. 1-113. Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts – OJ L 134, 30 April 2004, pp. 114-240.

¹⁰ Directive 2008/104/EC of 19 November 2008 on temporary agency work.

¹¹ Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals – OJ L 168, 30 June 2009, pp. 24-32.

¹² Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of the insolvency of their employer. This Directive protects the interests of employees in respect of old-age benefits, also of those employees who left the business before the insolvency occurred. In particular article 8 stipulates: Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes.

and/or case law based on Directive 2001/23 (consolidating the old Directives 98/50 and 77/187) on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses or undertakings (LU, MT),¹³ and legislation (partly) transposing Directives 2002/14/EC and Directives 98/59/EC and 2001/23/EC that bring obligations of information and consultation into play (NO, NL).

It is important to note that almost all relevant provisions in the Directives mentioned above only establish protection of worker's rights by defining obligations of the employer. This is not surprising, since said Directives are not specifically meant for the protection of workers employed by subcontractors. Instead, they aim at protecting workers in general or in a certain sector (the construction and the sector of the temporary work agency), or, in the case of Directives 2004/17 and 2004/18 the aim is coordination of procurement procedures. Although the focus of Directive 2009/52 is neither specifically on workers employed by subcontractors, the EU legislator did in this Directive for the first time introduce a *direct way of extending the responsibility/liability for protecting worker's rights* in subcontracting processes to others than the direct employer only.¹⁴ For this purpose, chain liability rules were adopted in the framework of subcontracting processes covering illegally staying employees with a third country nationality. Where their employer is a subcontractor, the Directive, under certain conditions, provides for a mechanism of joint and several liability with respect to financial sanctions as well as back payments relating to outstanding remuneration. The liability may also be extended to those contractors further in the subcontracting chain who knew that the subcontractor employed illegally staying third-country nationals.

Another important point to note from the outset is that this existing EU acquis of directives is based on minimum harmonisation. This means that Member States are free to stick to the lowest common denominator as provided by the set of rules in a directive. In fact, in several of the Member States which joined the EU in 2004 and 2007, the national implementation of said EU Directives was reported to be of a minimalist character – for instance (in LT), it was reported that the legislative provisions just repeat relevant provisions from the Directives with no particular emphasis on their implementation mechanisms in the national context. However, Member States can also choose to go beyond the degree of protection granted by a directive by introducing or maintaining rules with a higher level of protection.

See for instance the Preamble of Directive 2009/52, which states that:

As this Directive provides for minimum standards, Member States should remain free to adopt or maintain stricter sanctions and measures and impose stricter obligations on employers.

Hence, a uniform application of national law on the topic covered by said Directives is neither aimed at, nor guaranteed. As a consequence, great differences exist in the level of protection implemented and applied by the Member States.

¹³ The Acquired Rights Directive 2001/23/EC of 12 March 2001 ('Business Transfers Directive').

¹⁴ See article 8 Directive 2009/52:

"1. Where the employer is a subcontractor and without prejudice to the provisions of national law concerning the rights of contribution or recourse or to the provisions of national law in the field of social security, Member States shall ensure that the contractor of which the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay... any back payments (outstanding remuneration)... Here a direct contractual relationship is required.

2. Where the employer is a subcontractor, Member States shall ensure that the main contractor and any intermediate subcontractor, where they knew that the employing subcontractor employed illegally staying third-country nationals, may be liable to make the back- payments in addition to or in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor." Here there is a chain liability.

Finally, it must be noted that all Directives mentioned above primarily focus on establishing substantive rules to be implemented in the national legal orders. Although their scope may include situations with a cross-border element (or even specifically aim at that in the case of Directive 2009/52), no particular solutions are provided for problems that may arise in this context.

III. An overview of ‘general’ responsibility/liability measures

Below, we present an overview of measures establishing responsibility and/or liability of other parties than the direct employer with regard to (minimum) wages, social funds, health & safety, social security premiums and income tax, as well as any functional equivalents/alternatives, including corporate social responsibility (soft law codes of conduct).

The measures are partly of a statutory nature and partly embedded in collective agreements or in codes of conduct and other ‘soft law’ tools. Where we refer to ‘statutory law’, this is meant as a common denominator for Acts and Regulations.¹⁵ Where we refer to ‘collective agreements’, it must be noted that this term does cover various kinds of agreements that are not in use (in exactly the same way) in all Member States and Norway. In some countries (e.g. BE, NO¹⁶) national collective agreements exist. These contain ‘basic agreements’ on general and overarching issues, mostly concluded on the confederations level. Sometimes, specific agreements of an industry or part of an industry, setting out provisions on wages, working time, and other concrete terms and conditions, are also included (NO). However, in this study we always refer to such specific agreements as ‘sectoral agreements’, regardless of whether a country has or has not linked these to national collective agreements. Sometimes, mention may also be made of (subordinate) local collective agreements concluded at the workplace. A brief overview of collective labour law systems in the 27 Member States was recently given in the PWD1 and PWD2 studies.¹⁷

A. Measures regarding wages, including holiday payments¹⁸

With regard to the extension of responsibility and/or liability for wages to other parties than the employer of the employees involved in subcontracting processes, several instruments were identified in ten Member States in total, which may be distinguished in (full) chain liability and social clauses.

General wage liability arrangements

In eight countries (AT, DE, EL, ES, FI, IT, NL, NO) some kind of ‘general’ wage liability is established. With ‘general’ we mean here that the liability arrangement protects the wages of all workers employed by a subcontractor. This general wage liability may be enacted at a national or at a sectoral level. Next to this, in several Member States also ‘specific’ wage liability instruments exist, either limited to a specific group of

¹⁵ Definition taken from the Norwegian report by S. Evju. We also adopt his description of Acts, Regulations and Circulars: Whereas *Acts* are legislative instruments adopted by Parliament, *Regulations* are legislative instruments adopted by the government, by a Minister, or by an administrative body. Regulations may only be adopted in accordance with devolved (delegated) power in pursuance of an Act and are thus subordinate to Acts. *Circulars* etc are (internal) instructions / policy guidelines to the administrative bodies concerned.

¹⁶ In Norway a basic agreement contains provisions of a general nature and is designed to span all or most industries within the umbrella of the employer side organisation.

¹⁷ See section 2.3 of PWD1 and section 2.3 of PWD2.

¹⁸ See in the particular context of posted workers also section 3.6 of PWD1 from p. 72 onwards, and section 3.5 of PWD2 from p. 109 onwards.

workers (such as agency workers or illegal/undeclared workers) or in the framework of public procurement.¹⁹ These more specific tools are grouped together in Chapter 2-IV.

In six of these countries (AT, DE, EL, ES, IT, NO) general wage liability tools are based on statutory rules. Additional arrangements in collective agreements exist in Greece (only in the sandblasting profession) and Italy. Regarding Norway, the General Applicability Act (GAA) contains a joint and several chain liability. Hence, Norway uses a statutory tool, which can be invoked by social partners with regard to their specific collective agreements.

Applicable to all sectors

In Austria, a statutory liability regime regarding wages applies to all sectors, but it is not a full chain liability. There are in fact two different regimes depending on whether the subcontractor is based inside or outside the European Economic Area. If the subcontractor is based within the European Economic Area, a distinction is made between legitimate and illegitimate situations of subcontracting. In the latter case, a stricter regime of liability applies (see also below in Chapter 2-IV A).

Italy and Spain have enacted a statutory liability system for minimum wages encompassing all sectors of industry and binding all contractors in the chain. In the Italian and the Spanish construction sector additional requirements exist for the client and the contractors. The Italian law implementing the PWD, includes a special rule on joint and several liability for the Italian recipient with regard to the obligations of the foreign service provider.

Limited to one or more sectors

In Germany, the different rules on joint and several liability differ with respect to the sectors they apply to. The main provision on liability for minimum wage is in principle applicable to a wide category of industries, ranging from construction to industrial cleaning, postal delivery services, security services, special mining work, laundry services, waste management and education and training services.

In Greece, there are specific (mostly statutory, one conventional) rules regarding different branches of the economy such as construction, temporary agency employment, public works, etc. These rules cover responsibility/liability regarding wages, including holiday payments. In the Netherlands a liability arrangement is set up in several extended collective agreements (for a specific statutory minimum wage liability regarding agency workers, see below under Chapter 2-IV B).

Also in Finland, wage liability is incorporated in (only) some nation-wide collective agreements for instance in the construction industry. This liability of the principal contractor is however only a (albeit strong) moral obligation.²⁰

Not yet (fully) adopted and implemented

Next to the arrangements in the seven Member States mentioned, in Belgium the social partners and in particular the construction sector recently agreed to a kind of liability system with respect to the labour conditions of the employees of subcontractors including wages. However, the legal implementation is not yet finished.

Social clauses

Seven Member States (DK, FI, IE, IT, NL, NO, UK) are familiar with so-called 'social clauses' in collective labour agreements. In Danish collective agreements, through either a direct or an indirect clause, employees of foreign subcontractors often have to be treated like Danish employees. In Finland, several

¹⁹ For social clauses and/or liabilities in the context of public procurement law (AT, BE, DE, EL and NO), see below under Chapter 2-IV C. For social clauses and/or liabilities in the context of illegal work (e.g. FR, NL), see below under Chapter 2-IV A.

²⁰ See in this regard also the Dublin study, p. 30

collective agreements, for instance in the construction sector, state that a contract on subcontracting (including temporary agency work) must include a provision obliging the subcontractor (and the temporary work agency) to respect the sector's national collective agreement regarding the terms and conditions of employment. Also in the Irish and Italian construction sector and in some other branches (more or less far-reaching) social clauses are laid down in binding collective agreements.²¹

In the Netherlands, several generally applicable collective agreements contain 'social clauses' which impose on principal contractors the obligation to contract subcontractors only on the condition that they will apply the provisions of the collective agreement concerned to their employees. Under the General Application Act in Norway the client is under the obligation to inform a contractor of the duty to abide by the relevant provisions on wages and other terms and conditions of employment by the contractor himself and by all subcontractors, and to include this in the contract for the assignment.

In the UK, the main objectives of collective agreements in the construction industry are to maintain differentials for the differing trades and to detail all other agreed payments. They often provide a minimum rate for jobs which can be exceeded at site level. Overall, they have been the first means to maintain labour standards in the industry and apply to all workers, including posted and migrant workers, with the NAECI agreement in particular recognising that foreign workers have been used to undermine labour standards.

B. Measures regarding social fund payments²²

Responsibility/liability arrangements regarding social fund payments exist in five Member States (AT, BE, DE, IT and NL).

In Austria, a liability system is applied with regard to outstanding contributions to be paid to the Annual Leave and Severance Payment Fund by the subcontractor.

In Germany, a similar system exists with regard to the contributions to be paid to the holiday pay funds.

In Belgium, a liability system is enacted including social fund payments, combining this with liability for tax on wages and social security contributions.

In Italy, in the construction sector a tripartite regulation exists concerning contribution payments (Single Insurance Contribution Pay Certificate, abbrev. 'DURC') to e.g. social funds which contains a liability clause.

A generally applicable collective agreement in the Dutch construction industry establishes two social fund schemes (a vacation fund and a risk fund). The first scheme mentioned is strengthened by a guarantee scheme, which may be invoked by the employee in case his employer defaults – this also applies in case of subcontracting and temporary agency work. Moreover, the collective agreement establishes, in case of non-compliance with the collective agreement provisions, several liability of the recipient next to the supplier.

²¹ Under Part III of the Irish Industrial Relations Act 1946, collective agreements made between unions and employers that are registered with the Labour Court are legally binding. While many of these are company agreements, they can be applied to all employers and employees working in a particular sector or industry, so long as the parties to such agreements are 'substantially representative' of workers and employers in that sector. The most important of these so-called Registered Employment Agreements (REAs) are undoubtedly the REA for the Construction Industry and the related, but separate, REA for the Electrical Contracting Industry.

²² See in the particular context of posted workers also section 3.6 of PWD1 from p. 73 onwards, and section 3.5 of PWD2, p. 118.

C. Measures regarding occupational health & safety, including working time²³

With regard to health & safety, at least a certain minimum layer of responsibility of other actors in the subcontracting chain than the immediate employer is established all across the EU and Norway, thanks to relatively elaborate EU law in this field. Below, an impression is given of arrangements in several Member States which clearly shows how similarities and differences go hand in hand.²⁴ A distinction is made between measures which pertain to jointly securing health & safety at the workplace and measures which pertain to the prevention of or liability in case of industrial accidents.

Responsibilities and liability for a healthy and safe working environment

In Austria, the legislation on health and safety knows specific regulations containing the respective obligations of the employer-client and the employer-subcontractor, dealing with the exchange of information, coordination and cooperation, leading to a liability system. An elaborated system exists that deals with occupational health and safety. In this system, the contractor has certain obligations when employees of the subcontractor execute their work in their business premises. It is also foreseen that in case employees of the contractor and the subcontractor are working in a joint place of work, on a construction site or an external place of work, the employers have to cooperate regarding the implementation of the guidelines for the health and safety conditions. They do not only have to coordinate their activities, but they also have to inform each other as well as their employees about possible dangers. This can lead to certain obligations with liability aspects.

Also in Belgium, the legislation on health and safety knows specific regulations containing the respective obligations of the employer-client and the employer-subcontractor, dealing with the exchange of information, coordination and cooperation, leading to a liability system.

In Bulgaria, securing health and safety work conditions is a duty of the client who makes use of the workforce. For instance, natural persons and legal entities using workers made temporarily available by another company must notify the contractor/subcontractor-employer about the specific characteristics of the workplace, the professional hazards and the professional qualification required. In Estonia in the field of occupational health and safety, employers have specific obligations and responsibility when employees of at least two employers work at the workplace at the same time.

In Greece, regarding health & safety, several liability arrangements exist, most importantly in the construction sector and the shipbuilding sector.

In Spain, there are specific statutory obligations regarding health and safety in case of subcontracting. Non-compliance with these obligations also leads to joint and several liability. The latter (Act 32/2006) contains special rules for subcontracting in the construction sector.²⁵

In Hungary, responsibility for health and safety issues is in fact the only issue concerning employee protection in subcontracting processes at construction sites, which is widely discussed. The employers' liability for various types of damage is under debate regarding the contract between general contractors and subcontractors. Formerly, the subcontractor was in principle liable for any kind of damage caused. That situation changed when Hungary joined the EU in May 2004, as a ministerial decree regulated the 'minimal health and safety standards at construction sites and in the course of construction processes'. This decree

²³ See in the particular context of posted workers also section 3.7 of PWD1 from p. 78 onwards, and section 3.6 of PWD2

²⁴ For a more developed account of applicable arrangements in the field of health & safety, see Chapter 3-IV below.

²⁵ See for more information on the specific measure in the shipbuilding industry Chapter 3-IV B under 'additional measures'.

prescribes the nomination of a coordinator – that is, a natural person responsible for health and safety issues for the overall construction project; prior to the actual work, this individual's name must be reported to the Labour Inspectorate (*Országos Munkavédelemi és Munkaügyi Főfelügyelőség, OMMF*).

In Ireland, under the Construction Registered Employment Agreement, principal contractors are required to engage only 'approved' subcontractors, which they must ensure are compliant with e.g. health and safety legislation (section 10 of the Construction REA).²⁶

In Italy, the legislation provides for some specific obligations for the client and the contractor regarding health & safety aiming at preventing the risk that arises from the fact that two or more parties are involved. For example, the client (as every other contractor in the subcontracting chain) is held to check the technical and professional qualifications of the contractor (by means of a certificate of registration at the Chamber of Commerce and a certification delivered by the contractor him or herself). All employers involved in the chain of subcontracting must also cooperate in the implementation of prevention and protection measures that have to be taken and coordinate their activities informing each other, as well as eliminate or minimise the risks due to interference between the work of each undertaking. To this aim, the client is required to prepare the DUVRI (single document of interferential risk assessment), which lists all measures taken to combat the risk of interference. The contractor and subcontractor must also equip all workers with a special identification card.

In the report on Latvia, mention was made of requirements regarding a joint health & safety plan and the supervision of all workers of subcontractors employed at a construction site, including those subcontractors which are employed at a site in their capacity of a self-employed subcontractor. Furthermore, the law requires the joint and coordinated liability of all employers involved where several undertakings share a workplace or where an employer sends his workers to perform work in a workplace of another employer.

In Sweden, the client or user undertaking is directly responsible for the health and safety of employees of the subcontractor or the temporary work agency.

Responsibility for the prevention of and/or liability for industrial accidents

Although in France the client or user undertaking has no direct and automatic liability for accidents that occur at the workplace, he is responsible for the coordination of preventive measures (put in place by the (sub)contractor).

Notwithstanding the fact that in Greece liability arrangements are as a rule only regulated sector-specifically, Art. 8 of Act 551/1915, which provides that the client, the contractors and the subcontractors are jointly liable for compensation of workers in the event of an accident at work, seems to have a general personal scope.

In Italy, with regard to health and safety there is a joint liability for injuries suffered by the contractor's or subcontractors' employees.

In order to protect workers from accidents at work and occupational diseases in Lithuania, employers must cooperate and coordinate actions in the implementation of provisions of the legal acts concerning safety and health at work. Moreover, they must inform each other, the workers' representatives, the employers' representatives for safety and health at work, as well as the workers about possible dangers and risk factors. Where necessary, the employers must draw up a description of the procedure to coordinate cooperation and actions. Despite the lack of a clear liability regulated by the legislator, the case law gave a very broad interpretation to the provisions just mentioned. Both the Supreme Court of Lithuania and the

²⁶ For more information, e.g. on how principal contractors and 'approved' subcontractors in practice ensure compliance and how this is enforced, see in subsections C (preventive measures), p. 58 and D (sanctions), p. 61 of Chapter 3-II under 'conventional liability arrangements and (soft law) social clauses'.

Court of Appeal of Lithuania embraced the principle of several (proportional) liability of companies involved in the accident at work level. This means that, in practice, under certain circumstances not only the direct employer, but also other contractors and the principal contractor (and/or client) can be held responsible.

Regulation in the Netherlands makes the 'actual employer' (e.g. the contractor/user undertaking) responsible for the health and safety (i.e. working conditions and working time) of the hired/posted workers. There is a joint safety obligation and joint liability for the agency or company which posts the worker together with the user undertaking with regard to industrial accidents or work related diseases (in certain cases of subcontracting). Furthermore, there is a special liability for user undertakings regarding working time in cases of cross-border subcontracting.²⁷

D. Measures regarding tax on wages and social security contributions²⁸

In the field of tax on wages and social security contributions, *twelve* Member States have responsibility/liability arrangements in place. Measures that extend the liability for the fulfilment of employer's obligations in the field of both income tax and social security contributions are enacted in *six* Member States (AT, BE, DE, ES, IT and NL). *Four* other Member States (EL, FR, IT and LU) have such a system in place only regarding social security contributions. Below follows a brief description per category.²⁹ Next to this, two Member States have imposed a certain responsibility on the client and/or principal contractor (FI, IE).

Liability systems regarding both subject matters

AT knows a liability system with respect to the obligations of a subcontractor to pay social security contributions in the country, as well as with respect to tax on wages. This is also the case in Belgium, where a combined liability system deals with tax on wages and social security contributions and social fund payments. Dutch statutory rules stipulate a joint and several liability for social security contributions and income tax in case of subcontracting (including temporary agency work).

However, in Germany, Italy and Spain, two separate mechanisms exist with respect to liability for taxation of wages and social security contributions. In Germany, these are both limited to the construction sector.

In Austria the liability provided by Sect. 67a of the General Social Security Act is, in legal terms it is linked to Sect. 19(1a) of the Turnover Tax Act. The contractor is liable for all social security contributions of the subcontractor.³⁰ The liability of the contractor vis à vis the subcontractor is limited to a maximum of 20% of the wage paid. This liability is a direct liability. However, in some cases, the direct liability can become a chain liability: according to Sect. 67a(10) of the General Social Security Act, the liability of the contractor includes all (sub-)subcontractors, when the subcontracting is considered a transaction with the aim to circumvent the liability. This way, the contractor does not succeed to evade the liability by formally interposing a subcontractor between himself and a sub-subcontractor. Sect. 67a of the General Social Security Act provides two possibilities for the client to avoid liability: in the first place, when the subcontractor appears on the *HFU-Gesamtliste*, a comprehensive listing of the companies which are

²⁷ For more detailed information see Ch. 3-IV B, p.74, just above 'some additional measures'.

²⁸ For detailed information on liability arrangements regarding this subject matter in AT, BE, DE, FI, FR, IT, NL and ES (the 'Dublin countries'), see the Dublin report, Dublin 2008, Chapter 2.

²⁹ Although slightly more information is given on arrangements in the 'non-Dublin countries' presented under this heading (EL, IE and LU).

³⁰ These include not only the contributions for the statutory health, accident or pension insurance, but also contributions for the statutory unemployment insurance, for the insurance against non-payment in case of insolvency, and for the statutory licensed severance and retirement funds, the apportionment of the employee to the Federal Chamber of Labour, and the contribution for housing subsidies.

exempted from liability and, in the second place, a money transfer of 20% of the wage to the Service Centre. The confirmation provided for in Sect. 7 of the Guidelines for the Consistent Enforcement of the Insurers in the Area of the Employers' Liability 2011 doesn't exclude the contractor's liability, but limits it. *Sect. 82a of the Austrian Income Tax Act* provides for a liability of the contractor, which is linked to the liability according to Sect. 67a of the General Social Security Act, partially by a literal repetition, partially through a direct reference to Sect. 67a of the General Social Security Act, which shall ensure wage-related contributions, collected by the tax authorities (Sect. 82a of the Income Tax Act).³¹

Similar rules are provided by Article 30 bis of the RSZ-Act and the Code of Income Tax for Belgium³² and by § 28e para. 3a *Sozialgesetzbuch IV (SGB IV)* and by § 48 para. 1 of the Income Tax Act (*Einkommenssteuergesetz – EStG*) for Germany.

Again, these mechanisms are characterised by fierce limitations. In Austria, as well as in Belgium and in Germany, the liability for social security contributions and taxes is not only limited to a certain amount, relative to both the debt of the subcontractor as to the amount the client owes the latter. The scope is also limited to the construction sector.

The Netherlands have an interesting system: Articles 34 and 35 of the Collection of State Taxes Act 1990 (*Invorderingswet 1990* (Dutch abbrevv: IW) provide for the liability of the user firm or the principal contractor, relating to social security contributions and wage tax.³³ These provisions stipulate a joint and several liability for the user firm (client) as well as for the principal contractor for the whole chain of temporary work agencies and/ or (sub)contractors, who follow in line and who are at work on the same project at the building site, concerning their obligations about social security contributions and wage tax.³⁴ The liability does not apply in the case the whole chain is not culpable. Employers may escape this liability by opening a special blocked account, known as a Guarantee account or G-account. This is a blocked bank account in the agency's or subcontractor's name. This account may only be used for paying social security contributions and wage taxes to the Inland Revenue. User companies and (principal) contractors that use

³¹ The liability under the Social Security and Income Tax Act are in some ways similar to the liability mechanisms provided for in Belgium and Germany (cf. *infra*).

³² In the case *Commission v Belgium* (ECJ 9 November 2006, case C-433/04), the Court condemned at least the fiscal part of an older version of this Belgium liability arrangement as contrary to the free movement of services. Although the prevention of tax avoidance and the need for effective fiscal supervision may be considered an overriding reason of general interest, this is not true for a general presumption of tax avoidance or fraud (point 35). Hence, the ECJ ruled that the need to combat tax fraud is not sufficient to justify application of the withholding obligation and joint liability, generally and on a precautionary basis, to all service providers who are not established and not registered in Belgium, while some of those providers are in principle not liable for the mentioned taxes and deductions (point 37). As they apply in an automatic and unconditional manner, the disputed measures do not allow any account to be taken of the individual circumstances of service providers who are not established and not registered in Belgium (point 38). See on this judgement also Chapter 2-VI.

³³ In the case of *Rheinhold and Mahla* (ECJ 18 May 1995, case C-327/92), the Court decided that the old Article 16 of the CSV – now replaced by Articles 34 and 35 of the IW – did not fall within the scope of Regulation (EEC) No. 1408/71. See dictum in point 34 where the Court states that provisions which make a main contractor liable for social security contributions left unpaid by a defaulting subcontractor do not fall within the scope of Regulation 1408/71 (now: Regulation 833/2004). Hence, it has been concluded from this judgement that when a Dutch subcontractor carries out work abroad, the principal contractor established abroad could probably not be deemed liable for Dutch social security contributions not deducted by Dutch subcontractors. The ECJ stated that the situation could be different when it is indisputably established that fraud is committed by the principal contractor. 'Such might be the case if it were proved that the latter was in fact the true employer of the workforce for which social security liabilities remained unpaid' (point 31). See on this judgement also Chapter 2-VI.

³⁴ According to art. 49 (1) IW, the (principal) contractor or user company or any entity upward in the chain can only be held liable if the employer – as the party which is primarily responsible for the payment of wages to its employees – fails to meet its financial obligations in relation to the Inland Revenue.

the G-account for the payment of social security contributions and wage taxes are protected against liability for the portion paid, provided that they observe the rules pertaining to G-account transfers.

Furthermore in the Netherlands, Art. 36b IW, in force since 1 January 2008, provides for an additional provision concerning the liability of directors of user companies and principal contractors for their liability debt regarding the chain liability for social security contributions and wage tax of the principal contractor and the user company, ensuing from art. 34 and art. 35 IW. Art. 36b stipulates a joint and several liability for every director of a legal person that is subject to corporation tax, for the liability debt of the latter legal person, deriving from art. 34 or art. 35 IW. The non-exculpable violation of the obligation to report the incapacity to pay the liability debt, leads to the non-refutable suspicion of manifestly improper management by the director, which is the base for the liability. With the introduction of art. 36b IW the legislator aimed at terminating the abusive practices of mala fide subcontractors and temporary work agencies, which tried to avoid liability for social security contributions and wage tax by inserting a legal person. With this provision, the tax collector has a new instrument in order to hold liable mala fide directors of legal persons and to have recourse against the aforementioned.

Spain has enacted a statutory liability system for social security contributions encompassing all sectors of industry and binding all contractors in the chain. Article 127 of the Spanish Social Security Law (Royal Legislative Decree 1/1994, 20 June) establishes a liability for the client regarding the debts of Social Security arising during the term of the subcontracting. In contrast to the liability for wages, the liability for social security contributions applies to all forms of subcontracting and “own activity” criterion does not apply. This responsibility does not affect Social Security contributions, but only the benefits the employer has been held responsible. In order to generate this responsibility, the principal debtor must have been declared totally or partially insolvent. Furthermore, Article 43(1)(f) of Law 58/2003, 17 December, on General Tax, also provides for a liability of the client in relation to tax debts. In particular, this article states that individuals or entities that contract or subcontract the execution of works or the provision of services related to its main economic activity have secondary liability for tax obligations relating to taxes to be passed or amounts to be retained to workers, professionals and other entrepreneurs for these works or services. Again in contrast with the liability for wages, the liability for taxes is *not* strictly limited to the subcontracting of the “own activity” of the client.

The Italian regulations with regard to minimum wages also apply to social security contributions. Article 29 paragraph 2 extends the chain liability to the payment of social security contributions. In this case the creditor is the Social Security Institute to whom contributions have to be paid (and not the worker as the law incorrectly states) and who can act against the client for contributions due not paid by the contractor and against both of them for contributions not paid by subcontractors, under the same rules regarding employees’ wages.

Article 35, paragraph 28 Law Decree (D.L.) 4 July 2006, n.223, “Urgent provisions for the economic and social revitalization, for the control and rationalization of public spending, and interventions on public income and on contrast of tax evasion” states: “the contractor is jointly and severally liable together with the subcontractor for the retention and payment of withholding tax on income from dependent labour”.

The joint and several liability for the tax obligations integrates the provisions of Article 29, paragraph 2, with some important differences. First of all, the joint and several liability applies to taxes on “income from dependent labour”. It does not apply to the income of the self-employed protected by the joint and several liability in Article 29 paragraph 2. Secondly, it is a direct liability: the bond applies only to contractor and does not extend to the entire chain of subcontracting. Especially the principal client is excluded. Furthermore, the liability for taxes is not subject to the limitation period of two years, but to the normal time limit for the action in court.

Liability system regarding social security

In Greece, in the context of public procurement (see also Chapter 2-IV C below), regarding public services and private companies employing more than 50 employees, the (principal) contractor and the subcontractor are jointly and severally liable towards workers concerning e.g. their social security contributions. This law seems to provide a broader liability mechanisms, yet still limited to the construction sector: Article 8 of Law 1846/1951 (OJ/A/179/1951) provides that the owner of the house or the building as well as the client of a technical project are liable for social security contributions of their and of subcontractors' workers.

Joint liability of the client together with the principal contractor and subcontractor for the payment of e.g. social security contributions due to the subcontractors' workers is established in France, limited to the case of recourse to illegal work (see also Chapter 2-IV A below). This liability is a direct liability that does not run down the chain. Illegal work mainly encompasses three different circumstances corresponding to three different criminal offences: undeclared work, bogus subcontracting and trafficking.

The Social Security Code of Luxembourg provides for a joint and several liability between the main contractor and subcontractors for the payment of social security contributions and for other obligations which the Social Security Code and its regulations imposes on them.

Responsibility

In Finland, the client has an obligation to gather certain evidence proving the reliability of a candidate (sub)contractor or temporary work agency before concluding a contract with them. This reliability check also concerns social security and fiscal law. The main contents of the Finnish Liability's Act are based on investigating and assessing the reliability of the subcontractors and temporary work agencies with regard to social security and fiscal law.³⁵ In terms of conformity with the labour law, the obligations of a client or subscriber are limited to gathering information on the applicable collective agreement or, if such agreement is exceptionally lacking, on the principal conditions of work. The general obligation of an employer to respect and apply the generally applicable collective agreement of the sector or profession under the Employment Contract Act naturally also covers a subcontractor's workers and temporary agency workers, and is subject to supervision by the labour protection authorities.

However, the Liability Act does not impose a liability throughout the chain, the liability is limited only to the contracting partner. The Act defines the liability indirectly, thus via the liability's substantive contents. It contains a narrow definition of the responsibilities within a subcontracting chain. In this sense, the law establishes the client's obligation to require certain information on the reliability of the candidate,

³⁵ According to Section 5(1) of the Liability's Act, the client is under the obligation to check before concluding a contract on the use of a temporary agency worker or on work based on a subcontract: 1) an account of whether the enterprise is entered in the Prepayment Register in compliance with the Act on Prepayment of Tax (1118/1996) and the Employer Register, and is registered as VAT-liable in the Value Added Tax Register in compliance with the Value Added Tax Act (1501/1993); 2) an extract from the Trade Register; 3) a certificate of tax payment or of tax debt, or an account that a payment plan has been made regarding a tax debt; 4) certificates of pension insurances taken out and of pension insurance premiums paid, or an account that a payment agreement on outstanding pension insurance premiums has been made; and 5) an account of the collective agreement or the principal terms of employment applicable to the work.

(sub)contractor or temporary work agency – therefore, an ‘evidence obligation’.³⁶ In building activities this means that the client or the developer has an evidence obligation in relation to the principal contractor, which is the contracting partner – unless the general derogations apply.

In Ireland, under the Construction REA (collective agreement), principal contractors bear some responsibility in this respect, since they must ensure that their ‘approved’ subcontractors, are compliant with e.g. relevant tax and social welfare legislation (section 10 of the Construction REA).

Some responsibility regarding income tax

Finally, also a kind of responsibility tool regarding income tax is worth mentioning here.

In Ireland, some obligations for clients and or main contractors/user companies in the field of tax law exist in the context of (bogus) self-employment. The rules are as follows: when a subcontractor enters into a contract with a (principal) contractor to carry, or supply labour for, the performance of relevant operations in the construction, forestry or meat processing industry, Relevant Contracts Tax (RCT) applies (both for resident and non-resident contractors in these industries). The principal contractor and the subcontractor supply tax and VAT registration details and answer a series of questions designed to clearly indicate that their relationship is not that of employer-employee; otherwise the principal contractor (in his role as ‘employer’) must deduct tax at either 20 or 35 per cent from payments to subcontractors. Each (sub)contractor is obliged to comply with RCT rules only in respect of his direct contractual link with another (sub)contractor.³⁷

E. Functional equivalents/alternatives, including corporate social responsibility

For *ten* Member States (ES, FR, FI, IE, LT, LU, NO, SE, PL, UK) alternative measures to the ones reported above were identified, which may all add to strengthening the position of workers involved in subcontracting processes, albeit sometimes in a rather indirect or soft manner. The tools presented below include checking the reliability of subcontractors and temporary work agencies (FI), other ‘compliance tools’ (IE, NO, ES), information and consultation rights for worker’s representatives such as trade unions (NO, SE, UK), liability of the client/contractor for paying the subcontractors (FR, IE, PL) and a range of corporate social responsibility measures (FR, IE, LT, UK).

Reliability check or other measures aiming at control and compliance

In Finland, the protection of workers’ rights in subcontracting is based first and foremost on the Act of the Contractor’s Obligations and Liability when Work is Contracted Out (‘Liabilities Act’), as already explained above. The client has an obligation to gather certain evidence proving the reliability of a candidate (sub)contractor or temporary work agency, before concluding a contract with them. With regard to labour law, this reliability check is limited to gathering information on the applicable collective agreement. The check also concerns social security and fiscal law. These obligations not only apply to domestic subcontractors but also in case the subcontractor is a foreign undertaking.

³⁶ The client does not need to request the accounts and certificates referred to in subsections 1, 2 and 5 when: 1) the contracting partner is a state, a municipality, a joint municipal authority, the Region of Åland, a municipality or joint municipal authority in Åland, a parish, a parish union, the Social Insurance Institution or the Bank of Finland, a public limited company as referred to in the Companies Act (*Osakeyhtiölaki* No 624/2006), a state enterprise, a company subject to private law wholly owned by a municipality, or an equivalent foreign organisation or enterprise; 2) the operations of the contracting partner are established; 3) the contractual relationship between the client and the contracting partner can be held to be established on the basis of earlier contractual relationships; or 4) there is a reason for trust comparable to what is provided above in paragraphs 1–3. (Section 5(4)).

³⁷ An amendment to the rules of 2011 includes an explicit statement on the declaration form (RCT1 form) reminding principal contractors that they are *not* required to independently verify the information provided by the subcontractor.

In July 2011, in Ireland, a new multi-employer REA came into force which sets legally binding minimum pay and conditions for up to 300 workers who work for seven companies that install and maintain overhead power lines. The employers covered by the agreement are not to enter into a contract with a client, unless the client company has given an undertaking that it will employ the services of an audit services company to conduct an investigation at least once a year into the terms and conditions of employment of all overhead powerline contractors carrying out works on its behalf, to ensure these are compliant with the terms of the REA.

In situations of outsourcing or subcontracting, or when temporary agency workers are hired out, since 2004 in Norway, a considerable number of collective agreements impose obligations on client undertakings to produce evidence of the terms and conditions that apply at the enterprise where the personnel is drawn from. Moreover, in situations of subcontracting and outsourcing the client undertaking is obliged to ensure that the (sub)contractors' employment contracts are in keeping with the regulations pertaining to the cross-border posting of workers.

Notification systems regarding posted workers

Specifically in the context of cross-border subcontracting, an indirect protection for the posted workers concerned may derive from so-called notification schemes run in eighteen Member States for cross-border service providers who post workers to their territories. Within this group, two countries (BE and DK) extend the liability/responsibility for notification to the client and/or contractor. Hence, in Belgium a more elaborated form of chain liability can be found in the so-called LIMOSA obligation, the system for registration of foreign employees temporarily working in Belgium. Here, a multilevel responsibility is applicable, so that every end user and client is responsible for supervising the compliance with the registration obligation for all posted workers of all subcontractors in every level of the subcontracting.

The new system for registration and notification in Denmark, which entered into force from 1 June 2010, foresees that the notification requirement not only relates to the foreign service provider (subcontractor), but in case the service includes construction, forestry or horticulture, also to the principal. In two other Member States (CZ and SK), it is not the service provider (subcontractor), but the direct contractor established in the territory of the host country who has the duty to notify the presence of posted workers to the authorities.

Measures regarding the engagement of subcontractors (including rights for workers' representatives to co-decide or to be consulted on this)

In Sweden, a functional equivalent to liability arrangements for wages and other employment conditions can be found in the Co-Determination Act: trade unions have the right to negotiate and to ultimately veto the employer's plan to engage a certain (dishonest) contractor (on the condition that they are both bound by the same applicable CLA).

In Norway, no veto right exists, but a number of unique collective rules were developed in the course of the last few years concerning e.g. the hiring for a fixed term/specific task and the hiring of labour. The prevailing collective agreement regulation requires the employer to inform and consult with workers' representatives before making a decision, and to provide those concerned with information on terms and conditions. Some collective agreements also have specific provisions pertaining to subcontracting situations.

In Spain, Act 32/2006, containing specific statutory obligations regarding health and safety in case of subcontracting, limits subcontracting in the construction sector to three vertical levels in the chain.

In the UK, the Olympic Games Memorandum of Agreement fits into this category. It was introduced in 2007 and seeks to ensure direct employment and to guarantee minimum rates according to the collective

agreement. Its key objective is to involve trade unions in the Olympic construction programme. This agreement drew on the more stringent and regulated Major Projects Agreement applied in the building of Heathrow Terminal 5.

The liability of the client/contractor for paying the subcontractors

France knows statutory provisions specific to subcontracting that introduce the joint liability of the client for the benefit of the subcontractor (including independent workers) in case the principle contractor defaults payment (because of insolvency/default/disappearance); these provisions may indirectly benefit the workers of the subcontractor.

In Ireland as well, legislative provisions indirectly benefit the employees of a subcontractor by providing mechanisms for the subcontractor to be paid by the main contractor.

In Poland, with regard to construction works, a joint and several liability exists for the benefit of the subcontractor himself: pursuant to Article 647 of the Polish Civil Code, liability will be established if both the client and the contractor have given their consent. Implicit consent is presumed unless client and/or contractor within 14 days rise their objections regarding a subcontractor and any subsequent subcontractors. Furthermore, in order to guarantee the validity and effectiveness of a subcontract or a chain of subcontracts, it is also necessary that the contracts are in written form. Only under these two conditions a subcontractor is entitled to claim payment of remuneration for construction works jointly and severally from a client and a contractor. Indirectly this may also be beneficial to his employees. However, the Polish Supreme Court ruled (in a judgement of 29 April 2008) that lack of approval by a client does not affect the validity of the contract entered into with a subcontractor, but only means that the contract does not result in joint and several liability of a contractor and client towards the subcontractor. Hence, in practice many subcontractors are deprived of this protection.³⁸

Corporate social responsibility (soft law)

In France, many soft law instruments have been developed in recent years. Some were initiated by the Ministry of Economy, Industry and Employment, for example the 'Business Credit Mediator', which seeks to make sure that big clients do not abuse their dominant position in relation to suppliers and subcontractors to cut down prices. Again, this is an instrument that strengthens the position of the subcontractor, which may indirectly also benefit the employees. Many corporate groups also adopted corporate social responsibility instruments, either unilaterally or as a result of an agreement with social partners. Many of these initiatives (EDF, Rhodia, Renault and Peugeot) include commitments on workers' rights and protection. The initiatives also tend to make sure that those commitments are followed by subcontractors.

Recently, there were some strongly promoted corporate social responsibility campaigns in Lithuania. In those campaigns the social responsibility issues were raised actively but they mostly concentrated on the compliance of the direct employers with labour law standards. Among various political and unilateral declarations of the companies there were no statements indicating that companies oblige themselves to keep watch upon the compliance with social standards amongst their subcontractors and providers of services.

Because of their soft law character, the Irish social clauses in the building sector mentioned above under 2-III A and the model clauses in public contracts for goods and services making it the responsibility of the principal contractor to ensure that all its representatives and subcontractors act in accordance with good industry practice (see under 2-IV C below) can also be classified as corporate social responsibility or 'P(ublic)SR' measures. Similar 'PSR' codes and protocols exist in the UK. The public sector codes of practice in England, Scotland and Wales also oblige public sector organisations (the client) to actively engage in the

³⁸ For instance in the Baltic Arena Euro 2012 project, the awarding entity made the written approval and consequently assumed joint and several liability only vis-à-vis 10 of the 120 subcontractors.

compliance of service providers with their codes (see also below under Chapter 2-IV C). Furthermore, in some of the (voluntary) collective agreements in the construction industry, the client is obliged to actively monitor and coordinate the 'fair' application of the memorandum principles to all contractors engaged to work on the programme.

Finally, it is worth mentioning the contents of a mediation agreement of the Department of Labour Relations in Cyprus. An open-ended strike at Limassol Marina in April 2011 was resolved after four days with that mediation agreement. It states that the sectoral collective labour agreement must be observed for all contractors and subcontractors; that all dismissals of employees at J&P and Cybarco will be suspended; and that the collective labour agreement will be implemented immediately by the two contractors. The workers' decision to strike against the consortium of J&P and Cybarco was prompted by the consortium's decision to assign part of the construction work in the Marina to subcontractors, through individual contracts and in violation of the sectoral collective agreement.

In the aftermath of this conflict, an interesting proposal was debated which would affect the use of subcontracted labour in the construction industry in Cyprus: In dealing with increasing unemployment rates in the construction sector, there has recently been a discussion between the Department of Labour Relations and the sectoral social partners on the implementation of a quota for setting minimum numbers of permanent staff in subcontracted construction projects. Despite the fact that in the context of the framework agreement, too, the social partners active in the sector do not disagree in principle, OSEOK disagrees with the Ministry's proposal as it stands today, whereas the unions PEO and SEK have not yet taken a position. The Ministry has proposed that in the projects as a whole, permanent staff should constitute at least 50 per cent of all employment, and in each separate project the respective figure should be 40 per cent.

IV. An overview of 'specific' responsibility/liability measures

As mentioned in the introduction to this Chapter, the current section provides an overview of measures classified per group of workers or the client they aim at. These concern three categories: illegally employed and/or staying workers; temporary agency workers and public procuring entities. Under each heading the countries are presented in alphabetical order, since no further distinction is made with regard to the nature of the arrangement in place (as this has already been done in Chapter 2-III).

A. Measures regarding undeclared/illegal (migrant) labour

In seven country reports (AT, CY, DK, FR, DE, LV, NL) measures concerning illegal and/or undeclared work were elaborated upon. In this category, several rather new measures feature as a consequence of the recent expiry of the threshold to implement Directive 2009/52.

For instance, the Austrian wage liability regime contains additional (stricter) rules on illegitimate situations of subcontracting (see above under 2.2.1). A profound difference is that where the level of client-principal is excluded in cases where the subcontractor is situated inside the EEA, this relation is covered when dealing with subcontractors based outside the European Economic Area.

Linked to this liability regime, new provisions were adopted to implement Directive 2009/52, addressing the situation that the contractor tolerates violations against the regulations of the employment of foreigners by the subcontractor.

In Cyprus, any initiatives so far are placed in the framework of the debate on cross-border mobility, as well as of the debate on undeclared and illegal work. In this context, the few existing arrangements refer

particularly and exclusively to the construction sector, since both the social partners and the government see the building industry as one of the sectors that are the most affected by unfair business competition and illegal activity, including illegal immigration. However, the arrangements do not include any liability beyond the direct contractual partners.

In contrast, the violation of the Immigration Act in Denmark leads to high sanctions for the client (contract provider) or main contractor who hires a subcontractor whose employees are working in violation of this Act.

Also in France, there is a strong focus on combating illegal work. Hence, the most far-reaching provisions in the context of protecting workers' rights in subcontracting processes establish the joint liability of the client along with the principal contractor and the subcontractor for the payment of the salaries, taxes and social security contributions due to the subcontractor's workers in case of recourse to illegal work (including undeclared work, bogus subcontracting and trafficking).

Germany has already implemented the sanctions directive, leading to a liability system to pay the compensations to illegally employed workers.

Latvia adopted some specific rules which protect workers' rights in subcontracting directly or indirectly in order to fight undeclared employment and consequently to protect rights of workers and ensure fair competition on the labour market.

In the Netherlands, not only the direct employer, but also the user firm or principal contractor is liable for employing a (third country) foreigner without a working permit. If that foreign worker is not paid (correctly), he may initiate a wage claim which is legally presumed to extend to at least six months for a wage customary in the relevant branch; in subcontracting chains this presumption of law can also be invoked against the principal contractor and the user firm.

B. Measures regarding temporary agency workers³⁹

Measures in the field of the temporary work agencies vary from 'traditional' license systems (e.g. CZ) and other measures restricting the use of agency workers, to liability/responsibility arrangements specifically aiming at the protection of agency worker's rights or containing additional (stricter) rules for the –sector of the temporary work agencies. A lot of additional provisions on agency workers embedded in a general arrangement exist in the field of health & safety (e.g. SE) and also with regard to migrant workers. A selection of measures is highlighted below.

In Finland, the Liabilities Act applies to any kind of temporary agency work, whereas in subcontracting a link to the client's normal operations is required.⁴⁰ Moreover, several collective agreements, for instance in the construction sector, state that a contract on subcontracting (including temporary agency work) must include a provision obliging the subcontractor (and the temporary work agency) to respect the sector's national collective agreement regarding the terms and conditions of employment (see also above 2-III A under social clauses). Also in Germany, the general joint and several liability system applies to workers of commissioned temporary work agencies.

³⁹ See in the particular context of posted workers also section 3.7 of PWD1 from p. 88 onwards, and section 3.6 of PWD2 from p. 148 onwards.

⁴⁰ Apart from in building and civil engineering works, where the link to normal operations is not a prerequisite for the application of the Act.

Regarding the Netherlands, the national statutory rules stipulating a joint and several liability for social security contributions and income tax in case of subcontracting include temporary agency work. Since 2010 there is also a statutory joint and several liability for user undertakings regarding the payment of the statutory minimum wage and minimum holiday allowance to hired agency workers. (see also the arrangement mentioned above in Chapter 2-III B on social funds in the construction sector with a guarantee arrangement that also applies to agency work).

In Portugal, temporary agency legislation makes liability subsidiary, which implies that the user will only have to act in case a temporary work agency was not capable of paying its debts.

In the UK, no real liability/responsibility arrangements exist. However, there are some sanctioned client obligations in the Gangmaster Licensing Act (GLA). The GLA only regulates companies that provide temporary labour. It states that any gangmaster supplying workers into agriculture, forestry, horticulture, shellfish gathering and food processing and packaging requires a licence. The client is required to exercise due diligence and ensure that they only use licensed labour providers to supply workers. The rules apply to all appropriate labour providers including those based outside the UK.

The GLA has a wide interpretation of supply and this includes those who engage workers through both a contract of employment and a contract for services.

C. Measures within the framework of public procurement/public works

Twelve Member States (AT, BE, CY, DE, DK, EL, IE, IT, MT, NO, PL, UK) have enacted more or less far-reaching measures in the field of public procurement.⁴¹

In Austria and Belgium, rather similar systems are in place, including certain social clauses. In these countries, the public procurement regulations contain particular measures that should guarantee the respect of some minimum labour conditions. The contracting authority may indeed impose conditions of performance, which basically means that subcontractors have to obey certain ILO conventions. The regulations also include a clause providing that the contractor has to guarantee that every person of a subcontractor complies with the general employment conditions or provisions regarding the well-being at work, as well as with regard to taxes and social security.

In Austria, Sect. 19(1) of the Federal Act on Public Procurement 2006, provides public contractors can only hire authorised, capable and reliable (sub)contractors. Reasons for exclusions, provided for in Sect. 68(1)(5+6) of the Federal Act on Public Procurement 2006, are, among others: serious professional misconduct, especially non-compliance with tax, labour and social law.⁴² According to Sect. 72(1) of the Federal Act on Public Procurement 2006, the public contractor has to obtain information from the central Administrative Penalty Register of the Federal Ministry of Finance. This screening relates to the entire subcontracting chain. According to Sect. 108(1)(2) of the Federal Act on Public Procurement 2006, the subcontracting of the entire purchase order is illegal with some exceptions, and in any case, subcontracting is permitted only when the subcontractor(s) also hold(s) the legally required authorisation, capability and

⁴¹ For 'general' social clauses (DK, FI, IE, NL, NO, UK) and/or wage liabilities (AT, DE, EL, ES, FI, IT, NL, NO), see above under Chapter 2-III A. In Spain, Article 42 of Workers' Statute also applies to administrative concessions involving the indirect management of a public service [Supreme Court 24-06-2008 (app. 345/2007)]. But there are some peculiarities, includes in Law 30/2007, 30 October, of public sector contracts, and in Law 24/2011, 1 August, of public sector contracts in the fields of defence and security.

⁴² Applicants have to prove they have fulfilled their obligation of paying the social security contributions in their home state by presenting a confirmation of the social security bodies (Sect. 72(2) of the Federal Act on Public Procurement 2006) or by an affidavit (Sect. 72(3) of the Federal Act on Public Procurement 2006).

professional reliability. The consequences for a tenderer who does not comply are extensive. According to the jurisdiction of the Federal Trade Commission (“Bundesvergabebamt”), the exclusion of a tenderer is justified if his quote is based on a calculation for staff costs which is not in line with the regulations that apply in Austria regarding the payment for overtime. On the other hand, only the circumstance that the quote (with the highest costs) shows a remarkably higher grand total in comparison with the other tenderers, does not justify the conclusion that all other tenderers violate the regulations under labour and social security law, and thus have to be compulsorily excluded.⁴³

In Belgium, the Act on public contracts which was adopted in implementation of Directive 2004/18. However, amongst other parts of this act, the provisions with regard to subcontracting and liability still have not entered into force. However, the act of 24 December 1993 provided for similar provisions. Article 40 stipulates that, pursuant to the basic principles of the Treaty on the functioning of the European Union and insofar as they are not directly or indirectly discriminating and, as the case may be, as they are stated in the contract notice or in the contract documents, the contracting authority may impose conditions of performance which make it possible to take into account objectives such as: 4° the obligation to, basically, comply with the provisions of basic conventions of the International Labour Organization, in the supposition that they are not already applied in the national law of the country where the production occurs.⁴⁴

These conditions of performance may be applied both above and below the European thresholds. Nonetheless, they must abide by Community law and may, especially, may not be directly or indirectly discriminatory with respect to non-national tenderers.

Furthermore, in Article 42, the Act states that the contractor of the works must comply with all legal, statutory or agreed provisions and must make every person who acts as a subcontractor in whatever phase and every person who employs workers at the building site comply with the provisions with regard to the well-being of the workers in the performance of their work, as well as with regard to the general employment conditions, irrespective of whether these arise from the law or from a sectoral agreement at national, regional or local level; and that the contractor must comply with all legal, statutory or agreed provisions with regard to taxes and social security and must make his or her own subcontractors and every person who puts workers at his or her disposal comply with these provisions.

In the event that the contractor fails to pay the amounts due to the employees who worked or are still working on the building site for one of his or her subcontractors, the principal contractor must pay the amounts owed to these workers for the works executed on the building site in the form of wages, social security contributions or payroll taxes. The same goes for the workers which he or one of his subcontractors had or has at his disposal. As well as in the event that the employer fails to pay the amounts which are owed as wages to the workers who worked or are still working on the building site for which he is responsible by each subcontractor or person who put workers at the disposal on this building site, for the labour performed on this building site. These provisions foresee a difference. Where in the first place the amount that has to be paid, is higher (also dealing with social security contributions and payroll taxes), the number of people to which the principal contractor is responsible, is more limited (limited to the personnel of his or her own subcontractors). The second provision is more limited with respect to the amount to be paid (only wages, but no contributions or payroll taxes), but broader with respect to the persons for whom the principal contractor is responsible, i.e. every person, who has worked on the site of every possible subcontractor. The supplier or the service provider to a public contract must comply with all legal, statutory

⁴³ Federal Trade Commission, 28 August 2008, N/0101-BVA/12/2008-34.

⁴⁴ In particular, ILO Conventions no. 29 (forced or compulsory labour), no. 105 (abolition forced labour), no. 87 (freedom of association), no. 98 (right to organise and bargain); no. 100 (equal remuneration for men and women), no. 111 (non-discrimination employment and opportunities), no. 132 (paid vacation) and no. 182 (prohibition child labour) are referred to here.

or agreed provisions stated above and must make their own subcontractors and every person who puts workers at their disposal comply with these provisions. Under the same conditions, the subcontractors as well must, just as the contractors, comply with the legal, statutory or agreed provisions stated above and make their own subcontractors and every person who puts workers at their disposal comply with these provisions.

These measures also apply for the sectors in which more stringent measures are applied in the fight against gangmaster practices (see Article 30 bis of the "RSZ" law), insofar as the obligations imposed by these measure are fulfilled.

In Cyprus, the few existing protective arrangements refer exclusively to a small part of the construction sector, as particularly laid down in the "Contract Terms for the Construction of Public Construction Projects (with approximate quantities), General Terms" (hereafter the Contract Terms).

The violations of the social and tax obligations which the contractor must comply with himself and which he must make other parties comply with may be proven with any kind of legal remedy.

Without prejudice to the application of the sanctions as provided for in other legal, statutory or agreed provisions, the violations of these obligations are identified by the contracting authority and result in the application of the measures in the event of violations of the agreement's provisions.

Special liability provisions in Germany are foreseen in the public procurement laws of different German *Bundesländer*. The systems however differ considerably. Some apply to every professional activity, while others only apply in certain sectors. In some systems the chain of parties involved is limited, while in other systems the principal contractor has the possibility to exempt oneself.

In Denmark, it is quite common in tenders in the public sector to include an obligation for the tenderer that contracts with foreign suppliers must be concluded under Danish contractual terms (this is often achieved by the requirement that companies operating under contract must be enrolled in a Danish employer organisation).

In Greece, pursuant to Art. 37 of Act 3669/2008 (OJ/A/116/18.6.2008), when the contractor in public technical contracts delays the payment of salaries of workers employed in the project, the competent public service controlling the contract may request the contractor to pay employees within 15 days. If the contractor does not pay the employees, then the service pays directly to beneficiary workers from the sum due to the contractor. In this way the salaries of up to three months may be paid to the workers.

Pursuant to Art. 63 of Act 3863/2010 (OJ/A/115/15.7.2010), public services that wish to close a public procurement contract for the provision of security services or cleaning services should require the tendering companies to report the number of workers who will be employed, the number of days and hours of work and the collective agreement regulating the working conditions of these employees. When a contractor hires a subcontractor, he must inform the client in writing. The contractor and the subcontractor are jointly and severally liable towards workers concerning the payment of their salaries and the social security contributions. The same rules (information of the recipient, liability of contractor, payment of salaries by the recipient) must be applied by private companies which employ more than 50 employees.

In Ireland, in other sectors than the construction sector (where social clauses are in use, see above under 2-III A), public contracts for goods and services should contain model clauses making it the responsibility of the principal contractor to ensure that all his representatives and subcontractors act in accordance with good industry practice and comply with all applicable employment legislation, as well as all legally binding sectoral agreements. It should nevertheless be emphasised that the use of these 'model' contracts (with labour law compliance clauses) is not a legal obligation imposed on public procurers, but rather is government policy and advised as best practice (soft law, see also above Chapter 2-III E).

Also Italian law provides specific rules for the protection of the rights of workers executing a public contract and for the selection of the contractors and subcontractors are laid down in the Code on public works, supply and service contracts. First of all quantitative and qualitative conditions limit the awarding of subcontracts. The subcontract must be authorised by the contracting authority which verifies the content of the contract, the kind of activity subcontracted and the qualifying requirements of the subcontractor. A maximum of 30% of the value of the prevailing work ("categoria", that must be specified in the tender) for which the contract is to be awarded can be subcontracted to a third party. Further subcontracting is not permitted.

Article 118, paragraph 6, D.lgs.163/06 establishes further that: "Prior to commencement of the work, the contractor and, through him, the subcontractors shall provide the client with documentation confirming that the social security authorities, including the Local Construction Fund have been notified of the work and a copy of the plan of which in paragraph 7 [the plan on safety at workplace]. In order to enable payment of the amounts due on completion of various stages of the work and completion of the work as a whole, the contractor and, through him, the subcontractors shall provide the client authority or administration with a Single Insurance Contribution Payment Certificate (DURC)"

The construction sector in Italy adopted this tripartite regulation concerning contribution payments. The DURC is mandatory to perform construction contracts under a building permit (public works). The effect of this regulation is that all the employers in the construction sector must abide by the applicable collective agreements, for otherwise the certificate is not issued. Hence, without this certificate it is not possible to be awarded public contracts. As a consequence of these rules, the tenderer that does not apply the collective agreement is excluded by the tender. The tenderer must apply the sector collective agreement related with the object of the procurement, but he could apply a collective agreement different than the one signed by the most representative trade unions and employers' organizations of the sector. The same Article 118, paragraph 6 states that: "the contractor is also jointly and severally liable for ensuring observance of the aforementioned regulations by any subcontractors vis-à-vis all their employees involved in supplying the work or services which are the purpose of the subcontracting agreement". As clarified by the Ministry of Labour in the circular n.5/2011, this provision implies that within public procurements a joint liability exists between the contractor and the subcontractor "without any time or quantitative limits", which is wider than the one established by Article 29, paragraph 2, D.lgs.276/03.

Both the Code of public procurement (Articles 86, paragraph 3-bis, and 88, paragraph 7, D.lgs.163/06) and the D.lgs.81/08 (Article 26, paragraph 6) provide for another mechanism aimed at avoiding that the adjudication of a public procurement favours contractors who makes most economic tenders reducing labour costs and not applying collective agreements signed by the more representative trade unions. When the adjudication is based on the criterion of the lowest price (Article 55, Directive 2004/18/EC), the contracting authority has to assess that the economic value of the tender is "adequate and sufficient to the labours and safety measures costs" and if it's "reasonable compared with the size and characteristics of works, services and supplies". The "adequate and sufficient" labour cost is calculated on the basis of tables that are periodically compiled by the Ministry of Labour "based on economic values of welfare and social security rules provided for by collective agreements signed by the comparatively more representative trade unions".

In order to further promote the application of the sector collective agreement signed by the most representative social partners, a recent reform added a new general criteria for the awarding of the contractors in public procurements: the best tender (Article 53, Directive 2004/18/EC and Art. 55 Directive 2004/17/EC) must be selected net of "the labour cost, evaluated on the basis of the minimum rates of pay laid down by sector collective agreements signed by the comparatively more representative workers and employers organizations at national level, and of the measure adopted for implementing legal provisions on health and safety" (Article 81, paragraph 3-bis, D.lgs.163/06, inserted by Article 4, D.L. 70/11). Thanks to

this new provision, the application of sector collective agreement signed by the most representative organizations becomes a more stringent criteria for awarding the contract, even if only in an indirect way.

Specific rules for subcontracting situations can be found in the Procurement Regulations of Norway. The public procurement regulations lay down minimum standards that benefit employees of contractors/subcontractors if in their employment relation with their employer the ordinary terms and conditions are less favourable. This applies to domestic employees, with a domestic employer, in the same way as it applies to employees of a foreign, cross-border service provider.

The main provision is § 5 of the Regulations on *'Wages and working conditions in public procurement contract'* on *'Wages and working conditions in public procurement contract'*, which lays down the substantive requirements on public entities as regards wages and working conditions. The section reads:

'The client entity in contracts shall require that employees of contractors, and of possible subcontractors who contribute directly to the performance of the contract, have terms of wages and working conditions that are not inferior to those prevailing under an existing national collective agreement or otherwise are customary at the place and for the profession in question. This applies also to work performed abroad.

The client entity shall require of the contractor and possible subcontractors to provide, upon request, documentary evidence of the terms of wages and working conditions of employees involved in the performance of the contract.

The client entity shall reserve the right to effectuate requisite sanctions if the contractor or a possible subcontractor does not comply with the contract clause on terms of wages and working conditions. The sanction shall be suited to influence the contractor or subcontractor to comply with the contract clause.'

Moreover, pursuant to § 7 of the Regulations the client entity is under an obligation to carry out 'necessary controls', adapted to the circumstances, to ascertain that the contract clause requirements are complied with.

The Department for Contracts, which is responsible for public procurement in Malta, in its tender templates has included the requirement for any bidder to any tender to sign a declaration stating that employees' rights shall be respected. It is clear from the wording of this declaration that, should a subcontractor be found to be in breach of any employment conditions, the principal contractor would have the legal right to terminate the contract without any risk of being sued for damages. Hence, if a bidder who is assigned the tender is found to be in breach of such an obligation, then the contract may be terminated with immediate effect. Individual workers can complain to a trade union or the Employment and Industrial Relations Department. The Department is involved in the application and enforcement of the general employment conditions. However it does not carry out any specific tasks in relation to subcontracting. The union states that it plays a role in ensuring the protection of workers' rights in subcontracting where the workforce is unionised. Where the main employer is unionised and subcontracting is engaged, the union presses for clauses in the tender document. This is not always successful as the price consideration outweighs employment conditions.

In Poland, provisions on subcontracting can be found in regulations regarding public procurement and construction works. With regard to building contracts contractors may only resort to subcontracting with consent of the client. If a subcontractor wants to enter into subsequent subcontracting contracts, the consent of both the client and the contractor is required.

In the public sector of the UK, the social partners have recently universally adopted codes of practice designed to prevent the emergence of a two-tier workforce due to subcontracting. Subcontracting had grown, as central government encouraged a “procurement and commissioning” model for many local and central services. However, in England the coalition government has recently withdrawn the two most significant codes of practice and instead replaced them with Principles of Good Employment Practice. In Scotland, subnational collective agreements are enforced through the Public Private Partnerships Staffing Protocol (PPP protocol) guidance and through the Statutory Guidance to Local Authorities on Contracting noted above. In Wales, the Code of Practice for Workforce Matters in Public Sector Service Contracts still remains, but there is no overarching national agreement with regard to procurement. Finally, in Northern Ireland, local councils are comparatively small and deliver a limited number of services, whilst health and social care services are delivered through an NHS trust model with a lobbying approach being used to protect against the creation of a two-tier workforce.

V. An overview of responsibility/liability measures from a country perspective

In this section we provide a comparative overview of existing rules per country under three headings. In Chapter 2-V A information is given on the actor(s) that initiated the arrangements (government or social partners), whereas in Chapter 2-V B the sectoral or national scope of the rules is the central issue. The subject of the overview in Chapter 2-V C is the nature of the responsibility/liability measures in place.

A. No measures, government measures or measures initiated by social partners

Below, the (non-)existence of responsibility/liability measures is sketched with a view to the actors behind it. Did the initiative come from the government (statutory law) or from the social partners or other actors (conventional law)?

(Apart from health & safety) no initiatives of particular relevance

Subcontracting in general is not covered by labour law in many Member States (BG, CY, CZ, EE, IE, HU, LV, LU, UK, PL, PT, RO). Other countries as well (LT, MT, SI, SK) only refer to general protective labour law that may benefit employees involved in subcontracting chains, but is not directly targeted at this group. Hence, no specific legal framework on liability/responsibility for minimum wages or labour conditions in subcontracting processes exists in either of said countries. The general position is that employee rights are guaranteed by the immediate employer and few, if any, obligations attach to other ‘links’ or parties in the contracting chain. In particular, the law in these countries does not require contractors, whether public or private, to insert in their contracts a social responsibility clause requiring them to verify the employees’ working conditions at the end of the subcontracting chain or providing joint and several responsibility of different contractors vis-à-vis such employees. In several Member States mentioned above, the system of collective agreements is not developed enough to deal with the topic on a ‘conventional’ level either (Latvia, Estonia, Bulgaria). Nevertheless, collective agreements might set specific rules, for instance regarding the protection of posted workers in the construction sector (Romania in its capacity as a sending country).⁴⁵

Initiatives stemming from both government and social partners

In Finland, next to the Liabilities Act (statutory), some nation-wide collective agreements contain provisions on the principal contractors’ liability, for instance in the construction industry. This liability of the principal contractor is however only a moral obligation. Several collective agreements, for instance in the

⁴⁵ See on such bilateral agreements in the context of posting of workers also section 4.5, p. 149-150 of PWD1 and section 4.4 of PWD2, p. 206-213.

construction sector, state that a subcontracting contract (including temporary agency work) must include a provision obliging the subcontractor (and the temporary work agency) to respect the sector's national collective agreement regarding the terms and conditions of employment.

The protection of workers' rights in subcontracting processes in Greece is mainly regulated by national statutes. There is one collective labour agreement (the collective labour agreement of workers in sandblasting) that provides for the liability of the principal contractor.

In Italy, besides the protection given by the law, the main sector collective agreements contain clauses on subcontracting, often obliging the client to require that his contractor applies the same collective agreement.

In the Netherlands, next to statutory rules, a considerable number of (extended) collective agreements contain provisions relating to workers' rights in subcontracting processes: for instance 'social clauses', which impose on principal contractors the obligation to contract subcontractors only on the condition that they apply the provisions of the collective agreement concerned to their employees. Sometimes, these clauses are strengthened by a liability (regarding non-compliance with the Collective agreement provisions) for the principal contractor. Regarding compliance with collective agreement provisions, no supervising state authorities are involved. Hence, it is usually up to the employee involved to start judicial proceedings. In most situations, the social clauses are not accompanied by a liability measure. Then it is questionable whether the employee of the subcontractor may base his claim against the (principal) contractor on the social clause provision which establishes no real liability. The trade unions may defend the individual rights of the employees of the subcontractors, and they are also entitled to start judicial proceedings on the basis of their own capacity as parties to the CLA. In this capacity, they have an own interest in enforcement of the CLA.

In Norway, apart from the General Application Act, there are few statutory regulations, but some collective agreements have specific provisions pertaining to subcontracting situations. Since 2004, in situations of outsourcing or subcontracting, or when temporary agency workers are hired out, a considerable number of collective agreements impose obligations on client undertakings to produce evidence of the terms and conditions that apply at the enterprise where the personnel is drawn from. Moreover, in case of subcontracting and outsourcing the client undertaking is obliged to ensure that the (sub)contractor's employment contracts are in keeping with the regulations pertaining to cross-border posting of workers.

In Sweden, because of a tradition of strong trade unions and high rates of organisation the legislator relied very much on self-regulation and enforcement by the social partners as a guarantee for workers' interests. Nevertheless, two important regulations are of a statutory nature (the Co-Determination Act and the Work Environment Act).

In the UK, no direct protection of workers' rights in subcontracting processes exists in general employment law, nor in binding collective agreements. Nevertheless, in legislation and in the construction sector and in the public sector some (indirect) measures are issued in (voluntary applied) collective labour agreements and in (soft law) codes and/or model contracts.

Initiatives stemming from the government

Austria and Belgium have systems where protection is laid down in national legislation. It nevertheless has to be mentioned that, for the moment, in Belgium the social partners in the construction sector for the first time agreed on a limited system of joint and several liability. This system has however not yet been translated into legal terms.

In Cyprus, as mentioned (see Chapter 2-IV C), the few existing protective arrangements refer exclusively to a small part of the construction sector, as particularly laid down in the "Contract Terms for the Construction

of Public Construction Projects (with approximate quantities), General Terms”.

In France, applicable rules ensuring the protection of workers’ rights in subcontracting processes take the form of statutory regulations. There are no collective agreements specifically dealing with worker’s rights in the subcontracting processes. In Germany as well, almost all of the provisions result from legislation.

In Luxembourg, direct protection of workers’ rights in subcontracting processes neither exists in general employment law, nor in binding collective agreements. Nevertheless, the social security code contains a liability clause.

In Spain, the relevant regulations are of a statutory nature. A considerable number of collective agreements contain references to subcontracting, but these references are limited to merely repeating the legal provisions.

Initiatives stemming from social partners only

Denmark is a particular case. Based on their long tradition of negotiating agreements to resolve conflicts of interest between labour market parties, a collective regulation is of the utmost importance for the employment situation. Of course, a foreign subcontractor who enters into a contract with the Danish principal, e.g. a main contractor who has a contract with a client, is not automatically covered by the main contractor’s (the principal’s) collective agreement. There are, however, some examples where agreements seek to ensure that foreign companies and employees in case of subcontracting are governed by Danish agreements and are therefore employed at conditions applying to wages and labour according to that agreement. On the other hand, in a series of agreements, in particular within the building and construction sector, agreement terms have been made that the contractor who has entered the Danish collective agreement is obliged to ensure that the subcontractors who perform the work of the contract must also ensure compliance with the agreement terms. If no agreement can be reached, often various other rules may be agreed, requiring negotiations between the parties involved, e.g. stating that companies covered by a collective agreement in a particular sector and concluding contracts with subcontractors should ensure that the subcontractor has a profound knowledge of the Danish collective agreement to be covered by these provisions. Circumvention situations in relation to the agreement and the legal enforcement of such agreements may in accordance with industrial practice be determined by a specific rating. Most often, in practice such prosecution for the employee of a subcontracting company, however, presupposes membership of a Danish trade union. In situations where a posting subcontractor agreement is not directly or indirectly covered by a Danish collective agreement and in general when it is a case of posting of workers in Denmark, the rules on minimum standards according to the Posting of Workers Act are valid, but not the requirement for minimum wage. In order to ensure the verification of compliance with these minimum standards and to ensure trade unions’ increased control options, stricter rules on reporting to the Danish authorities have been imposed on 1 January 2011. The reporting obligation is now extended to the principal in terms of both developer and main contractor. However, the duties on the principal are only subsidiary and do not include every link of the subcontracting chain.

In Ireland, no specific protection is provided by legislation. Specific protection does exist in some collective labour agreements. Most important is the Construction REA. Under the Construction REA, principal contractors are required to engage only ‘approved’ subcontractors, of whom they must ensure are compliant with the REA and relevant tax, social welfare and health and safety legislation (section 10 of the Construction REA).⁴⁶ No liability, under section 10, extends to the service recipient (unless, of course, the

⁴⁶ For more information, e.g. on how principal contractors and ‘approved’ subcontractors in practice ensure compliance and how this is enforced, see sections C (preventive measures), p. 58 and D (sanctions), p. 61 of Chapter 3-II under ‘conventional liability arrangements and (soft law) social clauses’.

service recipient is also the principal contractor). The REA covers employees, the self-employed, atypical employees and apprentices. It does not appear to cover agency workers; although there is a legally non-binding collective agreement in respect of such workers. Workers employed by other 'labour-only' subcontractors are covered.

Outside of construction and electrical engineering, a number of company-level REAs have been agreed between employers and workers in the mushroom-harvesting sector.

B. Sectoral or general scope

Below, we made an inventory of the applicable tools, according to their sectoral or general scope.

When specific rules apply to workers employed by temporary work agencies (which is the case also in the Czech Republic), the sectoral approach might be more visible since recourse to temporary work is common in some sectors like construction, the automotive industry, etc. This is however only a very indirect way of making an association between subcontracting and a sectoral policy.

The nature of rules aimed at protecting subcontracting may also create some links - albeit, again, indirect - with specific sectors; for instance, when in the field of occupational health and safety, employers have specific obligations and responsibilities when employees of at least two employers work at the workplace at the same time (Estonia, Latvia) in sectors such as building construction or maintenance.

Some reports (Czech Republic) mention the lack of sectoral information, which may underline the absence of relevant national data on the topic.

Other reports, however, do mention sector-specific protection rules. In many countries, it can be noticed that sectoral systems were in particular enacted in those sectors most sensitive to the subcontracting phenomenon. This is without any doubt the construction sector.

Measures aiming at the construction sector

The Belgian system on liability with respect to tax on wages, social security contributions and social fund payments is limited to the *construction sector*. Reference can also be made to the negotiations and agreement of the social partners in the construction sector for a joint and several liability system.

Also under Austrian legislation, some of the specific protections in case of subcontracting are also limited per sector. Whereas e.g. the specific liability for wages in case the subcontractor is based within the European Economic Area applies to all sectors when dealing with subcontracting taking place despite legal or contractual prohibitions, the liability with permissible subcontracting arrangements is restricted to building sites in *the construction sector*. Moreover, the special liability with respect to social security contributions and tax wages and the Act on temporary agency work is limited to cases of subcontracting in the construction sector.

In Greece, the client has a limited liability in *the construction sector* with regard to salaries. Also in Cyprus, Finland, Germany, Ireland, Italy, the Netherlands, Malta, Poland and the UK, some responsibility/liability measures laid down in public procurement law or soft law codes and/or at collective labour agreement level are targeted specifically at the *construction sector*. For instance, in Germany, the income tax and social insurance liability is only applicable to the building sector (construction businesses). In Spain, there are specific statutory obligations regarding health and safety in case of subcontracting. Non-compliance with these obligations also leads to joint and several liability. The latter (Act 32/2006) contains special rules for subcontracting in *the construction sector*.

Measures aiming at other sectors

In Greece, extensive liability arrangements apply through specific sectoral statutes and one collective labour agreement⁴⁷ in the sandblasting industry.

In Germany, the different rules on joint and several liability differ with respect to the sectors they apply to. The main provision on liability for minimum wage is in principle applicable to a wide category of industries, ranging from construction to industrial cleaning, postal delivery services, security services, special mining work, laundry services, waste management and education and training services.

In Malta, no specific measure is enacted, but a landmark ruling regarding Maltese law on the transfer of undertakings was reported as an important step forwards in the protection of employees involved in subcontracting processes in the cleaning sector. The case dealt with a cleaner who was made redundant as the cleaning services where she performed her duties was subcontracted to another party. The Industrial Tribunal ruled that this was a situation of transfer of business and that the new contractor (transferee) was obliged to employ the cleaner under the same terms and conditions she had with her former employer (transferer).

Although this case does not directly deal with the protection of workers in the subcontracting chain, it still serves as a deterrent for any company using subcontracting to make its workforce redundant. From a comparative perspective the ruling fits into established ECJ (European Court of Justice) case law.

C. Nature of responsibility/liability measures

Finally, we review the measures per country, again with regard to the nature of their responsibility/liability measures.

Apart from health & safety measures and some soft law initiatives, as a rule only the direct employer is liable and responsible

In the countries without any specific (and/or hard law) regulation on the subject matter of this study, at the end of the day the employer remains the only liable person, often even in case of temporary work agencies. This concerns Bulgaria, Cyprus, the Czech Republic, Estonia, Ireland, Hungary, Lithuania, Latvia, Malta, the UK, Poland, Portugal, Slovenia, Slovakia, Romania.

Nevertheless, some exceptions may exist, in particular with regard to health & safety. In Bulgaria, for example, the direct employer is responsible with the exception of the health and safety working conditions, for which all the parties have obligations.

Notably in Ireland and the UK the responsibility of others in the subcontracting process is part of soft law measures. For instance, the model contracts for public procurement in Ireland generally contain clauses which make the principal contractor (the successful tenderer) responsible for labour law compliance in respect of all subcontractors. Which workers are covered will depend on the provision in question (so, only 'employees' will be covered for the purpose of unfair dismissal, while 'self-employed' workers will be covered in terms of any breach of the Construction Registered Employment Agreement). Procurement measures are applicable to all undertakings which successfully tender for public contracts in Ireland.

Noteworthy is that, in Estonia, the law sets a general principle of "solidarity liability", meaning that, in general, if several persons are to perform an obligation jointly, the creditor may require full or partial performance of the obligation from all the debtors, from any one debtor or from some of the debtors separately.

⁴⁷ See for more information below under Chapter 2-V C.

Liability restricted to one or two levels

In several Member States which do apply liability arrangements, the liability for employers' obligations is limited to one or two levels in the chain of contractors. For instance, in Finland and in France the liability is limited to one level: the direct contracting partner, i.e. between the client and/or the principal contractor and the subcontractor(s). Also in Austria, the liability system for employers based within the European Economic Area does not relate to all subcontractors, but only applies between the respective contract partners, like contractor vs subcontractor or subcontractor vs sub-subcontractor.

In Belgium, the particular system for liability in case of tax on wages, social security contributions and social fund payments abolished a real chain liability. Whereas in the past the client of the principal contractor could be held liable for the debt of every subcontractor below him in the chain, the current system starts from the bottom of the contracting chain. Moreover, the new agreements concluded between social partners in Belgium provide for a system of liability only in a direct relation between two parties.

In Greece, in the construction sector the client has a limited liability concerning salaries of workers. Art. 702 of the Greek Civil Code provides for this liability and provides that workers employed by a contractor for the construction of a building or other immovable installation have a direct claim against the master of the work in respect of their salaries to the extent of the sum which the master owes to the contractor. As from the time a worker has declared to the master that he makes use of his right to claim, the master will be prevented from paying the contractor or his successor or to enter into a compromise with either of them to the detriment of the worker. An agreement which limits such rights of the worker beforehand is considered void.

With regard to the liability for the sandblasting profession, the collective labour agreement of 17 May 2010 states that the contractor or client providing subcontracting work to subcontractors who do not meet the legal requirements of undertaking projects in sandblasting works will be responsible both for paying the wages to employees and the social security contributions.

The non-fulfilment of (most of) the specific regulation in the Spanish construction sector leads to joint and several liability of the contractor directly responsible for the non-compliance and of the recipient, being either the client or the contractor.

Conditional liability

Sometimes, however, the system of joint and several liability is used only conditionally. For example, with regard to the liability for wages when dealing with permissible subcontracting arrangements, the Austrian act foresees that the contractor is only liable within an "indemnity bond", meaning that the employee has already made a legal claim on the subcontractor without success. The same applies in case of the Temporary and Agency Workers Act in Austria.

A similar system exists in Portugal, where temporary agency legislation makes liability subsidiary, which implies that the user will only have to act in case a temporary work agency is not capable of paying its debts.

In Germany, the liability for social security contributions is subordinate to the liability of a subcontractor. This implies that the principal contractor is only liable after the collecting agency has given notice to the subcontractor and after the period specified in the reminder has expired.

Liability involving the entire subcontracting chain

In Germany, depending on the specific arrangements, the whole chain either will or will not be affected by the liability clause. On the one hand, the liability for minimum wages as well as the liability implementing the sanctions directive are applicable to the whole subcontracting chain. On the other hand, when the principal contractor as well as all other members of the subcontracting chain, having no immediate

contractual relationship with the employee, are liable, the tax liability and social security contributions liability only apply in the direct relationship between either the client and the contractor, or between the contractor and subcontractor, or between subcontractor and subsequent subcontractor.

In Italy, the joint and several liability rule for, inter alia, wages applies to the client, the principal contractor and all (sub)contractors involved along the chain. The liability for injuries suffered by the contractor's or subcontractors' employees is also considered a joint and several liability for the client as well as for any contractor in the chain.

In Luxembourg, Articles 431 and 444 of the Social Security Code stipulate that "the main contractor and subcontractors are jointly and severally liable for the payment of social security contributions and for other obligations which the law and regulations imposes on them." More generally, "[t]he prime contractor is jointly and severally liable with the subcontractor in the fulfilment of all obligations imposed on employers by the laws, regulations and statutes on the subject of social insurance.

In the Netherlands, if a subcontractor makes use of illegal employees, the direct employer (formal employer) as well as the user firm, the principal contractor and every other private person or legal entity that actually employs a foreign national in the Netherlands can be held liable. The liability of user firms regarding the minimum wage is a joint and several liability and the agency worker may choose who he will hold liable: the temporary work agency or the user company; he is not under an obligation to address the temporary work agency first before turning to the hirer.

In Norway, in 2009 a joint and several chain liability has been introduced to the General Application Act: contractors and subcontractors that contract out work or hire employees are liable in the same way as an absolute guarantor for the payment of wages pursuant to general application regulations to employees of the undertakings' subcontractors.

In Spain, the liability for wages and social security contributions (art. 42 of the Workers Statute) applies to the client and all contractors in the chain.

In Sweden, there is a chain responsibility (for persons who have actual control over a workplace) regarding the health and safety of all persons who work at the workplace, irrespective of whether they are self-employed or employed by a subcontractor (or a "sub-subcontractor", down to the end of the chain).

VI. Liability systems and the case Law of the European Court of Justice

As mentioned earlier, some liability systems were subject of review by the European Court of Justice.

Hence, for the purpose of the current study, it is interesting to know what guidance the ECJ gives with respect to the possible benefits and drawbacks of such measures in place in the Member States. This may also be useful knowledge with respect to a possible introduction of a liability system EU-wide.

What guidance does the ECJ give with respect to the possible benefits and drawbacks of such measures in place in the Member States and/or with respect to a possible introduction of a liability system EU-wide?

So far, the ECJ has ruled three times on national measures establishing a kind of joint and several liability of contractors vis-à-vis the employers' obligations of their subcontractors. Undisputedly, the most important judgement with respect to the subject matter of this study, the protection of workers' rights in cross-

border subcontracting processes, is the Wolff & Müller case.⁴⁸ Here, the ECJ deemed justified the restriction of the freedom of services introduced by the German liability arrangement for wages and holiday fund payments. The liability for minimum wages applies to principal and other contractors in the subcontracting chain, regardless of negligence or fault. Hence, this is a rather extensive liability arrangement.

In the other two judgements (Commission vs Belgium and Rheinhold & Mahla),⁴⁹ Belgian and Dutch liability measure rules for tax charges and social security contributions were at stake. Since such employers' obligations as a rule most often do not apply to foreign contractors providing temporary services in another Member State, the facts of these judgements are less representative for the subject matter of our study. As mentioned before, from a cross-border perspective, national liability regulations for wages are in fact the only (possibly) applicable tools in the host State, since for labour law issues the PWD requires foreign contractors to abide by a nucleus of minimum mandatory employment conditions in the host State. This makes it apt to start with an analysis of the Wolff & Müller judgement.

Wolff & Müller (C-60/03)

In the Wolff & Müller case, the referring German court explicitly asked the ECJ whether Article 49 EC (now Article 56 TFEU) on the freedom to provide services within the EU does preclude a national system whereby the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective. The ECJ included Article 5 of Directive 96/71 on the posting of workers in its judgement and ruled that this article, interpreted in the light of the freedom to provide services, does not preclude a system like that laid down in Article 1a (now Article 14) AEntG. Regarding the observation of the national referring court that the priority purpose pursued by the national legislature on the adoption of this measure is to protect the national job market rather than workers' pay, the ECJ stated that 'there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other'. It added that this is demonstrated in the fifth recital in the preamble to Directive 96/71 (point 42 of the judgement). More importantly, the ECJ pointed out that, apart from the objectives of Article 1a AEntG, it is necessary for the referring court to verify whether, from an objective point of view, the legislation at issue secures the protection of posted workers. Therefore, the ECJ ruled that the referring German court should determine whether the rules at stake confer a genuine benefit on the workers concerned, which significantly augments their social protection (point 38).

The liability system should objectively add to the protection of (posted) workers

Hence, based on Wolff-Müller, it may be concluded that liability arrangements which add, objectively, to the protection of (posted) workers in a context of cross-border subcontracting processes, can in principle make a justified infringement on the freedom to provide services within the EU.

A liability arrangement adds to the protection of (posted) workers because it strengthens their procedural position in asserting their rights

The key issue is then to determine whether the German liability system indeed augments the protection of the workers concerned. According to the referring national court the benefit of a liability arrangement was limited in its effects. Since their postings will generally only be for a few months for a particular construction project and since the foreign workers will generally not be conversant with either Germany or the legal position in Germany, for posted workers the enforcement of a guarantee claim in the German courts will involve considerable difficulty in practice. This protection also becomes less valuable economically if any real chance of obtaining employment in the Federal Republic of Germany is significantly reduced (point 17 and 39).

⁴⁸ See references to this judgement in Chapter 1-I and Chapter 3-II B (in the context of the German liability arrangement which was at stake in this case).

⁴⁹ See reference to these judgements in Chapter 3-II B footnotes 32 and 33.

These practical difficulties, which were also mentioned by opponents of liability systems in the current study (see most notably Ch. 4-IV under ‘desirability of mechanisms of joint and several liability’), were however disregarded by the ECJ. Instead, the ECJ made a subtle reference to the fact that the case was brought to the court by a Portuguese posted worker, Mr Pereira Félix, who used the German liability measure by seeking payment jointly and severally from his employer and from Wolff & Müller of unpaid remuneration. According to the judgement (point 37), if entitlement to minimum rates of pay constitutes a feature of worker protection, procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings, must likewise be regarded as being such as to ensure that protection. The ECJ gave a clear indication that this would be the case, if the arrangement ‘adds to the primary obligant in respect of the minimum rate of pay, namely the employer, a further guarantor who is jointly liable with the first debtor and is generally more solvent’. On an objective view, a rule of that kind is therefore such as to ensure the protection of posted workers’ (point 40).

Hence, we may conclude that the ECJ without any reservation acknowledges the claim that liability systems add an extra guarantee for the protection of workers’ rights in (cross-border) subcontracting processes. That it may involve practical difficulties to pursue such claims or that it economically may not even be an optimal strategy, was not taken into account by the ECJ.

A liability arrangement strengthening the protection of workers, must not go beyond what is necessary in that connection

Finally, as regards the claim of the main contractor Wolff & Müller according to which liability of (principal) contractors as a guarantor is disproportionate in relation to the objective pursued, the referring national court observed that the German liability arrangement could result in national general contractors having to carry out particularly intensive checks and obtain evidence from foreign subcontractors in particular. This involves additional expenses and administrative burdens, not only on the part of the general contractor, but also on the part of the subcontractors. These burdens would impede the provision of construction services in Germany on the part of construction firms from Member States and render them less attractive (point 14). Such arguments were also put forward in the context of the current study, but, again, not taken into account by the ECJ. Instead, the ECJ only referred to established case law in its answer that, in order to be justified, a measure must be apt to ensure attainment of the objective pursued by it and must not go beyond what is necessary in that connection (point 43). Apparently, the ECJ did not deem it necessary to give any further guidance on this matter, but only stated that it is for the national court to determine that those conditions are met in regard to the objective sought, which is to ensure protection of the worker concerned (point 44). Subsequently, the German Constitutional Court (Bundesverfassungsgericht, see BVerfG 20 March 2007, 1 BvR 1047/05) ruled that the German liability arrangement on wages and holiday payments is justified by social political reasons. An infringement of the principle of proportionality was not found.

So, based on the judgement in Wolff & Müller, it is at least clear that a general reference to the need for the main contractor and intermediary contractors to carry out intensive checks (due diligence) from (foreign) subcontractors, which involves additional expenses and administrative burden for all contractors involved, does not make a liability arrangement which clearly adds to the protection of workers disproportionate.

Commission v Belgium (C-433/04)

However, in its most recent of the three judgements on liability arrangements, the ECJ considered a Belgian joint liability system in the field of wage tax contrary to Article 49 EC (now Article 56 TFEU). Does that change the conclusions just drawn from Wolff & Müller? In our view this is not or at least not necessarily the case, since the different outcome in this case may be explained by the different assessment of the objectives of the Belgian liability measure on tax charges. Notwithstanding that in an area which has not been harmonised at European level, the prevention of tax avoidance and the need for effective fiscal supervision may be considered an overriding reason of general interest, the Court ruled that this is not true

for a general presumption of tax avoidance or fraud (point 35). So, the objective of liability measures seems to be of crucial importance. As long as it adds to the protection of workers, the ECJ seems to take a permissive stance. If it 'only' helps to combat abusive practices without any direct benefits for the workers involved, the ECJ seems to take a stricter approach.

Hence, the ECJ ruled that the need to combat tax fraud is not sufficient to justify the application of the withholding obligation and joint liability, generally and on a precautionary basis, to all service providers who are not established and not registered in Belgium, while some of those providers are in principle not liable for the mentioned taxes and deductions (point 37). The fact that contractors could be held liable irrespective of whether the service providers were responsible for the payment of these taxes and tax deductions at source, was also an important ingredient for the very different appreciation of this liability arrangement than the wage liability arrangement at stake in *Wolff & Müller*. With regard to liability for (hard core) employment conditions, reference to the PWD is enough to show that all service providers posting workers on the territory of the host State have to abide by its minimum wages regulation.

As the ECJ stressed in the *Commission vs Belgium* case, the disputed measures do not allow any account to be taken of the individual circumstances of service providers not established and not registered in Belgium, now that the measures apply in an automatic and unconditional manner (point. 38).

Rheinhold & Mahla (C-327/92)

Only in that regard, the judgement in the old case of *Rheinhold and Mahla* may still be of any interest for the subject matter of the current study. In this case, the Court decided that an older version of the Dutch liability system for social security contributions which makes a main contractor liable for social security contributions left unpaid by a defaulting subcontractor, did not fall within the scope of Regulation 1408/71 (now: Regulation 833/2004) (point 34). Hence, it has been concluded from this judgement that when a Dutch subcontractor carries out work abroad, the principal contractor established abroad could probably not be deemed liable for Dutch social security contributions not deducted by Dutch subcontractors. This judgement regards situations very different from the liability schemes which are of relevance for the subject matter of our study. First, it should be noted here that in this case the facts do not concern liability for employers' employment protection obligations due in the host State, but obligations regarding social security contributions due in the sending State. Moreover, as in the *Commission vs Belgium* case, also in *Rheinhold & Mahla* the objective of the liability arrangement at stake does not add to the workers protection, but is (only) meant to compensate the institute responsible for collecting the contributions for the loss of its revenue (point 29).

In this judgement, the ECJ assesses whether cross-border liability of third parties for employers' obligations fits into the system of Regulation 1408/71, which aims at regulating (only) the application of social security schemes to employed and self-employed persons and to their families, moving within (what is now) the EU. The only provision in the Regulation which concerns the rights of the collecting institutions against liable third parties is (old) Article 93, which is not in any way concerned with the recovery from third parties of social security contributions payable by an employer (point 33). So the conclusion must be that *Rheinhold & Mahla* only allows for joint liability in the context of social security contributions if it could be proved that the third party was in fact the true employer of the workforce for which social security liabilities remained unpaid (point 31). Liability arrangements which reach across borders and are not based upon the existence of an employer-employee relationship between main contractor and the workers in respect of whom the contributions are payable (point 28), cannot be regarded as having a direct and sufficiently relevant link with the scope of Regulation 1408/71, as defined by Article 4 of that regulation (point 30).

Conclusion

In summary, the succinct case law on joint and several liability shows that assessment of the different objectives of the arrangements which were judged by the ECJ is crucial for determining their relevance and pertinence with regard to the existing national systems of liability in 7 Member States and Norway and/or a system to be introduced EU wide. With regard to a liability arrangement regarding employment law obligations of cross-border subcontractors, it seems that only the Wolff & Müller judgement provides a (beginning of) guidance regarding the pros and cons of such a system. The fact that the German extensive chain liability system regardless of fault of (principal) contractors clearly adds an extra (procedural) protection to the (posted) workers concerned, was in this respect considered by the Court as a clear 'pro' and as a justification of the infringement such a system makes on the freedom to provide services. Arguments 'contra' such as practical difficulties for the workers to make use of it and administrative burdens on the side of contractors and subcontractors, have to be taken into account by the national court, but the ECJ did not give any indication that these 'deterrents' would be weighty enough to make the liability scheme a disproportionate measure.

The judgements in Commission vs Belgium and Rheinhold & Mahla show that the Court is less permissive regarding liability schemes on social security and fiscal charges. Clear cut rules of thumb which are also relevant in the field of liability schemes on employment law obligations could not be distracted from these rulings.

VII. Summarising and concluding remarks

A. A brief summary of the findings

As emphasised above, a majority of *fifteen* of the twenty-eight countries surveyed has not set up (m)any protective arrangements other than required by EU directives (BG, CY, CZ, EE, IE, HU, LT, LV, MT, UK, PL, PT, SI, SK, RO).⁵⁰ Nevertheless, we identified some soft law responsibilities (most notably in IE and UK, e.g. social clauses) and in particular some responsibility or liability for the protection of health and safety of subcontracted workers. For the other obligations, the contractual relationship applies strictly: the employer is solely responsible.

With regard to the other group of *thirteen* countries (AT, BE, DE, DK, EL, ES, FI, FR, IT, LU, NL, NO, SE), the applicable responsibility/liability measures can be summarised as follows. In ten Member States (AT, BE,⁵¹ DE, EL, ES, FI, FR, IT, LU,⁵² NL) more or less far-reaching legal (sometimes combined with self-regulatory) mechanisms of liability/responsibility (FI) exist. Apart from Finland, these are in particular joint and several liability schemes concerning the clients/main contractors/user companies. Next to this, there are countries with functional equivalents or alternative measures in place instead of joint and several liability, such as co-decision rights of trade unions, social clauses, limitation of the subcontracting chain, informational obligations. The Nordic countries particularly stand out in this respect (DK, SE, NO, FI), but there are more countries applying social clauses either outside (IT, NL)and/or within the context of public procurement (AT, BE, DE, EL, IT).

Perhaps not surprising in the context of subcontracting, thirteen countries have exclusive arrangements in place for the construction sector, often linked to public procurement law. This does of course not exclude that many of the reports (e.g. BE, DK, MT) also explicitly mention measures of subcontracting or problems arising in a variety of sensitive sectors like the cleaning industry, etc. Moreover, there are specific measures

⁵⁰ See Chapter 2-II.

⁵¹ Not yet implemented, see above under Chapter 2-III A.

⁵² Only regarding social security contributions, see above under Chapter 2-III D.

targeted to groups of workers and/or their employers in the context of the temporary work agency and undeclared or illegal workers. The identified arrangements differ considerably with regard to the nature of the liability and/or responsibility concerned. We will take a closer look at the details of these measures in Chapter 3.

B. Concluding remarks

On a final note, it is interesting to draw attention to a more general 'preliminary' problem behind the vulnerable position of workers involved in (the lower ends of) subcontracting chains. This concerns the 'entry hurdle' to be taken before gaining the protection of labour law in the first place. The problems surrounding the status of the working person were reported most notably in the British and Polish reports.

In the UK, the greatest problem for a working person is to prove to an employment tribunal that he or she is an employee or 'worker', and not self-employed, in order to claim the superior employment rights available to those two types of working persons. In cases arising particularly in the construction industry, the principal contractor and subcontractors in the chain may argue that all those on site are self-employed, and not employees or workers.

Also in Poland, working persons have to go to court in order to claim (and prove) their employee status. Otherwise, Labour Inspectorates cannot act. In the Polish Labour Code, a theory of a contract has been adopted regarding the employment relationship. Here, priority is given to the will of the parties thereto, enabling them to freely select the legal basis for their cooperation. Nevertheless, Article 22 of the Labour Code in force enables to consider employment which meets the criteria of the employment relationship as employment on the basis of the employment relationship regardless of the name of the contract concluded between the parties. In practice, however, the possibility of questioning the legal relation between the contractor and the subcontractor is seriously limited and requires the taking of evidence of making an apparent legal transaction by the parties.

Chapter 3 A detailed review of relevant national laws on responsibility and joint and several liability in subcontracting processes

I. Introduction

From a global survey of the relevant measures we identified in the 28 countries subject to this study, we now move to a detailed review of more elaborate ‘responsibility/liability’ arrangements identified. In this chapter, we only chose to take a closer look at a selection of laws relating to employment law protection, particularly wages, social fund payments and health & safety obligations. Next to this, we reviewed a few tools belonging to a miscellaneous category.

The reason for not including liability rules for social security contributions and tax charges in our selection, is that these tools as a rule do not apply to foreign contractors providing temporary services in another Member State.⁵³ This implies that, from a cross-border perspective, national liability regulations for wages are in fact the only (possibly) applicable tools in the host State, since for labour law issues the PWD requires foreign contractors to abide by a nucleus of minimum mandatory employment conditions in the host State.

The chapter is organised as follows. In Chapter 3-II, some statutory and conventional/soft law arrangements on wages and other employment conditions are scrutinised with regard to their origins and main objectives, nature and coverage and connected preventive measures and sanctions. Chapter 3-III repeats this exercise with regard to arrangements of social fund payments, whereas Chapter 3-IV turns to arrangements regarding health & safety obligations. As a last,⁵⁴ miscellaneous category, we examine several ‘other’ arrangements in Chapter 3-V. The chapter ends with some concluding remarks (Chapter 3-VI).

II. (Statutory, conventional, soft law) arrangements on wages

A. Origins and main objectives⁵⁵

The main drivers behind statutory and conventional/soft law responsibility/liability arrangements on wages and other employment conditions are pretty much the same: to prevent abuse of employees’ rights and evasion of the rules, as well as to fight undeclared work and illegal/unfair business competition, also referred to as ‘social dumping’. The measures were introduced (mainly) in reaction to the growing popularity of outsourcing tasks and corresponding employers’ obligations. In several Member States the rules were developed in a cross-border context, sometimes in specific sectors only, such as the construction sector or the temporary agency sector with many foreign companies and workers. The rules are also meant to provide an additional guarantee for payment of wages, social fund payments and/or compliance to health & safety obligations in case of a fraudulent or disappeared contractor.

⁵³ Posted workers are excluded from the state-of-employment principle in Regulation 883/2004 for the first 24 months of the posting. They should be covered by the social security system of the country where they normally work. 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 with a stay no longer than 183 days taxes are due in the country of origin (normal place of work).

⁵⁴ Please be referred to Annex 1 for a list with relevant legislation per country.

⁵⁵ For AT, BE, DE, ES, FI, FR, IT and NL (the ‘Dublin countries’) see also ‘Dublin study’ 2008, p. 10-13.

Statutory liability arrangements

Below, we firstly take a brief glance at the origins and main objectives of five countries (AT, DE, ES, IT, NO) where 'general' wage liability tools based on statutory rules were identified (see Chapter 3-II A).

The introduction of liability legislation in Spain and Italy dates back to the 1950s and 1960s. The most recent changes date from respectively 2006 and 2003. The relevant legislation in Austria dates from 1995. It was most recently updated in 2011. Germany introduced wage liability in 1999, in the implementation Act of the Posting of Workers Directive (PWD) with a last amendment in 2010.

A considerable number of similarities between the Member States were identified with regard to the background and objectives of this legislation. In all Member States rules were introduced (mainly) against a background of evasion of employers' obligations and abuse of employees' rights in (cross-border) subcontracting chains. As far as external considerations were the crucial motivators behind (recent amendments of) the laws, common fears were reported of wage and social dumping caused by the influx of workers of other Member States with lower wage levels. Hence, regulation was often introduced or updated against the background of joining the (now) European Union (AT, NO), the upcoming phenomenon of the cross-border posting of workers (DE), the implementation of the PWD (AT), the subsequent enlargement with the new Member States in 2004 and 2007 and last but not least, recent lifting of transitional regimes (AT, DE).

On the other hand, particular domestic concerns colour the reasons behind the laws as well: in Spain, specifically the wish to reduce workplace accidents in cases of subcontracting (see the Preamble to Act 32/2006).⁵⁶ In Italy, the current rules on joint and several liability were adopted in 2003, as part of the broadest reform of the labour market in Italian history.⁵⁷ The idea behind the whole reform was to reduce constraints to business of the traditional labour legislation, no longer considered suitable for the characteristics of the new production system. Therefore, the 'Biagi' reform wanted to reduce the "substantial" protection of workers measures, while expanding the "procedural" ones: hence the extension of the rule of joint and several liability for wages and contributions in all cases of contracts of "services". In 2006, the – at the time – new government, while confirming the basic approach of the 2003 legislator, further strengthened the regime by extending joint and several liability to the entire chain of subcontracting, prolonging the time limit to act against the debtor from one to two years and eliminating the possibility of derogation by collective agreements.

Quite another matter of domestic concern played a role in Austria, where the impetus for a change of 1 October 1999, was, among other reasons, also an infringement proceeding initiated by the European Commission, whereby the conformity of the (old) liability rules with Community law were questioned, since these rules only established liability of contractors vis-à-vis the obligations of cross-border subcontractors. In Germany, the principal contractor's liability of § 14 AEntG became effective on 1 January 1999. It was the legislator's response to the massive and constant bypass of the AEntG in the construction industry. Whereas the original version of the AEntG was expected to react primarily to problems on the national labour market caused by the globalised economy and the intensification of the European Single Market, the reform bill pursues a further concern. The objective is now not only to implement fair working conditions in

⁵⁶ Which mentions the following objectives: The establishment of limitations on subcontracting from the third level, to prevent practices that could lead to risks to health and safety at work; The demand for quality or solvency requirements for companies that develop their activity in this sector; The strengthening of the guarantees on training in risk prevention of human resources; The introduction of appropriate mechanisms of transparency in construction sites, through documentation and some systems to strengthen mechanisms for participation of workers of the various companies involved in the work.

⁵⁷ The 2003 reform was inspired by the "European Employment Strategy" (quoted in Article 1, D.lgs.276/03 on principles) and also by the White Paper on the Labour Market of 2001 that preceded the reform. With regard to the provisions about contracts, however, it does not seem possible to find a direct basis in European law sources, neither hard nor soft ones.

favour of cross-border sent foreign workers, but also in favour of domestic workers. Furthermore, the new version should have an effective impact on the labour market in terms of an expansion of standard employment relationships subject to social insurance contribution and should stabilise free collective bargaining. Turning to Norway, although the General Application Act (GAA) was adopted, essentially resulting from the concern on the part of the trade union movement about the possible impact on the labour market of the approaching entry into force of the EEA Agreement or a possible EC membership, the Act was controversial when adopted, politically and vis-à-vis the employers' associations. Hence, the Act remained unused until 2004 and since then, its application has in part seen the social partners in agreement, in part in confrontation.

'Specific' statutory wage liability arrangements

Secondly, we examine the objectives behind specific arrangements in the Netherlands (regarding agency work and illegal work) and in France (illegal work). Attention is also briefly paid to the reasons behind liability arrangements in a public procurement context for Italy and Norway.

In the Netherlands, there is a liability of the user firm or principal contractor for *employing a (third country) foreigner without a working permit*. The legal presumption incorporated in Art. 23 WAV was meant to diminish the burden of producing evidence of the employment relationship existing for a foreign national. This serves to enable the foreigner to exercise his rights arising from his (former) employment relationship. In subcontracting chains this presumption of law can also be invoked against the principal contractor and the user firm.

The statutory joint and several liability for user undertakings regarding the payment of the statutory minimum wage and minimum holiday allowance to *hired agency workers* was introduced as a measure in the fight against unreliable temporary work agencies since the abolishment of the permit system in 1998. This must be placed in the context of an unwillingness to reintroduce a permit system because of the relative ineffectiveness and high costs of the old system. Furthermore, the government did not favour any other permit system since the costs and responsibility for the enforcement of such a system would be for the government, whilst it would serve the economic interests of recipients and suppliers of temporary workers. Finally, the temporary agency sector itself took the initiative. To combat fraud and illegal practices, the employers association ABU developed (in 2007-2008) a quality label (NEN norm 4400). This is meant to separate the wheat from the chaff. The quality label is voluntary, although several generally applicable collective agreements oblige employers to hire their temporary agency workers exclusively from NEN norm certificated temporary work agencies. Hence, the statutory liability scheme of Art. 7:692 CC specifically aims at furthering the use of certificated temporary work agencies.

In France, in 1979 specific liability rules for *temporary agency workers* were introduced to enhance the protection of these workers. Next to this, in 1992, liability provisions regarding illegal/undeclared work were introduced because of the inadequacy of previous provisions to fight 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 case of a fraudulent or disappeared contractor. Moreover, there is a strong focus on combating illegal work since the petrol crisis of the 1970s. French employers were enthusiastic about reducing costs by cutting down jobs related to secondary activities and replacing them by subcontractors or independent workers. As a result, abusive practices such as bogus subcontracting, the illegal supply of workers, trafficking or undeclared work became common. Hence, the most far-reaching provisions in the context of protecting workers' rights in subcontracting processes establish joint liability of the client along with the principal contractor and the subcontractor for the payment of the salaries, taxes and social security contributions due to the subcontractor's workers in case of recourse to illegal work (including undeclared work, bogus subcontracting and trafficking).

The need to ensure transparency in *public procurements* is particularly felt in the political and public debate, not only because of the high rates of undeclared work that characterise the Italian labour market, but also because of the phenomena of infiltration of organised crime, unfortunately widespread especially in the construction sector. For this reason, many measures introduced by the 2006 Code on Public Contracts for the protection of workers are more stringent than those laid down by Directives 2004/18/EC and 2004/17/EC, which the Code transposed in the Italian legal order. In Norway, as a part of the process leading to the adoption of the General Application Act steps were taken with a view to the ratification of ILO Convention No. 94 (1949) on Labour Clauses in Public Contracts. Once regulations under the 1992 *Public Procurement Act* (since then superseded by a new Act of 1999) were in place with regard to the state sector, the intention was to extend similar rules to cover all public entities. This was accomplished with new Regulations promulgated in 2008. The ESA has challenged this Regulation on the basis of Article 36 EEA [Article 56 TFEU] and Directive 96/71/EC, most recently through a ‘Reasoned opinion’ of 29 June 2011 (ESA Case No: 64849).

Conventional liability arrangements and (soft law) social clauses

Thirdly, we turn briefly to non-statutory arrangements regarding wages. In the Netherlands (since the 1990s) and also in Finland (since the 1970s) a *liability arrangement* is in place in several extended collective agreements, notably in the construction sector. The objective is to extend the compliance to the correct wage levels and other labour conditions as stipulated in the collective agreement.

Moreover, Finland, the Netherlands and several other Member States are familiar with so-called ‘*social clauses*’ in collective labour agreements. Not surprisingly, the rationale is to ensure that uniform minimum standards apply across the relevant industry in order to prevent a ‘race to the bottom’ amongst employers, who may seek to compete by cutting labour costs. For Norway, the underlying considerations pertain to concerns with changing business operation structures including ‘outsourcing’, a changing labour market, and challenges from new forms of organisation and the supply of manpower. Typically, provisions of this kind were first adopted into the building trades collective agreements, i.e. the industry most exposed to competition. On the other hand, a large number of typically ‘domestic industries’, e.g. bus transport, journalists, or hauliers, have no provisions of this kind in their respective collective agreements.

In Ireland, a significant number of labour law compliance measures (on ‘bogus’ self-employment, agency work, etc) were agreed by the social partners in ‘Towards 2016’, largely as a response to two major disputes in 2005. The first, involving the Irish subsidiary of a Turkish company, Gama Construction Ireland Ltd, concerned the widespread abuse and exploitation of Turkish workers posted to Ireland to work on public works contracts. The second dispute, at Irish Ferries, involved the company reflagging its vessels to Cyprus and seeking to replace its Irish workers with temporary agency workers, primarily from Latvia, who were to be paid less than half the Irish minimum wage.⁵⁸ These two disputes brought the issues of posted workers and migrant agency work onto the national stage in Ireland for the first time and led, under ‘Towards 2016’, to the establishment of a new labour inspectorate, the National Employment Rights Authority (NERA) and, in addition to the measures discussed above, a detailed package of measures relating to employment rights compliance, contained in the 2008 Employment Law Compliance Bill (which has not yet been passed into law).

In Italy, the *social clause* is a typical instrument of protection for workers *in public contracts*. This affects the award of any contract to the observance of collective agreements. The mechanism of the social clause has a fundamental importance in the Italian labour market, because it allows to extend (indirectly) the application of the collective agreement to all undertakings that wish to have relations with the Public Administrations. The rules on social clauses were not introduced in the Italian legal order on the basis of ILO Convention No. 94. Nonetheless, the Convention is often recalled within the doctrinal debate in order to confirm the full legitimacy of the social clauses provided by law, especially in the aftermath of the Ruffert

⁵⁸ See for more details the compilation of cases from the national reports in Annex 1.

judgement, which made their justification debatable. This structural feature of the Italian bargaining system explains why the Code on public contracts includes provisions which aim to counter competition on labour costs and to promote the application of collective agreements signed by the most representative organisations. For the same reason, social clauses seeking to ensure the application of the same collective agreement by the contractors and subcontractors are often included in the sector collective agreements signed by the most representative organisations.

In the UK, as *public sector* authorities began to outsource services to the private sector, a two-tier workforce emerged. Trade unions campaigned and negotiated the introduction of codes of practice from 2001 onwards to reverse this trend. The introduction of codes of practice was reaffirmed and extended by the central government. In the private sector, construction collective agreements have been negotiated along skill/trades boundaries and on a subsector basis at differing periods of time. The Olympic Games Memorandum of Agreement was introduced in 2007, seeking to ensure direct employment and to guarantee minimum rates according to the collective agreement.

B. Nature and coverage

Statutory ‘general’ wage liability arrangements

Chapter 2-III A showed that six countries (AT, DE, IT, EL, ES, NO) statutorily introduced ‘general’ wage liability arrangements. However, as observed in Chapter 2-V C, the character of these liability arrangements is by no means the same in each country. On the contrary, a great variance exists among and even within the countries in this regard. To allow for a better appreciation of the rules in place, below, one example of a ‘limited liability arrangement’ (AT) and two examples of ‘full chain liability arrangements’ are presented (DE, NO). Both chain liability regimes have in common that they are based on a statutory tool which only applies if collective agreements in specific industries are declared generally applicable.

In Austria⁵⁹, the *Antimissbrauchgesetz* (“Anti-Abuse Act”) stems from 1995 and contained §7(2)(2) – *Arbeitsvertragsrecht-Anpassungsgesetz* (Employment Contract Law Adaptation Act or “AVRAG”).

The provision was later amended with §§7a(2) and 7c, and came into force in 1999. Section 7a(2) exclusively applies to cross-border posted workers where the contractor’s corporate seat is outside the European Union. Section 7c AVRAG applies to contractors whose corporate seats are located within the EU, including Austria.

The regulations of the AVRAG guarantee that the wage, which is collectively agreed (generally) or statutory (rarely), will also be paid to the employee who is not under a collective agreement because of the non-membership of his employer in the so-called Austrian Federal Economic Chamber, which collectively represents employers’ interests. In case of a purchase order, the contractor is also liable for the safeguarding of this claim towards the employees of the subcontractor. Nationwide, Austrian employers, as mandatory members of the Austrian Federal Economic Chamber become subject to the collective agreement of the industry; therefore, the wage protection of the Employment Contract Law Adaptation Act usually concerns the employees of foreign employers. Nevertheless, the liability created by Sect. 7c AVRAG applies irrespective of the fact that the employee of the subcontractor is posted to Austria or is hired out or has his or her usual working place in Austria, whereas the liability created by Sect. 7a(2) AVRAG applies purely in the case of posted employees.

⁵⁹ See also Eurofound, *Liability in Subcontracting Processes in the European Construction Sector: Austria*, by Walter Gagawczuk, available at <http://www.eurofound.europa.eu/pubdocs/2008/871/en/1/ef08871en.pdf> .

Sect. 7a(2) AVRAG also applies on the level of client<>contractor, whereas Sect. 7c does not. Hence, according to Sect. 7a(2), when a domestic entrepreneur charges a foreign contractor e.g. with the repair of a machine or the servicing of his factory building, he is in principle⁶⁰ also liable. The contractor is liable as a joint debtor. Therefore, the posted employee can demand the payment of the wage owed, or respectively of the wage difference directly from the contractor without any further precondition. Self-evidently, the contractor has the right to recourse against the foreign subcontractor; often he can compensate this claim with the subcontractor's claim for remuneration. Pursuant to both Sect. 7a(2) and Sect. 7c AVRAG, the liability of the contractor does not relate to all subcontractors within the entire subcontracting chain, but only applies between the respective contract partners (contractor<>subcontractor; subcontractor<>sub-subcontractor).

Sect. 7a(2) AVRAG applies to all sectors, whereas Sect. 7c AVRAG differentiates with regard to the coverage and the extent of liability between public and privately awarded purchase orders. Whilst the liability on privately awarded purchase orders is less strong, and is confined to services at construction zones with civil engineering and building works, the liability in case of public procurement contracts is stricter, and not confined to any certain sector. In both cases, there is a liability for the collectively agreed minimum wage of the employees who are employed by the subcontractor. The nature of the liability also differs depending on the (il)legitimateness of the subcontracted part of the work. In case of impermissible subcontracting the liability is unconditional (Sect. 7c(2) AVRAG) and applies to all sectors.⁶¹ In contrast, when the subcontracting is legitimate (Sect. 7c(3-5) AVRAG), liability only applies in case of purchase orders for services on building sites.⁶² Moreover, the contractor will only be subsidiarily liable (jointly liability). Hence, in order to invoke the liability of the contractor, the employee must already⁶³ have unsuccessfully brought a legal claim against his employer (subcontractor) before court within a cut-off deadline of six months after the provision of service. Also, the liability is not applicable if the subcontractor is insolvent.

In order to prevent that the contractor is financially burdened twice,⁶⁴ some liabilities have a debt-discharging effect, but the contractor has to ensure contractually that this debt discharging effect also applies if Austrian Law under the Rome I Regulation (Regulation 593/2008/EC) will not apply for the subcontracting arrangements.

Finally, a new statutory offence concerning domestic as well as foreign employers is noteworthy. Introduced in May 2011, Sect. 7i(3) AVRAG stipulates the following: a person who, as the employer, employs or employed a worker without at least paying him the mandatory basic wage (laid down in law and/or collective agreement) in accordance with the respective classification criteria, is to receive a fine amounting from € 1,000 to € 50,000 per worker involved. Hence, this penalty can only be directed towards the employer (subcontractor), and applies to all sectors. Nevertheless, the contractor, including the user company in case of temporary work agencies, is obliged to secure the payment of the fine as stipulated in Sect. 7i(3) AVRAG. Pursuant to Sect. 7k(1) AVRAG, the district administrative authorities, in their capacity as law enforcement authorities, *can* instruct the contractor (or, in case of a temporary worker, the user company) to pay a part of the compensation as a deposit under the following conditions:

⁶⁰ Attention should be paid to the assembly privilege (Sect. 7a(4) AVRAG).

⁶¹ In case of such an impermissible subcontracting of a purchase order, the liability of the contractor is tightened, and he is liable as a bail. Before the employee can invoke the liability of the contractor, he has only to remind his employer of his obligations, judicially or out-of-court.

⁶² This term "building sites" corresponds to Art. 2(3)(a) of Council Directive 92/57/EEC.

⁶³ Including the situation that the employer is without a known residence, and therefore, the lawsuit was undeliverable.

⁶⁴ In that case there is no need for the employee to seek compensation from the subcontracting chain, since he can claim his outstanding wages from the '*Insolvenzausfallgeldfonds*', a fund for the protection of employees, should their employer go bankrupt.

- There are good reasons to suspect a remuneration below the minimum wage, and thus, an infringement under Sect. 7i(3) of the Employment Contract Law Adaptation Act.
- Based on certain matters of fact, there is a valid assumption that criminal prosecution or punishment of the employer is (almost) impossible.
- The compensation is not due to the subcontractor/user company yet. Compensation is defined as the entire sum to be paid for the completion of the purchase order or the hiring.

In Germany, compared to the rather complicated and detailed Austrian liability arrangement(s) described above, the liability measure is perfectly easy to understand. This liability arrangement was the subject of the Wolff & Müller case (C-60/03). In its judgement, the ECJ approved the restriction of the freedom of services introduced by the principal contractor's liability as justified. Also the German Constitutional Court ruled on 11 July 2006 that the provision is in conformity with the German constitution, because it does not infringe the principle of proportionality.

Introduced in 1999,⁶⁵ under the current § 14 of the *Arbeitnehmer-Entsendegesetz* (Posted Workers Act or "AentG"), the principal contractor or the intermediate contractor that hired the services of another contracting company is liable as a guarantor for the unpaid wages of the subcontracting company's employees. Article 14 AEntG does not specifically mention the principal contractor as such, but refers to the undertaking instead. However, in accordance with its purpose the prescription refers to the principal contractor in the sense of the definition of this study. Moreover, the term 'undertaking' also covers intermediate contractors who commission subcontractors on their part. temporary work agencies are also included in the liability arrangement. No other, more specific rules regarding the liability of temporary work agencies exist. The liability applies to the entire subcontracting chain, irrespective of where the contractor's corporate seat is (it includes both inside and outside the EEA established business). So, unremunerated employees have the right to seek redress in German labour courts from the principal contractor or any other contracting party above its employer in the vertical contracting chain.

Originally, the scope of Article 14 AEntG was restricted to the construction industry, since, according to the AEntG, mandatory pay and working conditions satisfying the preconditions of the PWD were admitted in the construction industry only. However, the law was substantially amended in 2007, and its scope was expanded to cover 'work and services' instead of building services exclusively. Ever since, the regulation applies to several additional industrial sectors added to the list in the AEntG. Industrial sectors included in the AEntG are, according to Article 4 AEntG, the construction industry, industrial cleaning contractors, postal delivery services, security services, special mining work on coal mines, laundry services in the customer business object, waste management – including street cleaning and winter road maintenance – and education and training services under the second or third book of social security law (*Sozialgesetzbuch*).

In Norway, the most recent 'general' wage liability regime we identified came into force as of 1 January 2010 and is stipulated in a new § 13 of the General Application Act (GAA) on joint and several liability. Responsibility as well as liability pursuant to Article 13 GAA extend beyond the direct employer and apply to the entire subcontracting chain, both down and up. The client is not part of the 'liability chain'. Hence, the chain starts with the main contractor and includes all subcontractors involved, however little or much, in completing the assignment covered by the contract between the client and the main contractor. Furthermore, the employee, if not paid or not fully paid on the due date, may turn to any party in the

⁶⁵ Earlier forms of the AentG merely imposed a fine, which the German government found inadequate to enforce the law in light of numerous complaints from foreign governments and their embassies that had to repatriate posted workers in Germany, who were presumably abandoned in Germany by their malfeasant subcontracting employer. See Eurofound, *Liability in Subcontracting processes in the European Construction Sector: Germany*, country report by Gregor Asshoff (2008), available at: <http://www.eurofound.europa.eu/pubdocs/2008/875/en/1/ef08875en.pdf>.

'liability chain', whether a 'superior contractor' to whom his employer is a (direct or remote) subcontractor or a subcontractor below his employer somewhere down the line. The employee must, however, submit his wage claim in writing to the jointly and severally liable contractor three months after the due date for the payment at the latest. This time limit of three months to present a claim is very much a compromise. Especially in case of short-term postings, the employee may well have left the country before realising his or her rights. Consequently, the trade unions argued for a longer time limit. The employers' associations, on the other hand, opted for a considerably shorter time limit. The liability cannot be limited, neither by contract between an employee and his or her employer or anyone else, nor contractually between (sub)contractors. The latter may agree between them who shall in the end bear the costs, but this is of no consequence to employees' rights. The statutory provision is mandatory and inderogable.

Statutory 'specific' wage liability arrangements

From the numerous 'specific' wage liability arrangements presented in Chapter 2-IV above, below we flesh out three selected statutory arrangements, regarding respectively undeclared/illegal workers (FR), agency workers (NL) and public procurement (IT).

France: liability concerning wages of illegal workers

Introduced by two acts of 1990 and 1992 in the context of illegal work, the client can be held jointly and severally liable with either the principal contractor or the subcontractor for failure to e.g. fully remunerate workers. 'Illegal work' includes practices such as undeclared work, bogus subcontracting and trafficking. In order to fight illegal work in an effective way, Article L8232-1 and Article L8222-2 of the Labour Code establish joint liability of the "order provider" (main or intermediate contractor) and the client⁶⁶ (*maître d'ouvrage*) in respect of the subcontractor's workers. Given the nature of the aforementioned offences, the protection includes bogus self-employed and third country nationals who do not have a work permit.

In case of '*marchandage*',⁶⁷ which is one form of bogus subcontracting, and illegal work of third country nationals, the law establishes a joint liability of the 'order provider' with a 'labour-only' subcontractor. By contrast, in case of undeclared work the statute establishes joint liability of both the order provider (*donneur d'ordre*) and the client (*maître d'ouvrage*). Article L 8222-2 provides that every person who has either not made the necessary verifications with regard to his subcontractors' workers, or has been condemned for having had recourse to undeclared work directly or through another, is jointly liable for the payment of taxes, salaries, social security contributions.

The liability in the context of illegal work is contractual in nature. In other words, the client's liability for having had recourse to illegal work through another can be engaged only if illegal work law provisions have been infringed by the client's contractual counterparts. Therefore, his liability for illegal work through another does not go down the entire subcontracting chain, but is limited to first level subcontractors. The liability applies to contracts concluded between an entrepreneur established in France, irrespective of his nationality, and a contractor either established in France or in the territory of another EU Member State or a third country.

The Netherlands: liability concerning wages of agency workers

Since 1 January 2010, user companies are liable for the payment of the statutory minimum wage and minimum holiday allowance to the hired agency workers. The user company and the temporary work agency are jointly and severally liable for the debt of the temporary work agency (regarding the minimum wage and holiday allowance) vis-à-vis the agency worker. This liability is laid down in Art. 7:692 of the

⁶⁶ The client (*maître d'ouvrage*) is defined as a natural or legal person, private or public, who irrespective of his activity is at the origin of the economic process organised for the realisation of a result (*ouvrage*) of which he is the recipient, the beneficiary or the owner.

⁶⁷ The offence of "*marchandage*" is defined as a profit-making operation consisting in the provision of work which causes detriment to the workers such as the non-application of labour legislation or of a specific collective agreement.

Dutch Civil Code (CC). According to Art. 7:692 CC, both ‘the employer’ and ‘the third party’ are liable for the payment of the statutory minimum wage of the temporary agency worker. Art. 7:692 CC therefore applies to, on the one hand, the recipients or user undertakings (referred to as ‘the third party’) and, on the other hand, temporary employment agencies – including the entire range of professional⁶⁸ staffing companies (i.e. ‘labour-only’ subcontractors), thus also posting companies and labour pools (referred to as ‘the employer’ in Art. 7:692 CC). ‘Temporary agency worker’ should also be understood in this broad way, meaning that this term also covers, for instance, a worker posted via a posting company. The liability applies irrespective of the law that is applicable to the employment contract and the contract between the employer and the user company (7:692 (1) CC) and applies also to users of *foreign* (non-certified) temporary work agencies. Thus, this liability also serves as a tool to further compliance with the host labour standards – i.e. the Dutch statutory minimum wage and holiday allowance – by foreign service providers who post workers to the Netherlands. The liability, however, does not apply in case the user firm makes use of a certificated temporary work agency (7:692 (2) CC). Hence, only the user company and the *non-certified* temporary work agency are jointly and severally liable.

The – voluntary – (NEN norm 4400) certification system was developed in 2007 by the temporary work agency’s industry itself. This statutory liability scheme is meant to further the use by user companies of certificated temporary work agencies. Therefore, this regulation can be considered as a (at least in the Netherlands) unique mix of public and private measures. It is interesting to note that several generally applicable collective agreements oblige undertakings, in case they want to make use of temporary agency workers, to hire these workers exclusively from NEN norm certificated temporary work agencies.

Italy: liability in the context of public procurement

The absence of legal mechanisms to extend the application of collective agreements in the Italian legal order is the rationale behind the ‘functional equivalent’ in place for workers’ protection in public procurement.⁶⁹ The obligation to apply collective agreements both nationally and locally is in fact a general condition necessary to be awarded public contracts, as much as the fulfilment of contribution duties certified by a specific document issued by social security agencies (Single Insurance Contribution Pay Certificate; Italian acronym: DURC).⁷⁰ The effect of this regulation is that all the employers in the construction sector must abide by the applicable⁷¹ collective agreements, for otherwise the certificate is not issued. Again, without this certificate it is not possible to be awarded public contracts.

Pursuant to Article 118, paragraph 6 D.lgs.163/06, the contractor is jointly and severally liable to ensure the observance of e.g. the applicable collective agreements by any subcontractors vis-à-vis all their employees involved in supplying the public work or services on Italian territory. As clarified by the Ministry of Labour in circular No. 5/2011, this provision implies that, within the public procurement context, a joint liability exists

⁶⁸ The liability does not apply to employers who only occasionally second or supplies workers.

⁶⁹ In the Italian legal order, the collective agreement is not universally applicable: it only binds organisations who signed it and their members, on the basis of the general rules of civil law on contracts. The Constitution (Article 39) provides for a method that makes collective agreements universally applicable, but the legislation implementing this method has never been approved. This makes a law binding employers to apply collective agreements in another way constitutionally unlawful.

⁷⁰ The construction sector in Italy adopted a tripartite regulation concerning contribution payments (Single Insurance Contribution Pay Certificate, abbrev. ‘DURC’). The DURC is mandatory to perform construction contracts under a building permit (public works). See also Chapter 2- IV C below on social funds.

⁷¹ This means any applicable collective agreement and not per se the collective agreement signed by the most representative social partners in the sector (!). This led to new legal initiatives, furthering the application of ‘the most representative’ sectoral collective agreements in situations where contracts are awarded on the criterion of the lowest price, referred to in Chapter 2-IV C above.

between the contractor and the subcontractor “without any time or quantitative limits”.⁷² Specific obligations bind the contracting authorities in case of non-payment of wages or contributions by the contractors or subcontractors. If the latter do not act in conformity with the contribution duties (as certified by the DURC), the client authority (that is the official entity responsible of the procedure) must directly pay the outstanding contributions to the National Insurance Institute, deducting the equivalent by the amount due to the contractor (or subcontractor) as a compensation for the works or services executed (Article 4, D.P.R. 207/10). If a delay in payment is ascertained, the client authority demands (with a written note) payment from the employer within 15 days. When the deadline expires, the client may directly pay the remuneration even during the execution of the contract, deducting the equivalent by the amount due to the contractor (Article 5, D.P.R. 207/2010).

Italian law on public procurement does not distinguish between national and foreign tenderers referring to the provisions examined.⁷³ The obligations provided for the first also bind the latter, including the duty to apply sector and local collective agreements.

Conventional liability arrangements and (soft law) social clauses

In Chapter 2-III A, seven Member States (DK, FI, IE, IT, NL, NO, UK) were identified in which so-called ‘social clauses’ in collective labour agreements are regular practice. Below, we take a closer look at the content of these kind of arrangements in Ireland and the United Kingdom.

In Ireland, under the so-called Construction Registered Employment Agreement (hereinafter REA), contractors are required to engage only ‘approved’ subcontractors, who should be compliant with the REA and relevant tax, social welfare and health and safety legislation (section 10 of the Construction REA). Thus, this is one area of regulation where a principal contractor is obliged to ensure that subcontractors are compliant with obligations regarding the rights of the subcontractors’ employees. No liability, under section 10, extends to the service recipient (unless the service recipient is also the principal contractor).

Approved subcontractors are defined in terms of their obligations; principally they must:

- comply with the terms of the REAs for the industry, health and safety, tax and social welfare legislation, and *employ the appropriate grades of trade union labour*;
- supply material as well as labour where this is the normal practice;
- carry employers’ liability insurance in respect of their employees and the work in which they are engaged unless this is provided by the principal contractor or client;
- employ appropriate numbers of apprentices relative to the number of craft workers;
- if in a labour only category, give security in a manner to be determined from time to time by the JIC for the Industry against default in respect of any liabilities they may have to employees.

The Construction REA covers employees, the self-employed,⁷⁴ atypical employees and apprentices. The Construction REA does not appear to cover agency workers; there is, however, a legally non-binding collective agreement in respect of such workers. Workers employed by other ‘labour-only’ subcontractors are covered. In the case of illegal/undeclared workers, however, working in violation of immigration laws,

⁷² This seems to be a broader liability than the general one established by Article 29, paragraph 2, D.lgs.276/03, where e.g. a time limit of 2 years applies. On the other hand, the liability of Act 276/03 also binds the client, whereas the liability in public procurement context does not.

⁷³ Provisions for the protection of workers in public procurements are laid down by regional legislation as well. If these are not “soft law” provisions (vd infra par. B3.3(3), problems of possible conflict with the State on the distribution of competence can arise on the basis of the Constitutional provisions (Title V of the Constitution).

⁷⁴ The definition, in section 23 of the Industrial Relations Act 1990, of a ‘worker’ for the purposes of the Industrial Relations Acts 1946-2004 has been held to include independent contractors for the purposes of coverage by the REAs.

both the employer and the worker are operating in contravention of a statute. As such, the contract of employment is illegal and therefore unenforceable at law.

Crucial for the strength of this social clause is the fact that the Construction REA is legally binding. Although collective agreements are not generally legally enforceable and no universal power exists in Ireland to declare them generally applicable, there is an important caveat to this. Under Part III of the Industrial Relations Act 1946, collective agreements made between unions and employers that are registered with the Labour Court⁷⁵ are legally binding. As many of these are company agreements, they can be applied to *all* employers and employees working in a particular sector or industry, as long as the parties to such agreements are 'substantially representative' of workers and employers in that sector. The most important of these REAs are undoubtedly the REA for the Construction Industry and the related, but separate, REA for the Electrical Contracting Industry. REAs are currently applicable to all undertakings (irrespective of their origin) operating in Ireland.

Outside of construction and electrical engineering, a number of company level REAs have been agreed between employers and workers in the mushroom harvesting sector. In July 2011, a new multi-employer REA came into force which sets legally binding minimum pay and conditions for up to 300 workers who work for seven companies that install and maintain overhead power lines. The employers covered by the agreement are not to enter into a contract with a client unless the client company has given an undertaking that it will employ the services of an audit services company to conduct an investigation at least once a year into the terms and conditions of employment of all overhead powerline contractors carrying out works on his behalf, to ensure these are compliant with the terms of the REA.

Apart from the use that is made of (legally binding) social clauses in the *private sector*, various commitments regarding *public procurement* and labour law compliance were made on a national level. As a result, public bodies are officially encouraged (but not obliged) to ensure that, in relation to construction projects, public contracts contain model labour law compliance clauses, which make it the responsibility of the principal contractor to ensure that all its representatives and subcontractors:

- comply with appropriate rates of pay and conditions of employment;
- apply the terms of the applicable REA for the sector;
- make appropriate deductions from payments to workers required by law;
- keep proper records (including time sheets, leave records, wage deductions, wage books and copies of pay slips) and produce these records for inspection and copying by any persons authorised by the client;
- respect the right under law of workers to be members of trade unions;
- observe, in relation to the employment of workers on the site, the 2005 Safety, Health and Welfare at Work Act and all labour legislation, codes of practice and legally binding determinations of the Labour Court.

In other sectors, public contracts for goods and services should contain similar model clauses making it the responsibility of the principal contractor to ensure that all its representatives and subcontractors act in accordance with good industry practice, and comply with all applicable employment legislation, as well as all legally binding sectoral agreements. The principal contractor should be responsible for the employment, remuneration, taxes, and immigration and work permits for all personnel retained for the purposes of carrying out the contract. Which workers are covered will depend on the provision in question (only 'employees' will be covered for the purpose of unfair dismissal, while 'self-employed' workers will be covered in terms of any breach of the Construction REA). Procurement rules are applicable to all undertakings which successfully tender for public contracts in Ireland. It should be emphasised, however,

⁷⁵ Despite its name, the Irish Labour Court is not part of the regular court system, but is a statutory industrial tribunal, comprised of representatives of unions and employers and chaired by a Government nominee.

that the use of these 'model' contracts (with labour law compliance clauses) is not a legal obligation imposed on public procurers, but rather is government policy and advised as best practice.

In the United Kingdom, all collective agreements are voluntary in nature and are often supplemented by circulars and letters which inform employers of new amendments to existing agreements. Collective agreements are typically focused on a workplace or single employer and therefore difficult to audit, although the construction sector has nine collective agreements in place covering the sector and the trades within it. The two most important ones contain social clauses. The Construction Industry Joint Council Working Rule Agreement (hereinafter WRA) was recently revised in March 2011 and is in force until the social partners decide otherwise. The National Agreement for the Engineering Construction Industry (hereinafter NAECI) is for the period 2010-2012 and is the most significant agreement with regard to posted workers as it now contains an appendix which specifically deals with non-UK contractors and labour on engineering construction sites, including the auditing of these contractors to make sure that they are following the agreement. This audit is undertaken by an independent auditor appointed by the client or managing contractor. The WRA applies to all workers in construction apart from those working within engineering construction, who are covered by the NAECI and those under the other relevant principle skill grades, such as electricians (JIB-ECI) and plumbers (JIB-PMES and SNIJIB), who are covered by the other seven agreements.

With these agreements, the employer federations involved in the agreement recommend that all member companies follow the agreed terms and conditions, whilst the trade unions enforce this at a site level through either trade union representatives or full-time officials making individual representations to the employer representative. In some instances a shortened version of the WRA is pinned up on site canteen walls for workers to view. With the NAECI agreement, local site representatives are also involved in Project Joint Councils and Local Forums; and with Major New Construction Projects via Supplementary Project Agreements (SPA). Also detailed with non-UK contractors is that there should be meaningful consultation with trade unions and site representatives (stewards) to explain the agreement and its operation. Finally, here the social partners support site stewards to attend a National Stewards' Forum, which meets three times per year for two days. Here activities include invited speakers on important topics to the sector and discussion on any issues that are arising on sites and with main or subcontractors.

Interestingly, there are also more innovative agreements in place that have facilitated union organising of migrant workers and the protection of their and other workers' employment rights. For example, for the delivery programme of the UK Olympic Games venues and infrastructure, the social partners and client signed a Memorandum of Agreement which recognises the relevant collective agreements. This Memorandum of Agreement (8 June 2007) is regulated by the client (Olympic Delivery Authority). They are detailed to undertake a monitoring coordinating role, whilst the partners to the agreement convene periodically to review progress, identify areas of concern and agree solutions. In particular, it identifies the WRA, NAECI and some other collective agreements in the construction sector (JIB-ECI, JIB-PMES, and the HVACR) as applying to the Olympic construction programme. As with the construction collective agreements, the Olympic Games Memorandum of Agreement applies to all subcontractors and their workers operating on the Olympic sites.

Within the public procurement context, there have also been a number of voluntary initiatives to promote decent labour standards. In England, there was a recently withdrawn commitment to monitor the Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts (2003) and the Code of Practice on Workforce Matters in Public Sector Service Contracts (2005). In Scotland, regulation is through the Public Private Partnerships in Scotland – Protocol and Guidance Concerning Employment Issues (7 November 2002) [PPP Protocol]. In Wales, regulation is through the Code of Practice for Workforce Matters in Public Sector Service Contracts (2005), reissued in February 2008. The codes of practice in England, Scotland and Wales require(d) any supplier to ensure newly employed workers were offered fair and

reasonable terms and conditions which were, overall, no less favourable than those of TUPE⁷⁶ transferred employees. The codes generally operate at a local level through the appropriate public sector management and trade union representatives or committee. This procedure is often through either a consultative committee or via individual representations from trade union representatives to managers. In some cases, such as in Scotland, trade union representatives are involved in the very early stages of the procurement process.

C. Preventive measures

In the previous Chapter 3-II B, we examined in considerable detail eight of the several wage liability/responsibility arrangements that were identified in Chapter 2 (see Chapters 2-III and 2-IV). Below, we screen said arrangements on the existence of specific preventive measures. In Chapter 3-II D we repeat this exercise with regard to existing sanction mechanisms.

What do we mean with preventive measures and why do we zoom in on them? In the context of the current study, preventive measures stand for measures that prevent the chance on liability for parties. In the Dublin study it was found that all countries studied there (AT, BE, DE, ES, FI, FR, IT, NL) have such tools, except for Belgium. However, these measures were mainly developed in relation to social security contributions and wage tax liabilities, which is not the focus of this chapter for reasons explained in Chapter 1 and Chapter 3-I above. As we will see below, in the field of wage liability less explicit preventive measures are in place. Nevertheless, it is still interesting to examine preventive tools, because these may strengthen the aim of liability/responsibility arrangements to push contractors and/or clients to select reliable and decent operating subcontractors.

Following the distinctions made in the Dublin study, the preventive tools may be divided in two main categories. In the first place, measures aiming at reliability checks of the subcontracting party and/or temporary employment agency. These measures may be of an optional or an obligatory character. Different than in the Dublin study, we do not include in this category measures that are solely focused on a reliability check, but only measures which introduce a reliability check that may lead to an exemption from liability for the wages of the employees concerned. In the second place, there are also preventive measures pertaining to the guarantee of e.g. the payment of wages.

Statutory general wage liability arrangements

From the three statutory *general wage liability* arrangements scrutinised above (AT, DE, NO), none include explicit preventive measures regarding reliability, neither obligatory nor as an optional tool. This means, as for instance clearly stated in the Norwegian report, that the liability cannot be limited, neither by contract between an employee and its employer or anyone else, nor contractually between (sub)contractors. However, the basic underlying consideration of joint & several liability arrangements is that they are preventive in nature. In other words, they push contracting parties to ensure beforehand that a contract partner is reliable and likely to comply with the applicable rules and regulations. With regard to the second category, the guarantee of payment of wages, the newest Austrian measure may qualify as such.

Austria: obligatory tool guaranteeing the payment of wages

As mentioned before, pursuant to Sect. 7k(1) AVRAG, the district administrative authorities, in their capacity as law enforcement authorities, *can* instruct the contractor (or, in case of a temporary worker, the user company) to pay a part of the compensation due to the employee of a subcontractor as a deposit. The payment of the instructed bail has a debt discharging effect for the contractor/user company. The amount of the bail amounts to at least € 5,000, according to Sect. 7k(4) AVRAG, and must not be higher than the maximum of the threatened fine. In case the compensation due is less than € 5,000, the bail may

⁷⁶ The British implementation legislation of the Transfer of Undertakings (Acquired rights) Directive.

not exceed the compensation. The bail will be reimbursed to the contractor/user company when the law suit is closed, or when the fine is paid by the subcontractor/temporary work agency, or when the expiry date of the bail is not declared within one year, or when the subcontractor/temporary work agency pays the bail himself (Sect. 7k(6) AVRAG).

Statutory specific wage liability arrangements

Regarding the statutory *specific* wage liability arrangements in France, Italy and the Netherlands, we did identify some preventive elements belonging to the first category (reliability checks). Only in Italy, the arrangement studied contains preventive tools which fit the second category (guarantee of wage payment).

France: obligatory tool to check reliability

For instance, in France, Article L.8222-1 of the Labour Code provides that “everyone”, meaning any client, order provider, including natural and legal persons, local and/or national authorities or the State is under a legal obligation to verify on the conclusion of a contract for the provision of services or the supply of goods worth a minimum of € 3000, (Article R.8222-1 Labour Code) and then periodically, every six months (Article D.8222-5), until the end of the contract that his contractors/subcontractors have accomplished all declaration formalities required in order to provide services as a self-employed person or in order to employ others. In other words, the client is legally bound to require and obtain proof from his contractors that they exercise their activity in compliance with the declaration requirements; so does the principal contractor with regard to his subcontractors and so on. If the client, the principal contractor or any intermediary contractor fails to make verifications with regard to his subcontractors, his liability can be engaged even though he has not been found guilty of an undeclared work offence. By contrast, if the client, principal contractor or intermediary contractor has made the necessary verifications regarding his contractors/subcontractors his liability is ruled out unless found guilty of an undeclared work offence.

Verifications should only take place with regard to direct contractors. These verifications are not always the same. They differ according to whether the contractor is domiciled in France or abroad (EU Member States or third countries).

The Netherlands: optional tool to promote hiring only reliable temporary work agencies

According to Dutch law, temporary work agencies are under no obligation to acquire the so-called quality label ‘NEN-norm 4400’, nor are user undertakings obliged to hire workers from a certified temporary work agency (unless this is stipulated in an applicable CLA, see below). Nevertheless, user undertakings are strongly stimulated to do so, because the joint and several liability for the statutory minimum wage does not apply in that case (Art. 7:692 (2) CC). Therefore, the liability scheme of Art. 7:692 CC is an important incentive to deal exclusively with certified temporary work agencies. Hence, Art. 7:692(2) qualifies as a preventive tool, since it offers parties an escape route for the liability arrangement of Art. 7:692(1) CC.

As mentioned above, temporary work agencies established in the Netherlands can acquire the quality label ‘NEN-norm 4400 Part 1’ (since 2007) and temporary work agencies established abroad can acquire the similar ‘NEN-norm 4400 Part 2’ (since 2008) from the National Standardisation Institute (*Nederlands Normalisatie Instituut* (abrevv: NEN)). This quality label was developed by the temporary employment agencies sector itself and is meant to distinguish trustworthy agencies from their unreliable colleagues. temporary work agencies qualify for this label when they have shown that they have fulfilled the requirements concerning the payment of taxes and social insurance premiums and the legitimacy of employment in the Netherlands (NEN norm 4400 Part 1). The assessment is made by private certifying companies. After the certification, the agency will be registered by the Foundation Norms Employment (*Stichting Normering Arbeid* (abrevv: SNA)). Regularly monitoring the registered agencies with regard to the compliance with the applicable law and regulations and on the payment record of the agencies takes place to assure that the agencies stay on the right track. Otherwise, the non-complying agency will be expelled from the register.

In order to encourage the certification of agencies, as well as the use of certified temporary work agencies, several generally applicable CLAs oblige undertakings to hire agency workers exclusively from NEN norm certificated Dutch and foreign temporary work agencies. This is, for instance, stipulated in the extended CLA for the construction industry (Art. 96b), CLA Finishing Work (Construction Industry) (Art. 2B), CLA Road transport and haulage (...) (Art. 9) and CLA for the painting, finishing and glass business (Art. 7) in order to promote the certification of agencies.

Italy: obligatory tool guaranteeing the payment of wages

Specific obligations bind the contracting authorities in case of non-payment of wages or contribution by the contractors or subcontractors. If these latter default regarding their contribution duties (as certified by the DURC, the client authority has to pay the outstanding contributions directly to the National Insurance Institute, deducting the equivalent by the amount due to the contractor (or subcontractor) as compensation for the works or services executed (Article 4, D.P.R. 207/10).

Obligatory reliability checks

The public client is required to carry out periodic checks on the contractor's and the subcontractors' fulfilment of wages and contribution obligations and to stop payment of the work in the event of "serious" non-compliance (Article 118, paragraph 6, D.lgs.163/06). These serious violations must have been "definitively proven" (Article 38, paragraph 1(i), D.lgs.163/06).

Optional certification

The client may limit his liability associated with the execution of the contract through certification, introduced into Italian law by Articles 75 et seq, D.lgs.276/03 and recently reformed by the Act of 4 November 2010, No. 183. Certification is a procedure that can be activated, upon request, at the special public or private bodies, authorised by the Ministry of Labour (Certification Commissions), which certify the nature and content of the employment contract or the "authenticity" of a contract (Article 84, D.lgs.276/03). The Commission shall verify that the contract is lawful (e.g. Article 29 paragraph 1), namely that it is signed with a "real" employer who organises and directs the workers and who not merely supplies workers (labour-only) to the client. The legality of the certificate contract agreement may be challenged by the employee in the labour court contesting certification, because of a consent defect or discrepancies between the negotiated programme and the subsequent execution of it (Article 80, paragraph 1). The effects of the certification are produced in particular in respect of inspection bodies, the activities of which must address the non-certified contracts (Directive of the Ministry of Labour 18 September 2008, G.U. 12 November 2008, No. 265). Certification is therefore a tool that allows the client to check the organisational characteristics of contractors and their financial robustness in advance with the help of a competent third party. In the presence of a certificate contract agreement, the client could reduce the risk of legal actions by the workers (under Article 29, paragraph 3 bis) and (mostly) avoid complaints of violations (punished also with criminal sanctions) from inspection authorities. Nevertheless, the certification does not have any legal effect on joint and several liability. The client is in fact always exposed to it anyway in the event that the contractor and subcontractors are insolvent.

Conventional liability arrangements and (soft law) social clauses

Regarding the measures applied in Ireland and the UK, no 'explicit' preventive tools were identified. Nevertheless, in Ireland, own initiative checks of reliability seem to be rewarded with exemption by case law. Certain public procurement model contracts contain obligatory reliability checks. In the UK, the NAECI agreement does contain some informational requirements which may be classified as having a preventive aim.

Ireland: unclear options and obligations to check the reliability of subcontractors

In Ireland, the Construction REA is silent on how confirmation that a subcontractor is 'approved' (i.e. compliant) is to be demonstrated. No certificate of compliance needs be sought. In a ruling of 2011 (MDY Construction v BATU), the labour court held that, by simply making an enquiry of the subcontractor at the

time of engagement, and providing no other evidence to the court of taking reasonable steps to ensure compliance with the REA, the principal contractor had not discharged its obligations under section 10. However, case law also shows that if the principal contractor can prove that he took appropriate steps to ensure the subcontractor was compliant with the REA, his liability will be excluded (for example, if the subcontractor misled the main contractor by producing falsified records).

In the case of public procurement, the obligations to ensure compliance by subcontractors with labour, tax and social security laws fall on the principal contractor. How compliance with labour law requirements is to be monitored is not stated. The Standard Forms of Construction Contracts do provide that the principal contractor should keep proper records and produce these for inspection by the client. Public works contracts should also include a clause giving the client the right to conduct random checks of the records of (sub)contractors to assess compliance with employment provisions and agreements. The Contracts require mandatory checks to be completed in cases where the contract sum is expected to exceed € 30 million; and the duration of the work is expected to exceed 18 months. It is not clear how a principal contractor can limit its liability in these circumstances.

The United Kingdom: 'non-legal' obligations to ensure reliability and law abidance of subcontractors

As construction collective agreements are voluntary in nature, there are no legal obligations placed on the parties to the agreements. The NAECI agreement, however, places an obligation on the managing contractor to ensure that all foreign contractors are aware of the agreement (NJC, 2010, Part 3 Appendix G). On large projects, which are mainly covered by this agreement, there is also an audit procedure in operation that places an obligation on all subcontractors to provide contracts of employment and wage slips in order to prove that workers are obtaining the agreed NAECI terms and conditions. The Olympic Games Memorandum of Agreement states that it is not legally binding and that any grievances or disputes will be resolved through the applicable collective agreement.

The public procurement codes of practice in England, Scotland and Wales place public sector organisations (the client) under a duty of responsibility to pay regard to them. This includes emphasising that service providers should consult with employees and trade unions from the earliest stages of contract procurement. This has to some extent limited the growth of the supply chain and it is why the English codes were recently withdrawn by the coalition government.

D. Sanctions

Apart from being jointly and sometimes severally liable, parties who do not abide by the rules in place may additionally be sanctioned by fines and/or alternative or additional penalties. Below, we examine whether the arrangements elaborated upon above do apply these kinds of sanctions.

Statutory wage liability

In Austria, under constitutional law, no punishments for misconduct can be forced on the (principal) contractor if the contractor is not to blame for his own fault. Therefore, a punishment can only be administered if the contractor failed to comply with duties entrusted to him, e.g. duties of disclosure, or if he is concerned in the breach of duty of the subcontractor.

In Germany, one aspect of the sanctions are the *back payments obligations* in the different pieces of legislation. Furthermore, the AEntG constitutes several *finer* as sanctions. Primarily § 23 AEntG stipulates an administrative offence in cases of failing to grant minimum working conditions according to § 8 AEntG by either the principal contractor or subcontractor, even if this did not happen deliberately but negligently. Art. 23 (3) AEntG defines the maximum amount of the fine as € 500,000. Both domestic as well as foreign employers can be subjected to such fines. An *alternative sanction* is laid down in § 21 AEntG. Once a fine of at least € 2.500 is imposed according to § 23 AEntG, the company can be excluded from future public

contracts. § 21 AEntG states that companies should be excluded for an appropriate time. No maximum duration is stipulated in the norm. The legal doctrine proposes a duration of three years by analogy to § 21, paragraph 1 SchwarzArbG.

Statutory specific wage liability arrangements

In France, apart from the liability itself, a range of *criminal and administrative sanctions* is provided, the latter particularly in the context of public procurement. For instance, when the controlling authority has made a formal report against a client and/or a subcontractor for one of the previously mentioned illegal work practices, administrative authorities can turn down the offenders' requests for public subsidies related to the enhancement of employment and to training.

In Italy, non-compliance with the rules may produce liability, but also *exclusion from future public contracts/public tendering* (although not in all circumstances) and to *administrative fines and criminal charges*.

In the Netherlands, regarding the liability for statutory minimum wages when hiring non-certified temporary work agencies *Art. 7:692 CC*, it is in the first place up to the temporary agency worker to *claim the statutory minimum wage* either from his employer (the temporary work agency) or from the user undertaking. Furthermore, the labour inspectorate is authorised to impose direct *finances* on employers who fail to pay statutory minimum wages. An employer who violates the Minimum Wages Act (*WML*) may forfeit an administrative fine up to € 6,700 per worker.

Conventional liability arrangements and (soft law) social clauses

In Ireland, under the Construction REA, the precise sanctions that can be imposed can best be illustrated by case law. For instance, if the labour court orders a principal contractor to take a specific course of action and the contractor refuses to comply, the contractor is liable to *a fine* (rather than to fulfil the precise terms of the order). Therefore, the court's orders, although backed by law, rely substantially on the contractor to 'morally' force the subcontractor into compliance. In reality, the presence of trade unions and the associated threat of industrial action are important in the monitoring of section 10 compliance.

There are no specific procedural arrangements that guarantee the payment of wages and entitlements; in respect of alleged breaches of REAs, a worker (or NERA on behalf of the worker) can pursue a civil claim, or a trade union can apply to the labour court and the court may direct the main contractor to do such things (including the *payment of any sum due to a worker for remuneration* in accordance with the agreement) as will, in the opinion of the court, result in the agreement being complied with by the principal contractor. Failure to comply with the terms of a labour court order renders a party guilty of an offence and liable to fines.

If non-compliance occurs with the public contracts model labour law compliance clauses, contracting authorities can take whatever corrective action is considered necessary and appropriate, within the terms of the contract, including the *proportionate withholding of payments*, to ensure compliance. Contracting authorities may provide for *random checks* of the records of contractors and subcontractors in their contracts in order to assess the compliance with the requirements of labour law, as appropriate.

The Standard Forms of Construction Contracts provide that where a principal contractor has not complied with obligations in relation to e.g. employee payments and/or conditions of employment rights, the client is entitled to estimate the amount due and to deduct it from payments to the contractor. The client may continue to deduct the payments until it is satisfied that all payments due have been made. Moreover, each request for an interim payment by a principal contractor should be accompanied by a certificate that all labour law obligations have been complied with, otherwise the client may commence an investigation and the contractor will be liable for any costs incurred from this. The client may also cease payment to the contractor for the work in question until the certificate is produced. Model public contracts for the supply

of goods and services provide that, if a sum of money is recoverable from or payable by the principal contractor, the parties may agree to deduct this from payments to be made by the client. It is not clear how a principal contractor can limit its liability in these circumstances. As with the REA, the sanctions may not be applied where a principal contractor can prove that he took appropriate steps to ensure that subcontractors were compliant with the relevant obligations.

Nevertheless, it is important to stress that the only legislative requirement on principal contractors is to state that, in preparing their tenders for the contract, they have taken account of the obligations relating to employment protection and working conditions that are in force. Any ensuing penalty must be provided for contractually (and will be subject to general principles of contract law, including interpretation and, if necessary, adjudication by the courts). Failure to comply with the legislative requirements will result in the tender being disregarded. The sanctions that may be imposed on principal contractors in breach of public procurement contractual provisions have been outlined above (withholding of payments).

In all areas, however, no additional penalties for non-compliance with labour rights obligations exist; there are no additional fines and offending contractors are not 'black-listed' or excluded from future participation in public contracts.

In the United Kingdom, all construction collective agreements are voluntary in nature and therefore the threat of industrial action is the main sanction open to trade unions. Whilst the WRA procedures detail no sanctions – and indeed any dispute will be resolved by the employer in question only – the NAECI disputes procedure can in some cases go to a national level, in which case it can become binding, whilst the audit has assisted some posted workers to secure back payments. The Olympic Games Memorandum of Agreement contains no specific sanctions.

Regarding the Public Procurement Codes, in Scotland they essentially detail that, if a local authority does not comply with the guidance, this could be regarded as a breach of a statutory 'Best Value' duty under s2 of the Local Government in the 2003 Scotland Act and therefore covered by the enforcement regime under that Act. Both codes are firm in their endorsement of fair employment conditions with the PPP protocol stating that compliance with it should be a condition of service specification and any subsequent contracts. The Welsh Code of Practice for Workforce Matters in Public Sector Service Contracts details that a public sector organisation (the client) can enforce the terms of contract, incorporating the code. This happens if after successive requests it finds that a service provider is failing to implement the code of practice. It is also allowed to not consider the service provider when future work is tendered.

III. (Statutory, conventional) arrangements on social funds payments

A. Origins and objectives

As stated in Chapter 2-III B, responsibility/liability arrangements regarding social funds payments currently only exist in five Member States (AT, BE, DE, IT and NL). Most notably, these funds are set up for special leave and holiday payments and are of particular importance to the construction sector. The reasons for setting up these leave fund schemes in the construction industry were historically inseparably linked to the specific features of this industry (frequent change of employers, lack of permanent employment relationships). The purpose of the leave fund schemes is to ensure on the one hand that construction workers – although they frequently change employer – can realise their full holiday entitlement and on the other hand an even division of the financial burden of holiday entitlements between employers. Despite the commonalities with regard to the origin and objectives of the social funds, they are differently framed and situated in their own national legal systems.

In Belgium, the liability system enacted combines social funds payments with liability for tax on wages and social security contributions. When introduced, Article 30bis of the RSZ Act created a sui generis form of limited joint and several liability for clients in case the latter appealed to non-registered contractors. In the construction sector the client in particular was imposed a joint and several liability for paying the social debt of the (sub)contractor. According to Belgian law, social funds are deemed to be a part of social security law rather than of employment law. Clients were exempt from this withholding and paying obligation, in particular when the registered subcontractor has no debt to the National Social Security Office or a social security fund at the date of payment, and also when it concerns an employer not established in Belgium, if the latter does not have social debt in Belgium and all employees have a valid form E101 or E102 (form regarding applicable legislation). For these reasons already, it does not suit our purposes to dwell on the details of this arrangement. Furthermore, the system was partly dismantled after the ECJ condemned at least the fiscal part of these rules as being contrary to the free movement of services.⁷⁷ For that reason, a completely new but less powerful system was set up in 2007 and became active in 2008.

In Austria, the Netherlands and Germany, liability arrangements concerning social funds payments in the construction sector stand apart from social security liability arrangements, whereas the particular Italian tripartite arrangement is more closely linked again with social security regulations, although not fully embedded in this discipline of law.

In Austria, the liability arrangement for social security contributions does not include the compensations to the Construction Workers' Annual Leave and Severance Payment Fund, but according to Sect. 14 of the Temporary and Agency Workers Act, a liability system is applied to the user company with regard to outstanding contributions to be paid to the Annual Leave and Severance Payment Fund by the temporary work agency.⁷⁸ Consequently, the Austrian liability arrangement concerning social fund payments is limited to user companies of temporary work agencies. In the Netherlands, the social funds schemes are included in a generally applicable collective agreement for the Dutch construction industry (vacation fund and risk fund). In fact, the liability/responsibility component of the scheme is not very elaborate.

The German liability arrangement and the Italian responsibility arrangement regarding social funds also mandatorily apply in the construction sector, but the Italian system may also be (and often is) voluntary applied in other sectors. In comparison to their Austrian, Belgian and Dutch counterparts, these seem to be rather elaborate arrangements. More importantly, these arrangements have high practical relevance, thanks to their strong institutional features. Therefore, we limit our more detailed observations below to the German and Italian social fund liability systems only.

B. Nature and coverage

Germany: liability towards the ULAK (instead of the workers)

The legal basis of the leave scheme is the Collective Agreement on the Social Fund Scheme in the Building Industry of 18 December 2009 (VTV). Article 8 No. 15.1 of the Federal Framework Agreement of the Building Industry of 4 July 2002 (BRTV) provides for the obligation of the employer to pay contributions to the holiday pay fund of the German construction industry (*Urlaubs- und Lohnausgleichskasse der*

⁷⁷ ECJ, C-433/04, *Commission v Belgium*, ECR 2006, I, 10653.

⁷⁸ Since 1 August 2009 (Federal Law Gazette I No. 70/2009), the liability on charges to the Construction Workers' Annual Leave and Severance Payment Fund was extended. With the latest reform, which will come into force only on 1 January 2012 (Federal Law Gazette I No. 51/2011), the user company can be excused from its liability towards the Act on Construction Workers' Annual Leave and Severance Pay by direct payment of the charges (Sect. 21a(9) to the Act on Construction Workers' Annual Leave and Severance Pay).

Bauwirtschaft, ULAK). Leave fund (ULAK). The ULAK is a paritarian institution set up jointly by the social partners of the German construction industry in order to implement the industry's holiday pay fund scheme. Both collective agreements VTV and BRTV have been declared universally applicable pursuant to § 5 of the Collective Agreements Act and were extended by means of the AEntG (Act on the posting of workers) to employment relationships between employers established outside Germany and their workers posted to Germany. The collective agreement provides that the employers currently have to contribute 14.3 per cent of the total gross wage per worker to the ULAK in order to finance the holiday entitlements. The ULAK determines the amount of the contributions on the basis of the paid gross wages which the employers have to declare for each worker monthly to the ULAK.

Therefore, the ULAK also plays an important role in controlling the payment of minimum wages. When checking that contributions have been paid in accordance with the regulations under the collective agreement, the ULAK simultaneously examines whether or not the domestic or foreign employer has complied with the minimum wage provisions of the construction industry. In this context, the contributions paid to the ULAK are subject to a plausibility check which focuses on the declared gross wages and the working hours liable to pay. Does the plausibility check lead to the presumption that the minimum wage might not have been respected, the ULAK will contact the company concerned and ask to clarify the situation. If the construction company has actually paid less than the minimum wage, the ULAK will ask the company to pay the outstanding contributions. ULAK can take legal action if the company refuses to pay. Each year, ULAK starts around 60,000 legal proceedings in this context. Particularly with regard to foreign construction companies which are posting workers to Germany, the ULAK regularly falls back upon the principal contractor liability pursuant to Article 14 AEntG. To facilitate legal proceedings against (principal) contractors, the German legislator amended § 150 paragraph 3 S. 9 SGB VI.

As explained above in Chapter 3-II, Article 14 AEntG entails a full chain liability. The contractor is liable for unpaid minimum wages as well as for outstanding holiday pay fund contributions like a guarantor who has waived the defence of prior recourse (§§ 765, 771, 773 No. 1 Civil Code (*Bürgerliches Gesetzbuch - BGB*)). After a contractor has discharged this liability, the claim against the principal debtor, i.e. against the employer, passes over to him pursuant to § 774 paragraph 1 BGB. If a subcontracting chain exists, the employees or the holiday pay fund respectively, can choose which contractor or lender in the chain they want to hold liable. With regard to minimum wage, possible claimants are the workers of a contractor, workers of hired subcontractors, or agency workers. Notably, regarding contributions to the holiday pay funds, only the ULAK is competent to claim such contributions.

Italy: prevention from responsibility/liability through DURC

In Italy, the main tool provided by law to control wages and social security obligations of contractors and subcontractors is the DURC (*Documento Unico di Regolarità Contributiva*), issued by social security institutions (INPS and INAIL) and (in building sector) by construction funds. It attests the occurred payment of social security contributions, and (in the building sector) to construction funds.

The requirement to be in possession of DURC has been generalised to all employers who want access to "*legal and social security benefits on labour and social legislation*" (Article 1, paragraph 1175 and 1176, Law 296/06) and in no case can it be replaced by other documentation confirming the payment of contributions (Consiglio Stato 25 August 2009, No. 4035, <http://www.giustizia-amministrativa.it/webcds/>). The DURC is valid for three months after issuing. By means of the DURC the client can verify the correctness of the contractor's contribution when awarding and concluding the contract and, if it lasts more than three months, in successive phases of execution of it.

Following a joint statement signed by the most representative social partners (in 28 October 2010), from 2012 on (and after a year of testing), in order to acquire DURC from the Construction funds, employers will also have to demonstrate that the incidence of labour costs on the total value of the work is not inferior to the "fairness indexes" (*indice di congruità*) including social security contributions, set by the social partners.

The fairness index applies to all works with a value equal to or greater than € 70,000.

In case of public procurement, public authorities acquire DURC directly from the social security institutions (Article 16 *bis*, Act 2/09), before awarding and signing the contract and before issuing invoices payment for work progress and for final work (Article 6, D.P.R. 207/10). In private construction contracts, contractors and subcontractors must acquire it before the beginning of the work and transmit it to the competent authority (Article 90, paragraph 9, D.lgs.81/08). Outside of the construction sector, DURC is not compulsorily, but it can be requested by the client (as usually happens).

As mentioned, the Code on Public Contracts subordinates the payment of work progress and the final state of work to the presentation of DURC by the contractor and, through him, by subcontractors. In private contracts such a requirement was repealed in 2006. The client is entitled, however, to suspend the payment of the work if the contractor does not produce the DURC or otherwise does not certify the fulfilment of obligations and pay contributions in respect of workers employed in the contract and subcontracting chain (Ministry of Labour, circular 5/11).

Employers established in another Member State do not have to acquire the DURC, with regard to social security contributions, as they are deemed to be registered in the social security system of the country where the worker usually works (pursuant to Regulations 883/04 and 988/09). Nevertheless, EEA subcontractors do need a DURC regarding their duty to contribute to local construction funds, as these are instituted and regulated by collective agreements and they entail benefits with a remunerative nature (payment of holidays). Hence, the Ministry of Labour (DG Inspective Activities) repeatedly asserted in its notes (*interpelli*) that a requirement to register exists for those foreign undertakings that “*have not already fulfilled, with a public or private body, obligations aimed at securing workers the same protection standards guaranteed by provisions imposed by collective agreements in Italy*” (*Interpelli* of 6 February 2009, No. 6/2009; of 3 September 2007, No. 24/2007; of 23 February 2006). In other words, the foreign undertaking has to pay contributions in construction funds if there is no equivalent obligation in the habitual country of work. It follows (for instance) that Rumanian undertakings cannot be exonerated from registration, because in Romania there is no fund equivalent to Italian construction funds.

C. Preventive measures

In Italy, in fact, the DURC, although having specific meaning for social funds in the construction sector, functions as a preventive tool for the general liability arrangements in place in Italy. The DURC is obligatory for all employers in any case of public procurement or private contracts in the building sector. Although the DURC cannot be issued to a defaulting employer, the DURC can be issued to the guarantor jointly liable who did not fulfil his duties in regard of workers of the subcontractors (Ministry of Labour, *Interpello* No. 3/2010).

In Germany, in order to keep liability risks in the context of the holiday fund contributions low, the construction industry instituted an “early warning system” at the ULAK or SOKA-BAU.⁷⁹ This serves to provide the contractor with particular information about the subcontractor’s contribution history, i.e. whether or not the subcontractor had a history of paying contributions reliably. Moreover, the ULAK does not pursue holiday pay fund contribution claims retroactively against undertakings which duly participated in the prequalification procedure for the construction businesses during the award of public contracts.⁸⁰ In this context, this prequalification is a pre-emptive, non-commission related inspection of proof of suitability. The exact requirements are defined in § 6 of the *Vergabe- und Vertragsordnung für*

⁷⁹ For further information: <http://www.soka-bau.de>.

⁸⁰ For further information: www.pq-verein.de/.

Bauleistungen, Part A (VOB/A)⁸¹ (German Construction Contract Procedures), while further criteria may be taken into account if necessary. Undertakings which are interested in public contracts can have their proof of suitability verified at a prequalification office. The VOB/A 2009, which became effective on 31 July 2009, stipulates that all public clients should acknowledge the entry in the list of the *Verein für die Präqualifikation von Bauunternehmen* as binding proof of suitability.⁸² Moreover, there are several possibilities to limit the responsibility in the context of § 28e paragraph 3a SGB IV (social security obligations).

D. Sanctions

Regarding the DURC, no specific sanction mechanisms are enacted. Regarding the German liability arrangement towards ULAK, please be referred to Chapter 3-II D above.

IV. Health & Safety arrangements

A. Origin and objectives

Health and safety measures in the workplace have always played an important role and were one of the first and main reasons for setting up and regulating labour inspectorates for the inspection and supervision of safety regulations. Industrial accidents and occupational diseases come indeed at a high price for both victims and society as a whole.

On the other hand, compliance with occupational health and safety regulations implies significant costs: safety equipment and measures are often very expensive and in many cases slow down the work. In other words, there is a certain negative impact on competitiveness. In that respect, it may be expected that companies try to rationalise or externalise costs brought about by occupational health and safety regulations. By outsourcing a part of its activity to another company, a company not only cuts back on costs, but also passes the risk to the latter. In reality, costs are being shifted to society and/or private insurance companies while the risks are being shifted to the workers employed by the subcontractor.

Since occupational health and safety is a specific domain, it calls for specific measures with regard to inspection and enforcement. Since decades, the European Legislator recognises this importance and has taken it into account when enacting, amongst others, Directives 89/391/EEC and 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites describing the duties, roles and responsibilities of the coordinators for safety and health matters.

In implementation of these instruments, the different national legislations have often introduced provisions that contain the respective obligations of the employer-client and the employer-subcontractor with regard to exchange of information, coordination and cooperation. On the one hand, this often implies that the employer him/herself provides the contractors with the necessary information for the benefit of the workers of the contractors and the subcontractors regarding the well-being of the workers in the execution of their work; ascertains that the (sub)contractors' workers have received the appropriate instructions typical of the business of the employer in whose facility work is being done and coordinates how the (sub)contractors act and guarantees the cooperation between these contractor's subcontractors and his or her own facility in implementing the measures on the well-being of the workers in the performance of their

⁸¹ Vergabeverordnung in the version of the announcement of 11 February 2003 (BGBl. I p. 169), which was modified for the last time by Article 9 of the Verordnung of 23 September 2009 (BGBl. I p. 3110).

⁸² See homepage of "Verein für die Präqualifikation von Bauunternehmen e.V.": <http://www.pq-verein.de/>.

work. On the other hand, the (sub)contractor is obliged to provide the employer in whose facility work is being done with the necessary information about the risks typical of his or her works and to give his or her assistance for the coordination and cooperation.

In line with these provisions many legislators have therefore established special (often shared / sometimes joint and several) liability mechanisms between the client-contractor and the subcontractors. In almost all countries special mechanisms were introduced according to which the non-compliance with certain obligations may lead to certain forms of liability. Moreover, the normal provisions of civil law often allow starting certain proceedings. In almost all Member States, occupational health and safety regulations are laid down in law. In a few Member States (e.g. Cyprus, Ireland, the Netherlands) additional rules are laid down in CLAs, mainly in the construction sector.

It could be mentioned that in many countries these provisions do not only aim to protect the employees of the subcontractors who are active on the site, but also any other person working at the same place, regardless of the contractual status this person has with the contractor. Consequently, self-employed people will often be covered as well. For instance, in Slovenia, a principal contractor is responsible for the safety and health at work for all people working at his or her premises. The legal basis or nature of the contract for their work is irrelevant in this context. In Ireland, liability potentially extends to all contractors, depending on who has 'control' over the work processes in the event that an industrial accident injury is sustained. Also in the Swedish Work Environments Act, a direct responsibility is put on certain subjects, for example a client in a subcontracting situation, towards workers who are not their own employees. In the construction sector, the responsibility is put on "the person who orders execution of building or construction work", i.e. the client, and (at other common work sites) on the person who has control over the work site. These rules work to the benefit of all persons working there, irrespective of their contractual status.

B. Nature and coverage

The extent to which a contractor is liable for his subcontractors differs. In some countries a system of joint and several liability could be found. Looking at the different regulations, it is clear that some countries have only direct liability, whereas some countries provide chain liability. An overwhelming majority in one or another direction is not present.

Some countries clearly favour *a system of chain liability* in order to avoid the non-compliance of occupational and health regulations. The extension of joint and several liability to the entire subcontracting chain entails the multiplication of persons liable regarding employees of subcontractors.

In Greece, the liability extends to the entire subcontracting chain.

In Spain, there is a joint and several liability responsibility for administrative sanctions for the non-compliance with the health and safety rules during the subcontracting period.

Act 31/1995 of 8 November on Health and Safety at Work establishes a number of obligations for subcontracting, according to which a joint and several and chain liability is imposed for administrative sanctions in the event of non-compliance with these regulations. Companies (clients) who subcontract their own activity are required to verify that subcontractors follow the rules of risk prevention (such as the fact that contractors and subcontractors have made the necessary risk assessment, the fact that the required coordination has been established). This liability extends to the entire duration of the contracting/subcontracting relationship and covers any breach of the obligations that this act establishes

with regard to the contractor's employees that develop their activity in the client's own workplace, when the violation arises in that framework.

In Belgium, it might be presumed that there is a joint and several liability system with regard to occupational health and safety. The Act of 4 August 1996 on the well-being of workers in the performance of their work contains the respective obligations of the employer-client and the employer-subcontractor with regard to exchange of information, coordination and cooperation, even for the self-employed who work in the same place as the employees of the former. The situation is however not so clear as there is some discussion due to obscurities in the legislation whether or not the liability in occupational health and safety matters is a chain liability or rather a direct one. The law provides for specific obligations for the different contractors and subcontractors involved. The problem is however that the further provisions in this part of the legislation seem to undermine this joint and several liability system. Depending on the case however, the law determines that, the project supervisor responsible for the project, the contractor or the subcontractors have the obligation to exclude the contractors, subcontractors or self-employed persons of whom they may know that they do not comply with the obligations imposed by this legislation. This sentence seems to refer to an obligation for a particular party to exclude its direct contracting party. This obligation therefore applies in the relation between the project supervisor responsible for the execution and the contractor, between the contractor with his or her subcontractor, between the subcontractor and his or her sub-subcontractor. This seems again to limit the responsibility to the relation between the direct contracting parties. . To the same extent, it is written that every contracting party has to conclude an agreement with its contractors, which in particular implies that their contracting party will comply with safety and health requirements on temporary mobile construction sites. In case the contractor or subcontractor or self-employed person does not comply with the health and safety requirements, the project supervisor responsible for the execution or the contractor may him or herself take the necessary health and safety measures at the expense of the person in default. Furthermore, a general obligation is provided for the project supervisor responsible for the execution or for the contractor or subcontractors to take the necessary measures him or herself if the contractor or subcontractors or self-employed persons do not or inadequately comply with safety and health obligations, after having sent these contractors, subcontractors or self-employed a notice of default. This implies that first a notice has to be sent and that secondly, in this last option, the expenses cannot be charged to the person in default. This last system is in particular applicable when the contracting party has not concluded any agreement. However, the law does not mention a joint and several liability. According to Article 1202 of the Belgian Civil Code, joint and several liability must have its grounds either in the law or in an explicit clause of the contract between the parties involved. Said article emphasises the exceptional character of joint and several liability as it points out that joint and several liability is never presumed. Since the 1996 act on occupational health and safety does not mention any form of joint and several liability, it is left to the contracting parties to introduce the mechanism in their contract. Nevertheless, it can be argued that jurisprudence accepts a form of joint and several liability (in solidum liability) in tort law. Much will depend on the contract, since the 1996 act has an obligation to contract on Occupational Health and Safety matters, and on the facts.

In the Netherlands, the Civil Code constitutes a joint and several liability according to which the employer together with the user undertaking can be held liable for the damage deriving from industrial accidents or work related diseases. There is no real chain liability. However, in the context of subcontracting, it is important to notice that the Dutch Supreme Court has accepted that in cases of work at construction sites where, besides the employer, work is also performed by other undertakings, the duty of care of the employer extends to the entire construction site. In such case, the employer is to leave the responsibility for the health and safety of his or her employees to others (e.g. the principal contractor and subcontractors). Regarding the safeguarding of the employer's duty of care, these others can be considered as 'assistants of the employer'. If these 'assistants' violate this duty of care, the main rule is that the employer is identically liable as if it would have been his or her own fault.

In Italy, there is a joint and several liability system in the health sector. Health and safety law has extended the joint liability to all damage suffered by the contractor's or subcontractors' employees and which has not been compensated by INAIL (National Insurance Institute for Industrial Accidents). The condition is that the worker must have suffered health damage from the breach, by his or her employer (principal contractor or subcontractor), of provisions on health and safety, which implies that this employer has to be liable for intentional or negligent violation of the general safety obligation. In practice, it is noticed that the criminal courts have repeatedly recognised the responsibility of the client (exclusive or together with the contractor) because of his or her omission of control or for his or her interference in the work, or for having allowed work performance despite the presence of dangerous situations.

In addition Italian law prescribes specific obligations for the client and the contractor aimed at improving the health and safety conditions of the workers. For instance, they are both responsible for the coordination and implementation of prevention and protection measures and for the identification of potential risks specifically related to the execution of the contract. In particular, the client is in charge of all preliminary checks on the reliability of the contracting undertaking and on its compliance with its obligations for workplace safety. All employers involved in the subcontracting chain must cooperate in the implementation of prevention and protection measures that have to be taken and must coordinate their activities informing each other. To this aim, the client, who should promote cooperation and coordination, is required to prepare the single document of interferential risks assessment (DUVRI), which "accurately" lists all measures taken to combat the risk of interference to be adjusted in light of work evolution. The DUVRI has to be attached to the contract agreement. The contractor and subcontractor must then equip workers executing the contract with a special identification card.

The liability in case of injury is not subject to any limitation period but is limited to dependent employees in the contract and in the subcontracting chain (thus excluding self-employed workers). The employer (principal contractor or subcontractor) is liable for the intentional or negligent violation of the general safety obligation under the Civil Code, or of the specific obligations contained in legislation.

The client and the contractors are liable for any so-called "differential damage", i.e. those elements of damage not covered by the national social insurance industrial accidents, viz the so-called "economic damage" for injury to the earning capacity in excess of 16% (related to the worker's income) and the so-called "biological damage" (for injury to the worker's mental and physical health to a greater extent than 6% (without with a link to the worker's income).

The joint and several liability does however not apply to damage suffered by workers as a result of "specific risks" related to the contractor's or his or her subcontractor's activity. This is a significant limit to the liability of the client (or of subsequent contractors), who is not liable for damage caused to the employee in every case in which, depending on the type of activity covered by the contract, he or she is not objectively able to check on the compliance with safety standards, because he or she lacks the technical expertise to do so.

In Estonia, the Occupational Health and Safety Act contains provisions on employers' obligations and responsibility when employees of at least two employers work at the workplace at the same time. According to this act, if workers of at least two employers work at the workplace at the same time and one employer organises the work, such employer shall be liable for collective occupational health and safety activities. If workers of at least two employers work at the workplace at the same time and there is no employer who organises the work, the employers shall enter into a written agreement on collective occupational health and safety activities and on the liability of employers. If no agreement has been concluded, the employers shall be jointly liable for damage.

In Ireland the Safety, Health and Welfare at Work Act 2005 places responsibility on all stakeholders (employers, temporary work agencies, contractors, designers, employees, suppliers, etc) for the protection

of health and safety in the workplace. According to this act an 'employer-employee' relationship arises if an employee is working in the capacity of an employee (regardless of whose employee he or she is) and is under an employer's direction and control. Therefore, if an employer uses an employee from another business for temporary purposes, the employer bears responsibility for a safe working environment for that employee. Moreover, even in relation to those who are not their employees, employers also have the obligation to ensure, as far as is reasonably practicable, that the workplace, access and egress, and any article or substance is safe and without risk to health. Workers may also pursue an action at common law, in particular tort law, for negligence in relation to an industrial accident. An employer may be liable at common law in negligence for breaching a duty of care with regard to an employee, either personally or vicariously, when the actual injury was caused by the negligence of another party, but where the employer remains fixed with the liability. The courts found that the employer's duty of care cannot be passed to another party in order to discharge it. Thus, when a worker is dispatched by his or her employer to work for another party (including an independent (sub)contractor) the general employer's duty of care to the worker remains. Similarly, in circumstances where a (sub)contractor comes onto the employer's property and is negligent and causes injury or loss to the employer's workers, the general employer retains liability (although a contribution can be sought from the negligent (sub)contractor).

Other countries, however, have *no joint and several liability system* but however know a system of direct liability which does not avoid the risk that employers might choose to subcontract risk inclusive activities in order to avoid liability for accidents.

In Austria, there is as such no joint and several liability system as each contractor is liable for his or her own fault. The client-contractor is however obligated to provide information and to ensure training for employees of the subcontractor working in execution of the (sub)contract on his or her business premises. He is also liable towards the employees of the subcontractor for industrial accidents which happen due to an infringement of this obligation. (Sect. 333 of the General Social Security Act). Just like in France, this act precludes the liability of the negligent employer, provided that the injured employee may assert a claim within the statutory accident insurance. The accident insurance bodies can only request compensation from the employer in cases of gross negligence. Within the framework of a services contract, Sect. 1169 of the General Civil Code additionally provides a duty of care which primarily concerns the protection of the life and health of the subcontractor and also of his or her employees who are employed during the manufacturing. Therefore, the contractor is responsible for the condition of the workplace which is required for the safe delivery of the service due to the contractor; therefore, he or she has to prove his or her compliance with due diligence in case of an accident.

In Cyprus, liability rules, as laid down in the Contract Terms for the Construction of Public Construction Projects are restricted to the direct contracting parties. In this framework, under the terms of the contract, liability rules exist mainly for the 'employer' and the principal contractor. However, in accordance with the specificities of the memorandum of understanding for regulating subcontracting activities in the construction sector, the liability for any defaults or omissions by the subcontractor in relation to the staff it employs lies with the principal contractor.

Also in France, the client has no general security duty with regard to the subcontractors' workers. In principle, responsibility/liability lies with the "employer" in the strict sense of this term, although the law (statute law and regulations) imposes on the client a close cooperation/coordination on preventive measures. According to Article R. 4511-5 of the Labour Code, the employer of the user is responsible for the coordination of the preventive measures he or she takes and for those undertaken by the external contractors operating in his or her undertaking. Nevertheless, the responsibility for the application of these measures by his or her workers lies with every employer. This means that the responsibilities and therefore the liability is divided between the user and the external undertakings. Violation of these measures can only cause the client's liability in case of gross misconduct (*faute inexcusable*). Since 2002, the French Supreme Court considers that there is gross misconduct when the employer was or should have been

conscious of the danger to which the worker was exposed, but did not take the necessary measures to safeguard him/her.

The Swedish Work Environment Act does not specifically refer to a (joint) and several liability either, yet only to “responsibility”. In the first place, the law puts a direct responsibility on certain subjects towards workers who are not their own employees, for example on a client in a subcontracting situation, who should ensure the existence at the worksite of permanent devices of such kind that a person working there without being an employee in relation to him is not exposed to the risk of ill health or accidents. So these provisions rather put a shared responsibility on the client and the subcontractor. This means that both have certain – but not identical – responsibilities for the health and safety of the subcontractor’s workers, that is, a positive obligation to take preventive measures. However, when it comes to liability, neither of them can be held liable for the other’s neglect. Each of them will be held liable for his or her own neglect, but not for the other person’s offences.

In Germany, the contractor’s liability is restricted to paying the contribution to the accident insurance, but only for the construction sector. The client has no general security duty either with regard to the subcontractors’ workers. In principle, responsibility/liability lies with the “employer”, in the strict sense of this term, although the law (statute law and regulations) imposes on the client a close cooperation/coordination on preventive measures.

In Romania, the employer is obliged to provide security and health for the workers. According to the Collective Labour Agreement at National Level 2011-2014, “posted workers maintain all rights they had at the date of the posting, except the ones on health and safety and hygiene at work. If at the posting location the equivalent rights have higher levels, the posted workers do benefit from those, or they receive other rights as well, as to fit the new workplace”. This legal provision is particularly relevant to subcontracting and temporary work, as it is the first indirect targeting of the legislator to workers in subcontracting chains that import the equivalent protection offered to direct employees of a different employer, at a different work location. Although the workers in a subcontracting chain enjoy this better protection, in case of work accidents they can only sue their direct employer and not the principal contractor (who was responsible for the implementation of the rules on health and safety). It is for the direct employer of the worker who has suffered a work accident to call upon the principal contractor. So there is a direct relationship between the worker suffering the work accident and his or her direct employer, and between the direct employer of the worker who suffered a work accident and the contractor who is responsible for the health and safety provision violation that has caused the accident.

But also in countries that only know a direct liability system and know no specific obligations at all in any field between a client and the employees of the principal contractor and between the principal contractor and the employees of the subcontractors, health and safety sometimes is the only field of labour protection which goes beyond the usual employee-employer relationship and which might also be relevant in the context of subcontracting. In Finland, the Liability Act does not impose a liability throughout the chain. It is limited to the contracting partner. The act contains a narrow definition of the responsibilities within a subcontracting chain. This narrow definition implies that a building project is legally seen as a pyramid of independent commercial service contracts, each contracting party having its own responsibilities. It is not considered an interrelated chain in which all parties have a share in the same project and which therefore would justify more responsibilities such as chain liability for the client and/or principal contractor. In Bulgaria, the rules on safety and health at work address the user (the client) and all the persons performing work at the enterprise. Although in principle only the direct employer is responsible with regard to the health and safety working conditions, every party concerned has obligations. Czech law does not divide liability in subcontracting situations between more employers, even in cases of temporary work agencies. Liability always lies with the direct employer. But this does not exclude for example, that the client/principal contractor must secure a healthy work environment and safety to all workers on his or her premises. Similar measures can be found in Latvia, Malta, Portugal and Slovenia. In Luxembourg such

provisions only apply within the framework of temporary agency work, where the user is solely responsible regarding the compliance with conditions of safety, hygiene and health at work for the entire duration of the assignment of temporary agency workers. In the UK, the duty of the employer to take care of the employee's health and safety at work is found in both common law and statute law. The former states that the employer must take reasonable care to provide safe tools and equipment, safe and competent co-employees and a safe system of work. Health and safety legislation imposes certain obligations on principal contractors, who must take all reasonable steps to ensure that every worker who carries out the construction work is provided with the required information and training.

Some specific measures for temporary agency workers

When dealing with temporary agency workers specific provisions can often be found according to which the user undertaking is to be considered the temporary agency worker's employer in terms of the occupational health and safety guidelines. Thus, both the user undertaking and the temporary work agency itself are responsible for the compliance with the industrial occupational health and safety regulations (see e.g. Bulgaria, Austria, Belgium, the Netherlands, Spain, Greece and France). Belgian legislation states that these obligations cannot be considered as the exercise of authority which would lead to the qualification as an employer of the user. In France, it is stated that the "employer" must guarantee the training of temporary workers. By contrast, the user undertaking is supposed to supply the temporary workers with individual protection equipment unless they are personalised. In this case, they will be supplied by the temporary work agency (Article L1251-23 Labour Code). According to the Labour Code, temporary workers and workers under a definite contract of employment are not allowed to occupy particularly dangerous jobs. Where such workers are employed to perform particularly dangerous work and are reported victims of an industrial accident although they have not received adequate training, gross misconduct (*faute inexcusable*) on behalf of the employer (temporary work agency) is automatically established. As a general principal the user undertaking is not liable with regard to temporary workers for accidents which occur in his or her undertaking. However, the Social Security Code provides that in order to take account of particular risks for temporary workers when posted to a user undertaking, the latter may have to support part of the cost related to the disease or the accident. User undertakings will normally support 1/3 of the total costs unless the judge decides otherwise on the basis of the relevant facts. The liability of the user undertaking along with that of the employer (temporary work agency) may be engaged as well if the worker has brought evidence that they were responsible for gross misconduct. In Sweden, a person hiring workers to work in his or her activity has stricter obligations. The temporary work agency has a duty to find out what the general work environment is at the place to which it sends its employees. The hirer, on the other hand, has a responsibility generally corresponding to the employer's as regards work in the hirer's activities. This means that the hirer must take the same safety measures for the agency workers as he or she would have taken for his or her own employees. This responsibility applies regardless of the length of the assignment. In case law, the following example is given. A building company performed demolition work on a roof with three teams of workers. The third team changed the work method, whereby a worker fell to the ground and was killed. A foreman responsible for the work environment measures was prosecuted. He argued that he was not responsible for the health and safety of the deceased worker, as the latter had been working as an independent contractor. However, the court concluded that he had in fact been hired by a temporary work agency and that, consequently, the responsibility for his health and safety during the demolition work lay on the building company. In turn, the foreman was responsible for keeping the work environment plan up to date, which should have included a detailed description of how dangerous situations were to be dealt with. Nevertheless, the foreman had not done so. He had restricted himself to giving oral instructions to the first team, and although he knew that the workforce would change, he relied completely on the oral instructions being forwarded to the next teams. Furthermore, he did not regularly check if the work was performed in a safe manner. This meant that he or she neglected his or her duties according to the Work Environment Act and caused the worker's death. The Work Environment Authority underlines that, according to the Work Environment Act, the responsibilities of the client and of the agency are not identical with the contractual responsibilities agreed between them.

Employers in the UK also have certain obligations with regard to temporary workers. They must, before the commencement of employment, ensure that persons on fixed-term contracts of employment or supplied by an employment agency are informed of any special qualifications or skills required of that employee in order to work safely and of any health surveillance to be provided to that employee by law. Furthermore, employers must ensure that employment agencies supplying employees to work in the undertaking are informed of any special qualifications or skills required of those employees in order to work safely and of any features of the work likely to affect their health and safety (the employment agency has the duty of informing those employees).

The Working Hours Act in the Netherlands contains special provisions on liability in situations of cross-border subcontracting: if a worker who is formally employed by a foreign employer carries out work on his or her behalf for a Dutch employer, the latter is considered jointly responsible for the obligations that are laid down in this act. Also the Dutch Civil Code provides for a joint and several liability in the event of industrial accidents or work related diseases where both the employer and the user undertaking can be held liable for the damage deriving from industrial accidents or work related diseases.

Some additional sectoral measures

Specific additional regulations are sometimes foreseen in the construction (Belgium, France, Greece, Ireland, Poland), transport (France), shipbuilding (Greece) or nuclear industry sectors (France), often in implementation of European or international legislation or treaties and often also extending liability with regard to the health and security of employees of the client or of the contractor. For example, the French Code of Transport provides that clients and recipients can be held liable if security rules are violated regarding the execution of a transportation contract and that contractual clauses included in transportation and work contracts which make remuneration dependable on excessive hours of work or driving are void. The carrier's contractor, the dispatcher and/or the recipient may engage their liability for accidents in case they have induced a violation of the working conditions. The latter provisions' objective was to deter the beneficiaries of a transportation contract from imposing illegal or excessive targets on carriers.

In the construction sector, big projects are subject to declaration formalities prior to the commencement of the works (see e.g. France, Luxembourg). This prior notice, if properly updated as required by the above-mentioned regulation, should also clearly indicate the various subcontractors working on site.

In Ireland, in the construction sector all workers must have attended an approved 'Safe Pass' safety awareness training programme and hold a valid registration card under this scheme.

In Poland, the cooperation of all participants in the construction process is a legally sanctioned duty. The Construction Law Act introduces the duty to prepare a health and safety protection plan prior to the commencement of the construction as well as its subsequent adjustment to the construction stages. The construction works' contractor prepares on obligatory basis, a so-called "Safe Construction Works Performance Manual", and presents it to the workers prior to having them perform the works. The workers are persons who perform work under an employment contract as well as under civil law contracts such as a contract for specific work, a building contract, or a commission contract. In this case, the contractor's liability is independent of the employer's liability. The Labour Code introduces to the basic duties of an employer the protection of the health and life of employees by ensuring conditions of health and safety at work, the standard of which is adjusted to the appropriate level of the achievements of science and technology.

In Greece, for shipbuilding repair works the principal contractor is also primarily responsible for dealing with the safety and security during the shipbuilding operations. He or she must adopt all safety and health measures even if he or she is not the employer as he or she has contracted out the works or a part of them. The ship owner is subject to a limited responsibility concerning health and security of employees when he or she is dealing with only one principal contractor. In this event, he has only some limited obligations.

These obligations constitute supervision before the commencement of the works or general duties of cooperation and information. On the contrary, when the ship owner assigns the execution of the work to more than one contractor or subcontractors, he or she has additional and extended obligations concerning safety and security during the shipbuilding operations. In Spain, The construction sector has a specific regulation. The client may unlimitedly employ subcontractors. In turn, the contractors may contract with subcontractors or self-employed people for the execution of the activity they had contracted with the client. The first and second subcontractors may, in turn, subcontract with other subcontractors to carry out the work they contracted with the contractor (or subcontractor). However, the act does not allow this operation when the subcontractor's role is limited to providing labour. Neither for self-employed people, nor for the third subcontractor does the act allow the subcontracting of the activity. As an exception, the act does allow a fourth level of subcontracting in certain situations, such as justified unforeseen circumstances, demands for specialisation of work, technical complications of production, or force majeure. This possibility is not supported, however, neither for self-employed persons nor for undertakings which merely perform manual labour, except in the event of force majeure.

C. Preventive measures

In some countries, it is possible to limit one's liability in certain circumstances or by taken certain measures.

Portuguese law on working or industrial accidents imposes each employer to have a mandatory private insurance contract against the risk of industrial accidents of the employees. This duty to insure rests only on the employer, which remains true even when the employer uses temporary agency workers. However, the law foresees the obligation for the temporary work agency to provide the client with a copy of the insurance contract, proving that this temporary agency worker is covered by a valid insurance contract. If the temporary work agency does not provide its client with a copy of the insurance contract, then (and only then) the user/client will be jointly liable for damage arising from industrial accidents. On the contrary, if the client/user is careful and demands, before contracting, the copy of the insurance contract for industrial accidents that the temporary work agency must have for its employees, the client will escape liability for the industrial accident.

In Belgium, there is some discussion about the agreements which, according to the law, must be concluded between the client, the principal contractor and the different subcontractors concerning occupational health and safety risks and measures. It is possible to draw these up in such a way that one of the contracting parties is exonerated in advance. In other words, the legal obligations can be shifted by means of private contracts, and therefore some consider this to be a flaw in the law on occupational health and safety.

Furthermore, in Austria, if the victim of an industrial accident is entitled to benefits provided under the statutory compensation insurance, in case of a slightly negligent endangerment the liability of the employer and of persons treated as such is excluded. In this respect, if an employee is hurt in an industrial accident caused by the employer's negligent misconduct, the General Social Security Act will preclude the liability of the employer provided that the injured employee may assert a claim within the statutory accident insurance. Moreover, if e.g. the employer negligently violates the provisions for the protection of the construction site and if this results in an occupational accident, the employer is not liable for the personal injury of the employee, despite his or her violation of the protection obligation.

In Germany, liability with respect to the payment of contributions to accident insurance generally occurs in the relationship between the contractor and his or her immediate subcontractor or temporary work agency only. The liability of the principal contractor is subordinate compared to the liability of the subcontractor, because the principal contractor is only liable after the collecting agency has given notice to the subcontractor and the period specified in the reminder has expired. The provision requires fault and

additionally provides for several possibilities of exculpation. Initially, this is valid whereby liability is exempted if the contractor can prove that he or she could assume without fault of his or her own that the subcontractor was able to honour his or her payment obligation. This is the case, for instance, if the contractor can prove a pre-qualification with respect to the subcontractor or commissioned lender. A further possibility of exculpation is the submission of a clearance certificate issued by the competent Inland Revenue Office. In this certificate, the health insurance confirms the correct contribution payment which the subcontractor or temporary work agency made in the past. The burden of proof regarding the conditions for exculpation lies with the principal contractor. The personal scope of the liability provision is expanded to the next undertaking appointed by the subcontractor if the commissioning of the immediate subcontractor – with a reasonable assessment of the overall circumstances – is seen as a legal transaction the objective of which, in particular, is to avoid liability. The chain liability is thus extended by one subcontractor.

On the other hand, contractors can exclude their responsibility by proving they have taken the appropriate measures.

In Ireland for example, the failure by a principal contractor to comply with the provisions of health and safety law can result in fines, imprisonment and/or a civil action by the workers affected. However, when the principal contractor can prove that he or she has complied with his or her responsibilities, liability will generally fall on the subcontractor. As some case law developments demonstrate, (sub)contractors who adequately fulfil their own responsibilities can be exempted from liability even if industrial accidents occur.

Most countries, however, do not provide for any possibility to limit the responsibility of the principal contractor, including potential chain liability (e.g. Bulgaria, Greece). In Spain, an agreement that contains clauses in order to avoid joint liability in fraud of law will be void and will be graded as a very serious offense.

D. Sanctions & complaint mechanisms

Sometimes special sanction mechanisms can be found.

In Spain, a special sanction applies when an industrial accident has occurred. In that case the employer shall pay the employee an additional amount, ranging between 30 and 50 per cent of the social security benefit that has been recognised. This amount is called the "benefit surcharge". With respect to this "benefit surcharge", subsidiary liability can be applied in cases of subcontracting. When the client and the contractors share the workplace, the client may default on his or her obligations regarding safety and health at work, as he is the one to whom the full capacity of the physical environment in which the accident occurs is available and the one who ultimately benefits from the fruits or results of the work.

V. Other arrangements

A. Origins and objectives

In Chapter 2-III E, a range of functional equivalents and/or alternatives were identified and briefly described. In ten Member States (ES, FR, FI, IE, LT, LU, NO, SE, PL, UK) alternative measures to the ones reported on above were sketched, which may all add to strengthening the position of workers involved in subcontracting processes, albeit sometimes in a rather indirect or soft manner. Moreover, it was noticed that posted workers may also enjoy some indirect protection as a result of the notification duties imposed

by four Member States (BE, CZ, DK, SK) on the service recipient (client and/or contractor) established in the host country.

Below, a selection of these tools will be presented: firstly, tools on checking the reliability of subcontractors and temporary work agencies (FI) and other 'compliance tools' (the notification scheme in Belgium and a – proposed – identification system in its construction sector); secondly, tools on information and consultation rights for worker's representatives such as trade unions (NO, SE); thirdly, tools on the liability of the client/contractor for paying the subcontractors (FR, PL); and finally, some attention will be paid to restrictive measures regarding agency work and the 'hiring of work' in a broader sense (as in NO, BE, LU, also referred to in Chapter 2-IV B). It must nevertheless be noted that the latter category does, strictly speaking, not qualify as a protective arrangement for workers employed by subcontractors, but rather as measures meant to protect the regular workforce from 'being threatened by or pushed into' more flexible employment contracts.

Again, we begin with a glance at the origins and objectives of the said measures, inevitably including a short description of the measure in place.

Reliability check

In Finland, the protection of workers' rights in subcontracting is based first and foremost on the Act of the Contractor's Obligations and Liability when Work is Contracted Out ('Liability's Act'). According to this regulation, the client has an obligation to gather certain evidence on the reliability of a candidate (sub)contractor or temporary work agency before concluding a contract with them. Regarding labour law, this reliability check is limited to gathering information on the applicable collective agreement. The check also concerns social security and fiscal law. These obligations not only apply to domestic subcontractors but also in case the subcontractor is a foreign undertaking. On 1 January 2011, an amendment of the Liability's Act entered into force, according to which the amount of the negligence fee was lifted so that it is now no less than € 1,600 and no more than e 16,000.

The background of the present Finnish legislation on liability in subcontracting and the hiring of labour is, in the incomes policy agreement for 2005–2007, concluded by the central social partners as a means in the struggle against undeclared work. As a general remark, the Employment and Equality Committee of the parliament noted how in many other European countries the principal contractor or other subscriber is burdened by more far-reaching chain liability concerning taxes and social security payments. The Committee anticipated that the government would monitor the results of the proposed 'evidence obligation' in combating the illegal economy and would eventually produce a new legislative bill in the case of unsatisfactory results.⁸³ Indeed, the responsible Ministry of Employment and Economy set up a working group in 2011 with the objective of preparing measures in order to prevent economic crimes and grey economy in the field of e.g. the construction industry. The Working Group provided its Report 31 March 2011, proposing several amendments to the Liability's Act. These proposed amendments seek to ensure the effectiveness of the Act in the construction sector. According to the proposals of the Working Group, the client operating in the construction field should always require the information required in the Act from the contracting partner. As to the more serious breaches of the Liability's Act, the Working Group proposed a higher neglect payment for situations where the client should have known that the other party to the contract did not have the intention to fulfil his contract and duties as an employer. Moreover, it was proposed that an enterprise with a higher neglect payment should be excluded from public procurements on certain conditions. Other recommendations of the Working Group include the partial extension of the scope of the Act to self-employed workers and a prohibition to pay salary in e.g. the construction industry.

⁸³ See Jari Hellsten, Liability in subcontracting processes in the European construction sector –Finland, <http://www.eurofound.europa.eu/publications/htmlfiles/ef088773en.htm> (research commissioned by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), published January 2009).

Moreover, the Group proposed to increase resources for monitoring and control. According to the Programme of the new Finnish Government, needs for revision of the Liability's Act will be addressed.

Notification duties on the service recipient and a new proposal for the construction industry

There has never been a significant insight in the cross-border employment in the framework of services in the internal market. The need for this was more urgently felt when new Member States joined the EU. Late 2006, the computerised system on cross-border employment called LIMOSA was introduced in Belgium: a cross-country information system for the purpose of research on migration with the social administration.⁸⁴ It has various objectives, such as enhancing the social inspection services' means of inspection, the administrative simplification of the cross-border supply of services to Belgium and better information about the applicable national legislation. In particular, it was set up to find a balance between a free movement of services and the obligation to guarantee posted workers a minimum level of social protection by means of efficient enforcement measures. Therefore, it was also considered a 'flanking measure' in the preparation for the termination of the transitional measures with regard to the 8 new Central and Eastern European Member States and thus for opening up the free movement of workers. According to the government, together with a right of action for posted workers and workers' organisations, a new cooperation agreement for the inspection services and a joint and several liability for principal contractors and clients, the registration obligation was supposed to make sure that the Belgian labour market was ready for an unrestrained free movement of workers.

Only very recently, employers' and employees' organisations in the construction sector have reached an agreement on the introduction of a joint and several liability for the protection of workers' rights (minimum wages). The construction sector itself is confronted with a huge number of fraud cases. Mala fide players are infiltrating the construction market in such a way that the market becomes disrupted and bona fide entrepreneurs are confronted with a level of unfair competition which makes it almost impossible for them to survive. This is one of the reasons why both employers' and employees' organisations were able to reach such an agreement, which still has to be translated into legal provisions.

Measures regarding the engagement of subcontractors (including rights for workers' representatives to co-decide or be consulted on this)

In Sweden, a functional equivalent to liability arrangements for wages and other employment conditions is incorporated in the Co-Determination Act, which states that trade unions have the right to negotiate and to ultimately veto the employer's⁸⁵ plan to engage a certain (dishonest) contractor. The so-called veto rules enshrined in Sections 38 – 40 were already introduced when the original Co-determination Act came into force on 1 January 1977. They were based on purely domestic considerations and came as a reaction to the emergence of new practices in business organisations. The adoption of the Co-determination Act was the culmination of a legislative offensive to advance workers' rights that had taken place during the first half of the 1970s. Before that, Sweden had for the first time adopted legislation on employment protection, on trade union representatives at the workplace and on study leave; a new act restricted the employer's right to compulsory set-off and important new elements had been introduced in the legislation on workers' health and safety.

In its bill to the parliament on the Co-determination Act, the government concluded that the increased social and economic responsibilities for having employees would also increase the risk that employers would try to evade the application of labour law and collective agreements by using other forms of contracts for work than employment contracts. Actually, one could already see signs of a disturbing development towards an increased use of workers who were not employees. For example, certain employers dismissed workers for economic reasons – but offered them to come back and do the same job

⁸⁴ The 'Limosa Limosa' or the 'Grutto' is a bird of passage who visits almost all continents and therefore gave its name to this Belgian project on cross-border employment.

⁸⁵ On the condition that they are both bound by the same applicable CLA.

as a self-employed worker. In certain sectors, employers would lease workplaces, e.g. hairdresser's chairs, in their businesses to persons acting as self-employed persons. Another mode of action was to introduce an agent between the worker and the enterprise that ordered the work. This agent was not bound by a collective agreement and his only task was to bill the enterprise for the work performed. Here, both public and private interests were deemed to be at risk, due to the agent's lacking financial strength or because it was difficult for other reasons to force him to fulfil employer responsibilities. According to the government, these were mainly problems of control and compliance. The definition of who is an employee (which decides who is covered by labour law or not) was so wide that, in many of the cases mentioned above, the courts would rule that they were actually employer-employee relations. However, courts' procedures are difficult and costly, and they cannot take place until after the dubious arrangement has been established. In situations of short duration, it may even seem meaningless to take action. Therefore, the government argued, the solution would be to give the trade unions a possibility to influence the employer's decision already when the employer is contemplating to have work performed by non-employees.

Hence, the objective of the rules on the right to negotiate and veto the engagement of a certain contractor is to give the trade unions an instrument which could help prevent contract practises which aim at depriving workers from the protection they should have according to labour legislation and collective agreements, especially the use of bogus self-employment. Chains of subcontractors were mentioned as examples, but they were not the only target of the rules.

In Norway, no veto rights for social partners exist, but in a number of collective agreements unique rules were developed concerning e.g. hiring for a fixed term/specific task and the hiring of labour. The prevailing collective agreement regulation requires the employer to inform and consult with workers' representatives before making a decision, and to provide information on terms and conditions of those concerned. The fundamental idea is that the employees' representatives have an opportunity to argue their view before the management makes a decision. Some collective agreements also have specific provisions pertaining to subcontracting situations. These initiatives of social partners are based on statutory rules laid down in the 2005 Act on working environment, working time, and dismissal (employment) protection, etc (WEA). The WEA leaves only a narrow scope for lawfully hiring for a fixed term/specific task, including agency work.⁸⁶ Hence, hiring is a starting point when the parties to the agreement underline the importance of information and consultation, referring to §§ 9-4 and 9-5 of the Basic Agreement, and state their concern to combat 'social dumping' and the importance of hired labour and employees of subcontractors having properly regulated terms and conditions of employment. Provisions as dealt with above first appeared in the collective agreement revision round in 2004. By the subsequent revision rounds in the spring of 2006 and 2008, they were largely in place in their present form.

Liability of the client/contractor for paying the subcontractors

France knows statutory provisions specific to subcontracting introducing the joint liability of the client to the benefit of the subcontractor (including independent workers) in case the principle contractor defaults payment (because of insolvency/default/disappearance); these provisions may indirectly benefit the workers of the subcontractor. This statutory liability arrangement dates back to the 1970s and deals with subcontracting in general. The initial scope of the statute was restricted to the construction industry. However, it was later extended to transport and then became applicable to industrial subcontracting as well. Its primary concern is to protect subcontractors against the principal contractors' insolvency or default. So, the statute seeks to avoid that subcontractors "plunge" as a result of the principal contractor's default and therefore reinforces the strength and resistance of the subcontracting chain. Nevertheless, the aforementioned law provisions seem to also benefit, although indirectly, the subcontractor's workers. In effect, the direct action against the client not only provides an additional guarantee to the subcontractor for the payment of services he provides, but also makes sure that the subcontractor remains creditworthy

⁸⁶ There has been some discussion and differing views on whether the WEA provisions concerning temporary work agencies can be deemed to be in conformity with Directive 2008/104/EC. No conclusions have been drawn.

with regard to his workers. As a result, once he gets paid for the services provided he will be enabled to proceed with the payment of salaries and social security contributions. Profit making subcontractors bring growth and employment stability for the whole sector.

As early as July 2010, the recently appointed “mediator for the inter-industrial and subcontracting relations” drafted a comprehensive report which pointed out the deficiencies of the current legal system in light of the world wide crisis which has especially affected subcontracting in the manufacturing sector. According to the author, although the subcontracting statute is not adapted to industrial subcontracting, it does not really need to be profoundly revised. However, it requires enforcement. He therefore suggests some minor changes, for example, that subcontracting agreements should be concluded in writing. He also suggests that the law should introduce a legal presumption according to which subcontractors would be considered as automatically known and approved by the client. If this ultimate proposal was to be put in operation it would mean that the subcontractor would no longer need to establish former approval in order to engage the client’s liability.

Also Polish legislation provides protection to the subcontractor in case of non-payment by the contractor above him in the chain. The specific structure of a building contract introducing liability grounds and mutual settlements between a client, a contractor and a subcontractor has developed under the influence of two important factors. The first reason of making a building contract the subject of broader political and expert debate was a serious change in its personal scope (*ratione personae*). As a result of the amendment to the third part of the Civil Code in 1990, it became a ‘universal contract’, i.e. a contract which can be entered into by all entities participating in business relations and not only by units of nationalised economy. The second reason was attributed to the controversies concerning the material scope (*ratione materiae*) of the contract in question as regards the determination whether it was a sub-type of a contract for specific work or a completely independent contract. The determination of the legal nature of the contract concerned also influenced the scope of liability of the entities involved in the construction works process (chain). The amendment of 2003 to the Civil Code which introduced in Article 647 a *novum* in the form of a requirement of approval by a client of entrusting construction works to subcontractors, eliminated any doubts in that respect. The prohibition in question may be derogated only by individual consent.

The financial and banking crisis that has engulfed Ireland since 2007 has played a significant role in the introduction of measures to protect subcontractors against non-payment. This has become a huge issue in Ireland, following the recent collapse of the construction industry. Many large building contractors have run into serious financial difficulties, often leaving major, outstanding debts owed to subcontractors and suppliers. Similarly, with high national levels of unemployment, particularly in the construction sector,⁸⁷ there has been an increasing concern about a growing ‘hidden economy’.⁸⁸ Against this background, new legislation is proposed on strengthening the rights of subcontractors who are finding it difficult to get paid. This legislation is being put forward in the context of employees of subcontractors being laid off due to the fact the principal contractor (or client) is not paying promptly.

Restrictions on the hiring (and hiring-out) of personnel

The subcontracting employer may be tempted to increase the use of fixed-term employment contracts and/or hire agency workers, instead of using open-ended employment contracts, to fulfil his contractual obligations. Restrictions on the use of fixed-term employment contracts under national law may therefore have the effect of protecting the rights of employees at the end of a subcontracting chain. Most notably in Belgium, Luxembourg and Norway strict rules apply concerning the hiring of personnel, including agency

⁸⁷ In March 2011, employment levels in the sector stood at approximately 100,000. This compared to a figure of 263,000 at the end of 2007 and 136,000 at the end of 2009. See: http://www.cso.ie/releasespublications/documents/labour_market/current/qnhs.pdf.

⁸⁸ The Irish Small and Medium Enterprises Association (ISME) has been particularly vocal on this question; see <http://www.isme.ie>.

workers. Although absolute bans on temporarily hiring-out workers and/or temporary agency work are lifted in all three countries, there are still strong reservations against the use of these types of contract. Provisions on the conditions for hiring personnel, including agency work are therefore accompanied by legislation preserving the rights of employees in this type of contract, since these are considered precarious for the employee. In particular, unlike in case of the hiring-out of workforce or posting, the temporary agency worker does not reinstate, at the end of his or her mission, the position previously held to his or her employer. Hence, the legislation also aims to sanction the abuse of agency workers and the temporary loan of workers.

B. Nature and coverage

Below, we examine the arrangements sketched above with regard to their more exact content. Subsequently, we again review (1) the tool to check the reliability of subcontractors and temporary work agencies in force in Finland,(2) the notification scheme regarding the posting of workers in Belgium, and a proposal for an identification duty in the construction sector, (3) tools regarding the information and consultation rights for worker's representatives such as trade unions in place in Norway and Sweden, (4) rules on liability of the client/contractor for paying the subcontractors (FR, PL, IE) and finally (5), restrictive measures regarding agency work and the 'hiring of work' as enacted in Norway, Belgium, Luxembourg.

The Finnish (re)liability Act

The Liability's Act applies to clients acting as builders and, in the contractual chain, to contractors, including developers, contracting out part of the work at a shared workplace, which, however, means liability only in relation to their direct subcontractor – therefore, no chain liability (Section 2(2)). Thus, the Liability's Act applies to any temporary agency work, whereas in subcontracting a link to the client's normal operations is required, apart from in building and civil engineering works where the link to normal operations is not a prerequisite for the application of the Act. In other words, the point of departure is that all construction activities are covered, unless subject to specific derogations.

However, the Liability's Act is not applied if the duration of the work by the temporary agency worker or workers does not exceed a total of 10 days; or the value of the compensation referred to in section 2, subsection 1, paragraph 2 is less than € 7,500 without value added tax. When calculating the limit values, the work is considered to have continued without interruption if the work or work outcome performed for the client is based on successive, uninterrupted contracts or with only short breaks between them. Hence, it is not possible to avoid the obligations to check by breaking the contract up into parts that remain below the statutory limit values.

The Act does not contain specific rules on public procurement procedures. The Act and the related liability does not apply to the entire subcontractor chain. The Act applies regardless of whether the subcontractor is established in Finland or not. The responsibility based on the Act is limited since it governs only the situation where a contract is made on the use of a temporary agency worker or, alternatively, on work based on a subcontract. The duty to check does not govern the possible chain.

The Liability Act does not impose a liability throughout the chain, the liability is limited only to the contracting partner. The Act defines the liability indirectly, thus via the liability's substantive contents. It contains a narrow definition of the responsibilities within a subcontracting chain. In this sense, the law establishes the client's obligation to require certain information on the reliability of the candidate, (sub)contractor or temporary work agency – therefore, an 'evidence obligation'. In building activities this

means that the client or the developer has an evidence obligation in relation to the principal contractor, which is the contracting partner – unless the general derogations apply.⁸⁹

Thus, the Liability's Act sets out that a principal contractor or other subscriber is obliged to require from the subcontractor that he will provide the client with information on e.g. the applicable collective agreement or the principal terms of employment applicable to the work. A foreign subcontractor or temporary work agency is obliged to provide the client with corresponding information.

The Belgian notification scheme and a proposal in its construction sector

The LIMOSA registration is essentially only a first phase of the greater LIMOSA project. A second phase is creating a central registry with information for the benefit of the inspection services and other government services involved. The generalised registration obligation for posted workers was introduced by the Programme Act of 27 December 2006. The main pillars of the new system are the prior registration of the posting, the obligations of end users and clients, the consequences for other regulations and the sanctioning. The prior registration is obliged for posted workers, self-employed persons and trainees. In this contribution, we will focus on the first two categories. The registration obligation applies universally and therefore to posted workers from around the world.

In principle, the registration is done electronically (if possible, by means of fax or letter) on the LIMOSA website and must be done prior to the employment⁹⁰ in order to prevent first-day registrations, where, in case of an inspection, one states to the inspection services that it is the first day that he or she is working. The registration for a posted worker is done at the National Social Security Office by the employer, his or her proxy, or his or her appointee. When registering through LIMOSA, a number of details must be provided. For the posting of workers these are: the worker's, the employer's and the user's identification details, the starting date of the posting, the anticipated term, the type of services, the place of the work performance, the weekly working hours and the work schedule. After the registration, the person who performed the registration is provided with an electronic receipt. This proof of registration is of great importance, as it is linked to the joint responsibility of end users and clients.

The registration must always be done before the duration of the activities, whereby no maximum term of validity is provided for a registration. If one wants to cancel the registration, this must of course be done before the end of the day which was initially indicated as the starting date. After all, the possibility to unlimitedly cancel it would enable persons to cancel the registration after the posting has ended and there had been no inspection thus "erasing the tracks". If the posting is going to take longer than the term initially indicated, a new registration must be completed before the end of the first term indicated.

To increase the enforceability of the registration and to make the system more sound, the responsibility for the registration of the posted workers and self-employed persons is not only put on the foreign posted employers or self-employed persons. The "end users and clients" as well – meaning the Belgian service recipients – must also watch over the compliance with the rules. The user, or every person near whom or for whom work is performed by posted workers or by posted self-employed persons, either directly or via a subcontractor, is obliged to complete a registration himself if the person liable to register is not able to

⁸⁹ See Hellsten, Jari, Liability in subcontracting processes in the European construction sector –Finland, <http://www.eurofound.europa.eu/publications/htmlfiles/ef08877.htm> (research commissioned by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), published January 2009), pp. 5-6.

⁹⁰ A special regulation was provided for posted workers or self-employed persons who regularly perform work in Belgium and in one or more other countries. In order to avoid separate registrations for each separate amount of work in Belgium they are able to do a "frequent work performance registration". This is a general registration which is valid for one year and which can be extended yearly. Because of the fraud sensitiveness and the accompanying necessity to know the exact place and duration of work, the temporary employment sector and the construction sector were exempt from this favouring regulation.

present a receipt. The user must then, also prior to the employment or to the start of the professional activities, electronically register the identification details of the posted worker and self-employed person, as well as of the posted worker's employer, as his or her own identification details. This is the only way in which he is able to release himself from joint liability, for the purpose of which he obtains a receipt that is specific for users. The legislation refers to every end user and client who are both responsible for supervising the compliance with the registration obligation.

Only end users who call in posted workers or self-employed persons for strictly private purposes are exempt from the registration obligation for users.

With regard to the *recent agreement on joint and several liability between the social partners in the construction sector*, one of the main issues in the ongoing debate regarding the introduction of a new joint and several liability mechanism in the construction sector (cfr. supra) is the introduction of the possibility of excluding this liability when complying with the regulations. The question is raised how to control and make sure in advance if a subcontractor is to be regarded a bona fide contracting party when it comes to respecting workers' rights. One of the options is the introduction of a certificate guaranteeing the subcontractor is a bona fide player on the market. When a contractor wishes to subcontract, he would have to check if the subcontractor he wishes to work with is holder of such a certificate. It is suggested that the so-called social secretariat could be a competent third party to issue such a certificate. However, it is unclear what the final result would be of the legislative negotiations.

The agreement provides that an obligation of individual registration is implemented. The aim here is to achieve an unforgeable and traceable identification of all persons present at the workplace, connected to a withholding obligation and to the liability of wages. Every person who is present at the building site needs to be in possession of a badge. Without it, a person may not enter the building site. The badge should allow to undeniably determine who has worked and when. In the event that the badge is not used, apart from the employee and his or her employer, the fellow contractor would be imposed a sanction as well.

Furthermore, a limited liability regulation is introduced with regard to the compliance with the minimum wage. Based on received documents, the fellow contractor will have to verify whether the employer with whom he concluded the contract has paid his or her employees the minimum wage. In case of doubt, he or she may inform the labour inspection and a possible fine will be cancelled. Every contractor will also be held liable for his or her direct subcontractor for correctly complying with the minimum wage regulations.

Information and consultation tools for worker's representatives in place in Norway and Sweden

The Swedish Co-Determination Act, including the veto rules, is applicable to all relationships between employers and employees, i.e. on the whole public sector as well as the whole private sector. The rules in the Co-Determination Act apply equally in cross-national situations as in purely domestic situations.

The employer's duty to negotiate and the trade union's veto right cover all situations where the employer plans to engage someone for work without that person becoming an employee of the employer, irrespective of the type of contract and if those who are to perform the work are called self-employed, temporary agency workers or something else. There are some minor exceptions in Section 38, second paragraph. The employer is not obliged to initiate negotiations if the work is of a short-term and temporary nature, or if it requires special skills. However, these exceptions are not applicable when the employer plans to hire temporary agency workers. In such cases, it is always obliged to initiate negotiations. Therefore, the definition of who is an employee (and who is his or her employer) is not important until the trade union is contemplating to interpose its veto because it suspects that the engagement of a certain contractor includes bogus self-employment.

The veto right is more limited in public procurement procedures. In these cases, the trade union can put a veto against a tenderer only in case the tenderer can be excluded from participation pursuant to the

provisions the legislation on public procurement, which are a blue-print of the provisions of the EU Directives 2004/17/EC and 2004/18/EC.

The veto rules are applicable only between an employer and a trade union that are bound by a collective agreement covering the work to be performed. Also, they do not cover other contract relations than that between the client and the first contractor. This does not mean that they cannot be used for protecting workers in subcontracting chains. Two examples will illustrate how they work:

If a local authority plans to buy services from a private provider of health services, it will have to negotiate according to Section 38 with the trade unions organising nurses and doctors, as all local authorities are bound by collective agreements for that type of work.

However, if it plans to procure the building of a health care centre, it will not have to negotiate according to Section 38, as it is not bound by a collective agreement with the Building Workers' Union or any other unions in the constructions sector. However, in most cases, the construction company that is awarded the contract is bound by these collective agreements, which means that it has to negotiate if it wants to subcontract part of the work. During these negotiations, the trade union can make certain conditions to approve the subcontractor, and require that the employer ensures that any additional subcontractors apply the same conditions. In the construction industry, the social partners have developed standard conditions for subcontracting.

As mentioned above, the Norwegian information and consultation rights enshrined in collective agreements are closely linked to the WEA, an Act on the restrictive use of agency work and other forms of flexible employment contracts. Please see below for more information on the content of the rules.

Rules on liability of the client/contractor for paying the subcontractors

The French statute introduces two separate means/guarantees for the benefit of the subcontractor. According to the first one, the principal (or any intermediate) contractor should make a formal deposit to a Bank corresponding to the worth of the works/services ordered to the subcontractor (preventive measure). In addition to that, in case of the principle contractor's insolvency/default/disappearance the subcontractor has a direct action against the client.

The statute on subcontracting supposes a tripartite relation between a client, a principal contractor and one or more subcontractors. This tripartite structure fits well subcontracting relations in the construction industry but is less relevant to industrial subcontracting where there is normally no intermediary between the client and the subcontractor. In addition, it seems that the first form of guarantee by deposit seldom applies in practice. As for the direct action against the client, it is only applicable where the principal contractor has presented his subcontractors to the client prior to the conclusion of the subcontracting agreement and got his approval. It seems that the statute is generally followed in the construction industry, but is less popular in transport and industrial subcontracting.

The law provisions do not explicitly determine whether they apply to subcontractors established outside the French territory. Articles 15-1 to 15-4 mention that these mechanisms are applicable in the French territory including French islands. Nevertheless, this reference to the territorial scope of the provisions should not be interpreted as an exclusion of foreign subcontractors from the scope of the law. The aforementioned reference must be interpreted in relation to the initial scope of these provisions which was restricted to construction sites. Indeed, the construction site must be situated in France.

The Polish legal arrangement secures the interests of the client, since it guarantees him the possibility to influence the selection of a contractor and subcontractor. Article 647(2) of the Civil Code provides that the client's consent to entering, by a contractor, into a construction works contract with a subcontractor is required and if a subcontractor enters into subsequent subcontracting contracts – a consent of both the client and the contractor is necessary (Article 647(3) of the Civil Code). Hence, he can also influence a

decision on the scope of works performed by subcontractors in a situation when there is no legal relationship between a client and a subcontractor. However, it should be noted that both Article 647(2) and 647(3) also introduce a presumption of [implicit] consent by the client and contractor unless they raise any objections concerning a subcontractor and [any] subsequent subcontractors indicated within 14 days.

In exchange for the client's right of consent, a subcontractor, pursuant to the wording of Article 647(5) of the Civil Code, becomes entitled to claim payment of remuneration for construction works jointly and severally from the client and his contractor. The unconditional nature of the legal rule concerned is evident from the provision stipulating that: "[any] contractual provisions making the date of remuneration payment by a contractor to a subcontractor conditional upon obtaining remuneration from a client should be considered null and void."

For the validity and effectiveness of a subcontracting contract or a chain of subcontracting contracts the written form is required.

In Ireland, legislative provisions, such as the Companies Act 1963, indirectly benefit the employees of a subcontractor by providing mechanisms for the latter to be paid by the main contractor. However, this is rather difficult to effectuate. Pursuant to these rules, a subcontractor owed a liquidated (clearly identifiable) sum of money, exceeding € 1,270, by a contractor can apply to the high court to have the contractor wound up. A difficulty, however, for the subcontractor is that he would need to have a client or a contractor further up the chain certify the value of the work and that his work has been completed. The *Construction Contracts Bill 2010* seeks to address outstanding payment issues between clients and contractors and subcontractors by introducing a new statutory dispute resolution mechanism for construction contract disputes. It applies to contracts worth more than € 50,000 (if the State is a party) or more than € 200,000 (if the State is not a party). The bill provides that parties to construction contracts cannot withhold payment of money due without giving notice; that parties can suspend performance due to non-payment, until payment is made in full; and that parties can refer a dispute to binding adjudication pending the final resolution of the dispute through agreement, arbitration or litigation.

Restrictive measures regarding agency work and the 'hiring of work'

According to Article 24 of the Belgian Act of 24 July 1987 on temporary work, temporary agency work and the putting of employees at the disposal of a user, sending temporary personnel by means of temporary work agencies is only possible for the execution of certain types of temporary work which are permitted by law. Pursuant to Article 31 of this act, every activity exercised outside the circumstances of temporary labour and the special situation of temporary agency work by a natural or a legal person, to put employed workers at the disposal of third parties who hire these workers and exercise some part of the employer's authority, is illicit. In such a situation, a system of joint and several liability will apply. This provision includes a general ban for any situation where a person is put at the disposal of a third party, also if an employer puts a person at the disposal of a third party only once. It is not at all required that the employed person was hired with the explicit intention to be temporarily put at the disposal of another employer. Therefore, every situation where a worker is put at the disposal of another employer which is contrary to the rules regarding temporary employment and temporary agency work, which is not exceptional and for which no authorisation was received from the inspection, is actually illegal. The conditions are strict. A worker who is employed particularly for the purpose of being sent abroad, acts – ignoring the exceptions permitted – contrary to the Act of 1987 and is ipse facto illegal, just as this is the case for permanent workers who are put at the disposal of an employer contrary to these conditions.

Indeed, the act on temporary agency work of 1987 allows certain forms of the hiring of workers which are not contrary to the prohibition of temporary employment. However, temporary agency work is limited to those employers whose main function is really to put their workers at the disposal of other employers. Foreign undertakings will have to be approved as a temporary work agency for this and receive a license, as it is a regulated profession.

A complementary condition is that the wage of the temporary employment agency worker may not be less than that which he or she would have had a right to if he or she would have been employed as a permanent worker by the user undertaking under the same conditions. Thus, competition based on social arguments is to be excluded. In the event that the situation where the worker is put at the disposal of a third party is allowed, the worker obtains extra protection as the user becomes jointly and severally liable for the payment of the social contributions, the wages, the remuneration and the benefits that arise from the employment contract between the worker and the employer. This is only a direct responsibility.

In Luxembourg, not only the use of temporary work agencies but also the use of *fixed-term employment* contracts is restricted. As such, the employer can make use of fixed-term employment contracts only for tasks unrelated to ongoing operations of the company, and it can be concluded only to perform a specific and not lasting task. The contract must indicate very precisely the limited duration of the contract and of the reason why a fixed-term contract instead of an open-ended employment contract is used (for instance, replacement of an employee on parental leave). Moreover, there is a maximum duration of 24 months, including renewals, and the contracts may be renewed only twice. A third-time period must be respected between two contracts. Unless otherwise provided by the law, the legal and contractual provisions applicable to employees under an open-ended employment contract shall also apply to employees bound by a fixed-term employment contract. If the employment relationship is continued after the fixed-term contract, the employee retains the length of service he or she had acquired at the end of the contract. If the conditions of fixed-term employment contracts are not respected, it is deemed an open-ended employment contract.

Regarding *temporary agency work*, the contract with an agency worker, including an employee working in a subcontracting chain, can be concluded only to perform a specific and not lasting task. It cannot be used to occupy a position linked to the normal and permanent activity of the company. This measure is deemed to be a way to protect employees, since in this way, employers are pushed to prefer open-ended employment contracts instead of temporary contracts to ensure the day-to-day functioning of the company. The protection of employees, including the ones working at the end of a subcontracting chain, is also ensured through measures on guarantees of good reputation and financial capability of the temporary work agency. For instance, the temporary work agency must provide evidence of a financial guarantee to ensure, at all times in case of failure on its part, the payment of wages and their accessories, allowances, social contributions and tax charges. The amount of the guarantee, which may be revised at any time, can be fixed with respect to the revenues earned by the temporary work agency. The agency worker must be informed in writing about his wage level and other employment conditions and has a right to full equal treatment with an employee of the same qualification or equivalent qualification employed under the same conditions as permanent employees by the user company. The provisions on Temporary Work Agencies provided for by the Labour Code and the collective agreement in this sector are applicable to any Luxembourg or EU company which makes temporary workers work on the territory of the Grand Duchy of Luxembourg. temporary work agencies located outside the EU are not allowed to send temporary workers for work to Luxembourg.

Finally, strict rules apply concerning the *temporary hiring-out of workers*. These rules only apply to employees made available to a user carrying on business in Luxembourg. The temporary loan of workers is generally not allowed in Luxembourg, except in very specific circumstances. Thus, employers, other than temporary work agencies, may be authorised by the Minister of Labour after consulting the Employment Administration, for a period it determines, to put their employees at the disposal of other employers, in case of: threat of dismissal or underemployment; execution of casual work in that the user company is not able to respond by hiring permanent staff, provided that this provision relates to companies in the same sector of activities; restructuring within a group; within the framework of a plan of maintenance of employment (*plan de maintien dans l'emploi*) authorised by the Labour Minister. The Minister of Labour may, exceptionally, after consulting the Employment Administration, also authorise employers, for a period it determines, to make their employees available to other employers if and as long as this provision is

covered by an agreement between social partners. 'Hired-out' workers have the same rights to equal treatment regarding pay c.a. as the agency workers.

As mentioned already, also the Norwegian WEA leaves only a narrow scope for lawfully hiring for a fixed term/specific task, including agency work.⁹¹ It must be something that is 'warranted by the nature' of the work and 'differs from' such work as is ordinarily performed in the undertaking. Undertakings that do not have as their object to hire out labour may only hire out personnel that have 'permanent' (indeterminate) employment contracts (pursuant to Art. § 14-13). Further, restrictions on the side of the hiring party are laid down as well; if hiring would be 'in excess of 10 per cent of the hirer's employees' (if three or more persons) or it would have a duration of more than one year, an agreement is required 'with the elected employees' representatives who collectively represent a majority of the employees in the category of workers to be hired'. So again, the control of hiring beyond a certain limit is in the hand of the trade unions representatives at the workplace.⁹²

According to the collective agreements, whether a worker is hired from a company in the industry or from a temporary work agency, the management, on the employees' representatives request, is obliged to produce documentary evidence of the terms and conditions that apply at the enterprise where the personnel is drawn from. The same applies in case of outsourcing or forms of subcontracting of work. The client undertaking then also has an obligation to ensure that the contractor/subcontractor's employment contracts are in keeping with the regulations pertaining to the cross-border posting of workers. Furthermore, employees' representatives have a right of information concerning the lodging and residence conditions for employees of a foreign contractor/subcontractor when staying in Norway. For instance, the provisions of the agreement for the installation, repair, and maintenance of lifts (No. 59 in that register) state that operations must be planned and based on using permanent employees only. If nonetheless extra manpower is needed, hiring is permitted, but solely from firms that do not have the hiring of labour as their objective (§ 1, ninth subsection). That means that hiring will have to be from firms in the industry; temporary work agencies are excluded. A more common form is a set of provision dealing with the hiring of labour, outsourcing, contracting out, etc. This range of provisions is included in quite a number of collective agreements, in full in many (e.g. the agreements for the metal working industry and for technology and computer businesses, Nos 83, 219, 352 and 446 in the NHO register), in abbreviated form in some (e.g. the agreements for electrical installation etc and for energy production, distribution etc, Nos 438 and 492 in the NHO register). On the other hand, quite a number of collective agreements have no provisions of this kind. As suggested above, albeit in the form of a simplification, a dividing line may be drawn between those industries that are exposed to foreign competition and those that are not.

Art. 14-12 WEA concerns the hiring of labour '*from undertakings whose object is to hire out labour*'. This is longhand for temporary work agencies. The basic rule and point of departure is that hiring is permitted *only* to the extent that the employer could otherwise have hired employees for a fixed term/specific task pursuant to § 14-9. Subsection 2 of § 14-12 offers an opening of sorts, by way of a conditional and limited exception clause. In an undertaking that is bound by a collective agreement, the employer and elected employees' representatives 'who collectively represent a majority of the employees in the category of workers to be hired' may conclude a 'written agreement concerning the hiring of workers for a limited

⁹¹ There have been some discussion and differing views on whether the WEA provisions concerning temporary work agencies can be deemed to be in conformity with Directive 2008/104/EC. No conclusions have been drawn.

⁹² There have been some discussion and differing views on whether the WEA provisions in § 14 12 can be deemed to be in conformity with Directive 2008/104/EC (Heuvel 2011, 256-66). (The provisions in § 14 13 are outside of the scope of the directive). No conclusions have been drawn. Proposals on legislative measures to implement the directive into Norwegian law have yet to be tabled.

period of time' notwithstanding the ground rule set out in the first subsection. The connection with § 14-9 clearly serves, as intended, to limit the scope for hiring manpower from temporary work agencies.

C. Preventive measures

Of the arrangements dealt with above, only a few have real preventive measures in place. On the other hand, measures sometimes qualify purely as a preventive measure (as is the case with the DURC, examined in Chapter 3-III above).

Finnish (re)liability tool

By virtue of Section 5(1) of the Liability's Act, the client has an obligation to check. Before the client concludes a contract on the use of a temporary agency worker or on work based on a subcontract, the client shall require from the contracting partner, and he must provide the client with e.g. an account of the collective agreement or the principal terms of employment applicable to the work. If the employer of the temporary agency worker or the contracting partner to a subcontract is a foreign enterprise, the enterprise must provide the client with information corresponding to that referred to in Section 5(1) above, by presenting an extract from a register or an equivalent certificate complying with the legislation of the country where the enterprise is domiciled, or in some other generally accepted way (Section 5(2)).

The client may also himself procure the information referred to in Section 5(1), paragraphs 1 and 2, and in Section 5(2). The client has the right to accept an account other than an account or certificate provided by an authority as referred to in subsections 1 or 2, provided that it has been given by another party generally held to be reliable that is responsible for evaluating or maintaining information (See Section 5(3)). The accounts and certificates referred to in subsections 1 and 2 above must be kept for no less than two years from the date on which the work relating to the contract has been completed. (Section 5(6))

The information based on the obligation set out in Section 5 of the Liability's Act has to be based on the current state of the contractor. Therefore, it cannot be more than three months old. The contractor has to ensure that it has all the information and accounts required at its disposal before signing a contract when the contract is being concluded the first time. Such information and accounts are not needed again if a new contract with the same contracting party is signed again during the period when the information is still valid (Section 7 of the Act). If a contract as referred to in this Act is in force for more than 12 months, the client's contracting partner must provide the client, at 12-month intervals during the contractual relationship, with certificates as referred to above in subsection 1, paragraphs 3 and 4, or with information equivalent to that referred to in subsection 2 (Section 5(5)).

The Belgian notification scheme and a proposal in its construction sector

The legislation on the LIMOSA registration towards the monitoring and inspection of posted workers, self-employed workers and trainees can in fact be seen as a preventive and controlling measure in order to have a better view on who is performing temporary activities in Belgium and in order to be able to control the employers and employees concerned, not at least the labour conditions of these employees.

Regarding the proposed rules in the construction sector: if it occurs that the contractor or subcontractor does not pay the minimum wage, the fellow contractor is obliged to withhold an amount and to transfer this to the Federal Public Service Employment. This observation would be done via, for example, the declaration to the National Social Security Office, via the Employer's Service for the Organisation and Control of the Social Security Schemes ("PDOK" in Dutch) or via findings by the social inspection. An enterprise has 14 days to put the situation in accordance with the rules. If this does not happen, the amount is to be withheld from the invoice. A fellow contractor who appeals to someone who is a qualified bogus self-employed person under Belgian law, would be imposed a particular fine. It appears from this

agreement that special attention is paid to the fight against foreign enterprises that come and carry out work via self-employed persons or active partners.

Information and consultation tools for worker's representatives

The Swedish legislation in itself does not include any direct preventive tools. However, pursuant to Section 38 (3) of the Co-Determination Act, the trade union can ask the employer to provide all sorts of information about the intended contractor and the conditions under which its employees work, their education in work environment issues, rates of pay, tax conditions and other information that it may need in order to judge whether the contractor is likely to fulfil its duties towards its employees and the society. Thus indirectly, the employer will have to undertake certain checks. In sectors where subcontracting is frequent, the social partners have developed simplified procedures that may be used as an alternative to the statutory procedure, on condition that the employer checks that the contractor fulfils certain requirements, typically

- that he is registered for income tax and VAT
- that he is registered as a company if the contractor is a legal person and
- that he is bound by a collective agreement (unless it is a genuinely self-employed contractor without employees).

Having checked this, the employer hands over a list of the contractors he may want to use, and as long as the trade union does not object, the employer is free to engage any of these without having to negotiate each time. However, it must be ensured that in case the contractor in turn engages a subcontractor, the former must make the same checks.

This possibility to free itself of the duty to negotiate gives the employer an incentive to select reliable contractors, including contractors who are bound by collective agreements. It is true that the trade union cannot put a veto on a contractor only because it is not bound by a collective agreement, but it will not be accepted on the list. Thus, if the employer wants to engage a contractor that has no collective agreement, it has to follow the more cumbersome procedure laid down in the Co-determination Act. In addition, there is another reason why the principal contractor prefers subcontractors who are bound by collective agreements. It is a means of guaranteeing that the subcontractors will not be exposed to industrial action, which would delay the performance of the contract. This has also occasioned the Swedish Construction Federation to work out standard contract conditions, UE 2004, for all works that are subcontracted within the scopes of the collective agreements for building work, construction work and road and railway work.

Hence, according to the stakeholders interviewed in the Swedish report, the veto rules seem to have a preventive effect even though the legal prerequisites for putting a veto according to the rule are so strict that the veto right can very seldom be used.⁹³

Rules on liability of the client/contractor for paying the subcontractors

In the context of the French Act of 1975 establishing a joint liability of the client to protect subcontractors from unreliable principal contractors, the principal contractor must fulfil more stringent requirements (mainly of an informational character) if the client is a public authority than in relation to private clients.

In *private procurement*, a principal contractor is legally bound to establish for the benefit of his subcontractors either a delegation for payment or a formal guarantee. The delegation for payment is a triangular agreement, provided for by Article 1275 of the Civil Code by which the principal contractor (*délegant*) agrees with the client (i.e. *Maître d'ouvrage*) (*délegué*) that the latter will pay the subcontractor (*délegataire*) directly for the work done. Alternatively, in the absence of such arrangement, the principal contractor is bound to provide an adequate guarantee for the payment of the works. This guarantee is delivered by a suitable organisation, most likely a bank or insurance company. In the absence of any of these two securities the subcontracting agreement is deemed to be void.

⁹³ See the Swedish national report.

There is, however, an additional guarantee for the payment of work (Article 12). This is a direct action of the subcontractor against the client. This action is subject to three cumulative conditions. First, the client must have accepted the execution of all or part of the contract by the specific subcontractor. Second, he must have agreed with the conditions of payment negotiated between the principal contractor and the subcontractor. Third, the principal contractor must have failed to pay within a month from the date he is so required. As soon as those three conditions are satisfied, the subcontractor has the right to take legal action directly against the client. In order to bring proceedings directly against him, the relevant subcontractor must show that the principal contractor was required to pay and failed to do so.

In *public procurement*, the principal contractor is not allowed to subcontract the entire provision of services he has been entrusted with. As a result, only part of the initial contract can be subject to subcontracting. According to article 5, the principal contractor must inform the client (public authority) of the parts of the contract he intends to subcontract, of subcontractors he has in mind and of their conditions of payment. The declaration of subcontractors and subcontracting agreements needs to be in writing and includes information on subcontracted works, price and conditions of payment (Article 114 1° of the Public procurement Code). Once the client approves the subcontractors and agrees their conditions of payment, he is liable for direct payment in respect to first degree subcontractors as long as the price of the works is superior to € 600 (Article 6). By contrast, second degree subcontractors and beyond can only have a delegation for payment or a formal guarantee. None of the subcontractors has a direct action against the client as in private procurement.

If the client knows that the principal contractor has not carried out any of the aforementioned declaration formalities, he must invite the principal contractor to declare his subcontractors under the previously mentioned conditions. If he does not do so, the client may engage his liability for the prejudice caused to the subcontractor.

D. Sanctions

With regard to sanction mechanisms, the arrangements with preventive tools in place, also have some sanction provisions enacted.

Finnish (re)liability tool

If the client does not abide by the requirements stipulated in the Liability's Act, by its decision, the local office of the occupational safety and health authorities (Regional State Administrative Agencies) will order the client to pay the so-called negligence fee by the date stipulated in the decision. The right to give a decision on a negligence fee expires if the matter concerning the ordering of the fee has not been taken up within two years from the date on which the work relating to the contract as referred to in this Act has been completed. The negligence fee is payable to the state, and the Act on the Collection of Taxes and Payments by Distraint (*Laki verojen ja maksujen perimisestä ulosottotoimin* No 367/1961) is applied to its collection. The Act on Surtax and Penalty Interest (*Lakiveronlisäyksestä ja viivekorosta* No. 1556/1995) is applied to negligence fees.

Under Section 9 of the Liability's Act, the clients shall be obliged to pay a negligence fee if the client has:

- 1) neglected the obligation to check referred to in Section 5; or
- 2) concluded a contract on work referred to in this Act with a trader who has been barred from conducting business under the Act on Business Injunctions (*Laki liiketoimintakiellosta* No. 1059/1985) or with an enterprise in which a partner, a member of the Board of Directors, the Managing Director, or another person in a comparable position has been barred from conducting business; or

- 3) has concluded a contract as referred to in paragraph 2, despite the fact that he must have known that the other contracting partner had no intention of discharging their statutory obligations as a contracting partner and as an employer.

The amount of the negligence fee is prescribed as no less than € 1,600 and no more than € 16,000. In determining the amount of the negligence fee, the factors taken into account are the degree, type and extent of the negligence, and the value of the contract between the client and the contracting partner. Factors to be considered for lowering the negligence fee are the client's effort to prevent or eliminate the effects of the negligence, and factors for raising the fee are the fact that the client's negligence has been repeated or systematic, and other circumstances. It is possible that a negligence fee will not be prescribed, or a lower sum may be prescribed than the minimum amount, if the negligence can be considered minor and it can be considered reasonable to refrain from prescribing a negligence fee or to lower the negligence fee in consideration of the circumstances.

The Belgian notification scheme and a proposal in its construction sector

Regarding the LIMOSA system, the service recipient is only able to release himself from joint liability by keeping the receipt that is specific for users. The legislation refers to every end user and client who are both responsible for supervising the compliance with the registration obligation.

Information and consultation tools for worker's representatives in place in Norway and Sweden

The only responsibility of the client according to the Co-determination Act is to fulfil the duty to negotiate with the trade union as laid down in the veto rules and the collective agreements on their application. If the client fails to do so, he will be liable for damage to the trade union because of breach of the Co-Determination Act and the collective agreement, but it has no responsibility towards the subcontractor's employees if the subcontractor does not fulfil its obligations as their employer.

Rules on liability of the client/contractor for paying the subcontractors

The French Statute No. 75-1334 did not until recently provide for specific sanctions against the negligent principal contractor who would not introduce and agree his subcontractors by the client. The only sanction was of a financial nature. In effect, where the client had not agreed upon the subcontracting agreements, his liability towards the subcontractors was (and is always) excluded. As a result, the principal contractor remained the only debtor in case he was himself insolvent as he could not count on the client's liability. However, in practice this "economic sanction" was actually operating against the vulnerable subcontractor. In effect, once the client's liability was cancelled, the subcontractor was left without any legal remedy in case the principal contractor became insolvent. He could neither exercise a direct action against the client in the private sector, nor invoke direct payment in public procurement.

This situation is, however, about to change as statute No. 2011-672 of 16 June 2011(OJFR No. 0139, 17 June 2011, p. 10290) on "immigration, integration and nationality", introduced Article No. 83 according to which, if the principal contractor does not get the client to agree subcontractors and subcontracting agreements, his conduct constitutes a criminal offence and entails a fine of € 7,500. As a result, principal contractors will have an additional motivation to the presentation of their subcontractors. They will not only seek to get an additional guarantor for the payment of the subcontractors' credits, but they will also seek to avoid an important fine.

According to Article 14-1 of Statute No. 75-1334, if the principal contractor has not gained approval of the subcontracting agreements, but if it is shown that the client knew that a specific subcontractor intervened or was present in the worksite, the client's liability may be engaged as long as he has not required the principal contractor or the subcontractor to proceed with presentation and approval formalities. This civil liability is generally acknowledged in the private sector and is also sometimes established in public procurement although in a lesser extent. The same Article (paragraph 2) provides that if subcontractors are agreed upon by the client, but there is no delegation for payment, the client must require that the principal

contractor establishes a formal guarantee for the benefit of the subcontractor. If he does not do so he may engage his liability for the damage caused to the subcontractor.

If the subcontractor is not accepted although introduced, or if his conditions of payment are not agreed upon by the client, the principal contractor will still be liable towards the subcontractors for the payment of their services, but he will be unable to enforce against them the subcontracting agreement (Article 3§2). This is a complementary sanction against the principal contractor which entails that subcontractors are freed from their contractual obligations.⁹⁴

VI. Concluding remarks

This chapter presented a detailed review of several responsibility & liability arrangements relating to employment law protection, particularly wages, social fund payments and health & safety obligations. Next to this, we reviewed a few tools belonging to a miscellaneous category. All in all, the main drivers which justified the introduction of the implemented responsibility and liability measures are pretty much the same: to prevent abuse of employees' rights and evasion of the rules, as well as to fight undeclared work and illegal/unfair business competition, also referred to as 'social dumping'. The measures were introduced (mainly) in reaction to the growing popularity of outsourcing tasks and corresponding employers' obligations. In several Member States the rules were developed in a cross-border context, sometimes in specific sectors only, such as the construction sector or the temporary agency sector with many foreign companies and workers. The rules are also meant to provide an additional guarantee for payment of wages, social fund payments and/or compliance to health & safety obligations in case of a fraudulent or disappeared contractor.

By contrast, regarding the nature and scope of the measures presented in this chapter, the main conclusion is that the national arrangements are very diverse. Nevertheless, it is interesting to note one striking similarity throughout all the categories: many mechanisms in place aim to check the reliability of subcontractors, notably in the construction sector and the sector of the temporary work agencies. Sometimes these arrangements are a combination of public and private interventions, ranging from monitoring tools in collective agreements to voluntary codes of conduct, initiated by individual companies or in the context of public procurement.

Below, a brief summary is provided of the arrangements reviewed in this chapter.

First of all in Chapter 3-II, statutory and conventional/soft law arrangements on wages and other employment conditions were scrutinized with regard to their origins and main objectives, nature and coverage and connected preventive measures and sanctions.

From five existing '*general*' *wage liability* tools (in AT, DE, ES, IT, NO) based on statutory rules, three were selected for a detailed review of the nature, coverage, preventive measures and sanctions. One is an example of a 'limited liability arrangement' (AT) and two are examples of 'full chain liability arrangements' (DE, NO). Both chain liability regimes have in common that they are based on a statutory tool, which only applies if collective agreements in specific industries are declared generally applicable. Compared to the rather complicated and detailed Austrian liability arrangement(s) as described above, the German and Norwegian liability measures were easier to understand. In order to be eligible for the recently adopted

⁹⁴ However, since 1988 the third civil chamber of the French Supreme Court has adopted a rather different interpretation and refuses to liberate subcontractors from their contractual obligations (in that sense, Cour de Cassation, 3ème chambre civile, 13 Avril 1988, No. 670-P and No. 671-P).

Norwegian liability arrangement, the employee must submit his wage claim in writing to the jointly and severally liable contractor at the latest three months after the due date for the payment. Interesting is the new preventive tool in the Austrian arrangement from 1 May 2011 on, which provides the district administrative authorities, in their capacity as law enforcement authorities, with the possibility to instruct the contractor (or in case of a temporary worker the user company) to pay a part of the compensation due to the employee of a subcontractor as a deposit.

From the numerous *'specific wage liability'* arrangements identified in Chapter 2-IV above, we selected three statutory arrangements, regarding respectively undeclared/illegal workers (FR), agency workers (NL) and public procurement (IT). The Dutch statutory joint and several liability for user undertakings regarding the payment of the statutory minimum wage and minimum holiday allowance to hired agency workers was introduced in 2010 as a measure in combating an increasing amount of unreliable temporary work agencies since the abolishment of the permit system in 1998. In France, in 1992, liability provisions regarding illegal/undeclared work were introduced, because of the inadequacy of previous provisions to fight against undeclared work in the context of subcontracting chains. The rules provide an additional guarantee for payment of wages, social security contributions and taxes in case of a fraudulent or disappeared contractor. The need to ensure transparency in *public procurements* is particularly felt in political and public debate, not only for the high rates of not declared work that characterize the Italian labour market, but also because of the phenomena of infiltration of organized crime, unfortunately widespread especially in the construction sector. For this reason, many measures introduced by the 2006 Code on public contracts for the protection of workers are more stringent than those laid down by Directives 2004/18/EC and 2004/17/EC. In all three statutory specific wage liability arrangements, we did identify as preventive elements the option or requirement to check reliability of subcontractors/temporary work agencies. Only in Italy, the arrangement studied also contains preventive tools aiming to guarantee wage payment of the employees involved in subcontracting processes.

From the non-statutory arrangements regarding wages, we looked briefly to liability arrangements set up in several extended collective agreements, notably in the construction sector in Finland and the Netherlands. Moreover, of the seven Member States (DK, FI, IE, IT, NL, NO, UK) where we identified so-called *'social clauses'* in collective labour agreements, we took a closer look at the Irish and British practice. In Ireland, a significant number of labour law compliance measures (on *'bogus'* self-employment, agency work, etc.) were agreed by the social partners in *'Towards 2016'*. Crucial for the strength of the Irish social clauses is the fact that the so-called REAs are legally binding. In the UK all collective agreements are voluntary in nature and are often supplemented by circulars and letters which inform employers of new amendments to existing agreements. The most significant agreement in the construction sector (NAECI) contains with regard to posted workers an appendix which specifically deals with non-UK contractors and labour on engineering construction sites, including the auditing of these contractors to make sure that they are following the agreement. Regarding the measures applied in Ireland and the UK, no *'explicit'* preventive tools were identified. Nevertheless, in Ireland, own-initiative checks of reliability seem to be rewarded with exemption by case law. Certain public procurement model contracts contain obligatory reliability checks. In the UK, the NAECI-agreement does contain some informational requirements which may be classified as having a preventive aim.

Chapter 3-III looks at arrangements regarding social fund payments. Currently such responsibility/liability arrangements exist only in five Member States (AT, BE, DE, IT and NL). In Belgium, the liability system enacted combines social funds payments with liability for tax on wages and social security contributions. In Austria, the Netherlands and Germany, liability arrangements concerning social funds payments in the construction sector, stand apart from social security liability arrangements whereas the particular Italian tripartite arrangement is more closely linked again with social security regulations, though not fully embedded in this discipline of law. The German liability arrangement and the Italian responsibility arrangement regarding social funds also mandatory apply in the construction sector, but the Italian system may also be (and often is) voluntary applied in other sectors. In comparison to their Austrian, Belgian and

Dutch counterparts, these seem to be rather elaborate arrangements. More importantly, these arrangements have high practical relevance, thanks to their strong institutional features. Therefore, we limited more detailed observations to the German and Italian social fund liability systems only.

Remarkable in the German system is the prominent role of the leave fund ULAK/SOKA-BAU. ULAK can take legal action if companies refuse to pay. Each year ULAK starts around 60.000 legal proceedings in this context. The ULAK regularly falls back upon the principal contractor liability pursuant to Article 14 AEntG, for instance in cases where a principal contractor subcontracts part of the project to foreign construction companies which post workers to Germany and where enforcement against the company was not successful. In order to keep liability risks in the context of the holiday fund contributions low, the construction industry instituted an “early warning system” at the ULAK or SOKA-BAU. This serves to provide the contractor with particular information about the subcontractor’s contribution history, i.e. whether or not the subcontractor had a history of paying contributions reliably. Moreover, the ULAK does not pursue holiday pay fund contribution claims retroactively against undertakings which duly participated in the prequalification procedure for the construction businesses during the award of public contracts.

In Italy, the main tool provided by law to control wages and social security obligations of contractors and subcontractors is the DURC (*Documento Unico di Regolarità Contributiva*), issued by social security institutions (INPS and INAIL) and (in building sector) by Construction funds. It attests the occurred payment of social security contributions, and (in the building sector) to Construction funds. The DURC is valid for three months after issuing. Through the DURC the client can verify the correctness of the contractor’s contribution when awarding and concluding the contract and, if it lasts more than three months, in successive phases of execution of it. The client is entitled to suspend the payment of the work if the contractor does not produce the DURC or otherwise he does not certify the fulfilment of obligations and pay contributions in respect of workers employed in the contract and subcontracting chain. The DURC, though having specific meaning for social funds in the construction sector, functions as a preventive tool for the general liability arrangements in place in Italy. The DURC is obligatory for all employers in any case of public procurement or private contracts in the building sector.

Chapter 3-IV turns to arrangements regarding Health & Safety obligations. Since occupational health and safety is a specific domain, it calls for specific measures with regard to inspection and enforcement. Joint and several liability mechanisms play a key role in this respect. To summarise, we can state that most Member States have introduced joint and several liability mechanisms in order to ensure compliance with (their) occupational health and safety regulations, often repeating the obligations provided for under the different EU Directives adopted in this field. Furthermore, nearly all Member States explicitly repeat these obligations regarding the compliance with OSH regulations in situations where temporary agency workers or other third party personnel are used. The regulations often treat workers and self-employed persons in the same way, thus imposing similar health and safety regulations on employers, workers and the self-employed. Specific additional regulations are sometimes provided for in the construction (Belgium, France, Greece, Ireland, Poland), transport (France), shipbuilding (Greece) or nuclear industry sectors (France), often in implementation of European or international legislation or treaties and often also extending liability with regard to the health and security of employees of the client or of the contractor.

Needless to elaborate on the importance of compliance with OSH regulations since in a lot of cases, liability for industrial accidents can even give rise to criminal prosecution, possible charges being involuntary manslaughter, manslaughter by gross negligence, grievous bodily harm etc. Non-compliance with OSH regulations can result in a very high cost for both victim and society, whereas in some cases it is used as an extreme cost-cutting measure by some (legal) persons, the final result often being that the costs are merely being shifted from this person to both the victim and society. The national legislations, however, know some divergent provisions whereby some countries have only direct liability (AT, CY, DE, FR, SE), whereas some countries provide chain liability (BE, EL, ES, IT, NL). Some form of joint and several liability, however, seems necessary in order to avoid subcontracting processes which are explicitly designed to circumvent

occupational health and safety regulations and avoid consequential liability. In this respect, the Greek regulations for shipbuilding are very interesting: the more subcontractors involved, the more liability the main contractor or client faces. This seems logical, since the main contractor or client is likely to be the only party concerned who has a full overview of all subcontractors involved.

As a last, miscellaneous category, we examined a selection of several 'other' arrangements in Chapter 3-V. Subsequently, we reviewed (1) the tool to check the reliability of subcontractors and temporary work agencies in force in Finland, (2) the notification scheme regarding the posting of workers in Belgium, and a proposal for an identification duty in the construction sector, (3) tools regarding the information and consultation rights for worker's representatives such as trade unions in place in Norway and Sweden, (4) rules on liability of the client/contractor for paying the subcontractors (FR, PL, IE) and finally (5), restrictive measures regarding agency work and the 'hiring-in of work' as enacted in Norway, Belgium, Luxembourg. We limit our summarizing remarks to the first three subcategories, now that the last two categories do not really classify as measures with the primarily aim to protect the employees of subcontractors.

The Finnish Liability's Act sets out that a principal contractor or other subscriber is obliged to require from the subcontractor that he will provide the client with information on e.g. the applicable collective agreement or the principal terms of employment applicable to the work. A foreign subcontractor or temporary work agency is obliged to provide the client with corresponding information. By virtue of Section 5(1) of the Liability's Act, the client has an obligation to check.

The Belgian legislation on the LIMOSA registration towards the monitoring and inspection of posted workers, self-employed workers and trainees can in fact be seen as a preventive and controlling measure in order to have a better view on who is performing temporary activities in Belgium and in order to be able to control the employers and employees concerned, not at least the labour conditions of these employees. The main pillars of the system are the prior registration of the posting, the obligations of end users and clients, the consequences for other regulations and the sanctioning. The responsibility for the registration of the posted workers and self-employed persons is not only put on the foreign posted employers or self-employed persons. The "end users and clients" as well - meaning the Belgian service recipients- must also watch over the compliance with the rules. After the registration, the person who performed the registration is provided with an electronic receipt. This proof of registration is of great importance, as it is linked to the joint responsibility of end users and clients. Next to this, we looked at the *recent agreement on joint and several liability between the Belgian social partners in the construction sector* which aims to achieve an unforgeable and traceable identification of all persons present at the workplace, connected to a withholding obligation and to the liability of wages. Every person who is present at the building site needs to be in possession of a badge. Without it, a person may not enter the building site. They allow to undeniably determine who has worked and when. In the event that the badge is not used, apart from the employee and his or her employer, the fellow contractor would be imposed a sanction as well.

In Sweden, the employer's duty to negotiate and the trade union's veto right cover (apart from some minor exceptions) all situations where the employer plans to engage someone for work without that person becoming an employee of the employer, irrespective of the type of contract and if those who are to perform the work are called self-employed, temporary agency workers or something else. Pursuant to Section 38 (3) of the Co-Determination Act, the trade union can ask the employer to provide all sorts of information about the intended contractor and the conditions under which its employees work, their education in work environment issues, rates of pay, tax conditions and other information that it may need in order to judge whether the contractor is likely to fulfil its duties towards its employees and the society. Thus indirectly, the employer will have to undertake certain checks. The veto right is more limited in public procurement procedures. In sectors where subcontracting is frequent, the social partners have developed simplified procedures that may be used as an alternative to the statutory procedure, on condition that the employer checks that the contractor fulfils certain requirements.

The Norwegian information and consultation rights enshrined in collective agreements are closely linked to the WEA, an Act on the restrictive use of agency work and other forms of flexible employment contracts. The Norwegian WEA leaves only a narrow scope for lawfully hiring for a fixed term/specific task, including agency work.

Chapter 4 The practical impact of the rules – particularly in the framework of cross-border subcontracting

I. Introduction

The previous chapter (Chapter 3) reviewed the objectives, nature and content of national law on responsibility and joint and several liability in subcontracting processes in detail. In this chapter the focus shifts from the national legislation itself to the application and enforcement of the rules in practice, especially in cross-border situations.

The objective of this chapter is to assess the relevance and effectiveness of the existing mechanisms directed at the protection of workers' rights, particularly in cross-border situations. In the analysis, special attention will be paid to the difficulties that (may) arise in practice and to the main underlying reasons of the relative (in)effectiveness of the existing systems in cross-border situations.

Whereas the previous chapters concerned all EU Member States and Norway, this chapter covers 13 Member States – Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Poland, Spain, Sweden, the United Kingdom – and Norway. As regards the objective of this chapter, this selection of countries can be considered a representative 'sample', since it covers the following mechanisms concerning the protection of workers' rights in subcontracting processes:

- mechanisms of ultimate liability, in particular joint and several liability schemes, as in place in Austria, Belgium, Finland, France, Germany, Italy, the Netherlands, Spain and Norway;
- functional equivalents of ultimate liability, laid down in law, notably in Sweden;
- other legislative mechanisms which at least protect rights of some workers involved in subcontracting processes, such as in Luxembourg;
- alternative self-regulatory and/or soft law measures, including ad hoc solutions, as used in the United Kingdom and Ireland.

The selection is also representative from a more empirical point of view, since it covers countries:

- with a high incidence of cross-border subcontracting processes, both as a receiving state (all but Poland) and a sending state (notably Poland, to some extent also the other countries, for instance Luxembourg and Ireland);
- with a variety of social models and legal systems;
- with specific problems regarding cross-border subcontracting as is evidenced by high profile cases (notably the United Kingdom, but also some of the other countries);
- with a high chance to find relevant examples of best practices – e.g. in the area of cooperation between relevant actors.

The methodology of this part of the research differs from that of the previous chapters (Chapter 2 and Chapter 3). Whereas the previous chapters are primarily based on an analysis of the national regulations in place, the information for this chapter derives mainly from interviews conducted with the stakeholders, notably representatives of social partners and the competent national authorities and/or offices in the fourteen countries under study. Such methodology is in line with the focus of this chapter, which is not on the national legislation itself, but on its application and enforcement in practice.

All 14 core reports are based on interviews with both sides of industry, i.e. associations of employers and employees.⁹⁵ Some core reports are also based on interviews with specific employers (Poland, Italy, UK). A large majority of the national experts contacted in particular employers' and employees' associations in the relevant sectors, for instance associations in the construction industry (Austria, Belgium, Germany, Ireland,

⁹⁵ Except one: the Luxembourg expert was not able to interview the employees' representatives. The contacted trade unions – OGBL and LCGB – did respectively not respond and refused their cooperation.

Italy, the Netherlands, Norway, Sweden, UK), the transport industry (Italy, the Netherlands, Sweden) and the temporary agency sector (the Netherlands, UK), or associations especially representing SMEs (Ireland, Italy). Next to this, almost all reports are based on interviews with labour inspectorates and all kinds of relevant authorities (social security, health and safety, competition and tax authorities), often also including ministries. Other interviewed stakeholders are, for instance, social funds (Austria, Germany), private compliance foundations (the Netherlands) and NGOs (UK). More information as regards the interviewed stakeholders by country can be found in Annex II.

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 regulation/mechanism 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 no standard, quantifiable indicators exist (yet) 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 – employer organizations, trade unions, relevant authorities. 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 application of the rules in practice, particularly in cross-border situations (Chapter 4-II). The focus is on the effective impact of the legislation in practice. The chapter then focuses on the enforcement of the implemented norms and instruments, especially in cross-border situations (Chapter 4-III). This part of the study also examines to what extent EU level cross-border legal instruments in force allow foreign administrations and other creditors to be paid. Moreover, both the collaboration with foreign actors and institutions, and the place and role of the national mechanisms of protecting workers’ rights in subcontracting in the overall system of enforcement of labour law will be scrutinised. Separate subsections are devoted to the effective impact of the rules regarding the payment of social fund contributions (Chapter 4-IV), and regarding a specific form of subcontracting, i.e. temporary agency work (Chapter 4-V). Although this study does not particularly focus on small and medium-sized enterprises (SMEs), the majority of contractors operating in the relevant sectors belong to the category of SMEs. Therefore, Chapter 4-VI deals with the question whether there are any specific problems for SMEs with regard to rules on liability in (cross-border) subcontracting processes. After this more generic assessment of the application of the existing rules in practice, we conclude with an assessment in more detail of both the positive issues and the problems identified by the actors involved; attention will also be paid to the various possibilities, put forward by the relevant stakeholders, to eliminate the identified problems (Chapter 4-VI).

II. Application of the rules in practice – specifically in cross-border situations

This section deals with the application of the existing rules on the protection of workers’ rights in subcontracting processes, especially in cross-border situations. The focus here is on the effective impact of the legislation in practice. Firstly, the effective impact of the protective measures regarding wages and other employment conditions will be examined (Chapter 4-II A). The application of the health and safety arrangements will be reviewed in Chapter 4-II B.

In this study the assessment of the effective impact of the rules is mainly based on the opinions of the relevant stakeholders and actors involved. It must be noted in advance that measuring the effectiveness of the rules can sometimes be rather difficult, especially if the rules under examination are only recently adopted. Several national reports, which form the foundation of this comparative report, make a

reservation in this respect. Please note that the positive issues and good practices as well as the difficulties which are encountered by the actors involved will be presented in more detail in Chapter 4-VI.

As mentioned in Chapter 4-I, the question how these rules on the protection of workers' rights in subcontracting processes are enforced, especially in cross-border situations, will be dealt with in Chapter 4-III. It must be emphasised that it is not always easy (or even possible) to distinguish between the application and the enforcement of the rules. Obviously, the enforcement of the rules also influences their application and effective impact. Nonetheless, this distinction is relevant to make a clear analysis of the practical situation. Therefore, as a starting point the mere relevance and effectiveness of the existing mechanisms are discussed in Chapter 4-II, whilst the ways these mechanisms are monitored and enforced in practice are scrutinised in Chapter 4-III.

A. Wages and other employment conditions

Before giving a detailed review of the effective impact of the protective measures regarding wages and other employment conditions, we will present some general information on the presence of foreign workers and subcontractors in the selected core countries, and pay attention to the specific case of Poland, being mainly a sending state.

The presence of foreign workers and subcontractors

The (relative) numbers of (posted) foreign workers present and foreign (sub)contractors active in the country vary considerably between the Member States. For instance, in Austria foreign workers are rarely posted to the country, whilst in the United Kingdom the enormous influx of migrant workers has been challenging indeed. The number of (sub)contractors established in other Member States and active in Italy and Spain is small.

According to all respondents, the posting of foreign employees to Austria has only a low level of practical relevance. With about 3.5 million salaried workers in Austria 55,000 up to 65,000 employees are posted to Austria every year (80% of them are from Germany); about 6,000 of these employees are posted solely in the construction sector. Moreover, experts do not expect a significant increase of foreign employees on the Austrian labour market. The estimations range from only 20,000 to 25,000 additional employees, most of whom will not be posted employees according to Directive 96/71/EC, but rather seasonal employees and cross-border commuters.

The exact reverse situation is found in the United Kingdom. Workers from other EU countries have been introduced into the United Kingdom labour market via an open door policy of free entry under Article 45 TFEU and via the more structured means of the Posting of Workers Directive and Article 56 TFEU. As a result, the UK is one of the most open Member States for the provision of cross-border services. Third country workers have either entered undocumented or via a more restrictive regime of work permits, and now via a points based system. Nevertheless, it is generally clear that the extent of cross-border subcontracting and, with it, labour activity increased following the accession of the Central and Eastern European countries (A8) in May 2004. The migration that followed the accession and in particular the introduction of Polish workers, is seen as the largest ever single migration to the UK.

The number of (sub)contractors established in other Member States and active in Italy, Poland and Spain is small. Although Italy faces some problems regarding cross-border subcontracting (see below), there are few (sub)contractors established in other Member States and active in Italy, and they are present only in some specific sectors, mainly in the construction sector. In the transport sector, workers are often posted by an agency or within a group (not on the basis of a contract) and most of the other relationships with foreign undertakings are based on transport contracts to which rules on protection of workers' rights in subcontracting chains do not apply. In some sectors, there is an almost total lack of cross-border posting of workers, which concerns especially labour intensive services (such as cleaning and catering). According to

trade union representatives, the opportunity to profit from “internal” social dumping explains why in some sectors a low number of foreign undertakings operate.

The subcontracting of works and services is a legitimate way of organising production in Spain and is very common in the construction sector. However, cross-border subcontracting is not common and not considered problematic. Nor is the posting of workers a particularly problematic situation in Spain, since its incidence is limited to the border between Galicia and Portugal. Actually, there is no massive posting of workers inside or outside Spain.

A specific case: Poland

Poland experiences the consequences of being mainly a sending state as regards cross-border subcontracting within the EU. The massive emigration for economic reasons causes large staff shortages in several fields of services, for instance the health service. This cannot always be matched by domestic supply of unemployed workers. Therefore, the Polish government has recently set out a migration strategy in order to increase the participation of foreigners on the Polish labour market. On the Polish (domestic) labour market subcontracting is increasingly used, mainly with the purpose of decreasing labour costs. According to the interviewees, outsourcing or outplacement is also applied to replace employment with cheaper forms of non-employment. In fact, it is a common practice that the former employees of undertakings now often work (in the same undertaking) under outsourcing and outplacement constructions. Those forms of subcontracting are largely applied in the public health sector, especially in hospitals.

The level of protection of foreign workers engaged in cross-border subcontracting in Poland as the receiving state differs depending on whether they are posted from other EU Member States or “expatriated” from third countries. Although the minimum protection standards (laid down in the Labour Code and the Act on the employment promotion and institutions of the labour market) for both groups of workers are the same, in practice any infringements of legal regulations are much more common in case of third country workers. In that respect, there was a considerable increase of infringements of the legal regulations – from 4.2% in 2008 up to 25.1% in 2009. The conditions applied to workers from other Member States do not seem to be different from the working conditions of the Polish citizens. Next to this, the number of cases of illegal employment in Poland has tripled since 2008. It must be added that, according to the interviewees, the use of foreign subcontractors is rather rare in Poland.

The initiative to fight fraudulent practices must be taken by the foreign worker

In many of the countries under examination the effective impact of the rules is seriously hampered, because it is up to the worker to commence proceedings in case of abuse of workers’ rights in subcontracting chains. According to the national reports of Austria, France, Germany and the Netherlands this is an important obstacle to the effectiveness of the rules on wages and other employment conditions. The following grounds were specified to explain this.

Notwithstanding all the measures currently in force in the Netherlands to protect workers’ rights in subcontracting, evasion of the rules is still a serious problem, especially in cross-border situations. The private enforcement of many rules is deemed to be one of the main difficulties. It is often the abused foreign worker who must be ready to institute an action against his or her employer and/or user undertaking, which often not happens out of fear for immediate loss of his or her job etc. The trade unions report that especially with regard to employees of foreign subcontractors the applicable Dutch CLA provisions are scarcely observed, but that they can only take action if the workers concerned are ready to claim their rights, which is often not the case. Therefore, the system of private enforcement of CLA provisions (employee versus employer) is not effective. According to all stakeholders this applies all the more to the liability of the user firm or principal contractor in case of underpayment of a (third country) foreigner without a working permit. Since illegal employment is usually related to the illegal stay of foreign

nationals, who are at risk of immediate deportation, these workers are not in a position to effectuate the intended legal protection. Hence, this liability is also not effective in practice.

The number of cases of liability for wages in Austria is low. One reason for this is the small amount of foreign employees active in the country (as mentioned before). Nevertheless, according to the Austrian social partners, wage and social dumping is a big problem with foreign subcontractors as the perpetrators of low prices especially in the construction sector. Only a small number of individual cases ever come into the public eye.

In the middle of 2005, for example, there was a very serious wage and social dumping case concerning posted workers from South Korea and Indonesia who worked 62 hours a week at an average hourly wage of € 1.30 and who were accommodated in very poor conditions.

Another, more alarming explanation for the low number of cases of liability for wages is that, if wage dumping occurs, there seems to be a lack of willingness to commence proceedings. The employees themselves must litigate under civil law, which they are reluctant to do for several reasons, in particular because of fear to lose their employment (even if the lawsuit is not directed against their own employer, but against the contractor, the employees concerned are often of the opinion that the contractor will seek recourse against their employer, while they would rather refrain from any action).

In France the same problem was mentioned regarding the joint liability for the payment of salaries, taxes and social security contributions due to the subcontractor's workers in case of recourse to illegal work. This joint liability mechanism is effective as regards the collection of taxes and social security contributions, but relatively ineffective with regard to (both French and foreign) workers. They meet serious difficulties in practice when they wish to assert their rights, including (most often) the necessity to introduce a (civil) court action.

Another reason why foreign workers are often not willing to initiate proceedings themselves, is that they do not consider wage dumping as (particularly) problematic. It was, for example, reported for Austria that if wage dumping occurs occasionally, the posted employees concerned do not really consider themselves as victims of wage dumping, since the wages received, although lower than the Austrian level, are often still higher than the regular wages in their own country.

The lack of information of especially foreign workers about their rights is another important reason, which can grow worse due to a foreign language problem (Austria, Germany and the Netherlands). For instance, in Austria posted employees are ill-informed about their entitlements under the protective regulations due to a lack of reliable legal information and the non-availability of the information in their own language. Such problems were also reported with regard to the German system of joint liability with respect to minimum wages (this liability also covers the payment of holiday fund contributions, to be discussed in Chapter 4-IV). In practice, one has to deal regularly with individual claimants who usually assert their minimum wage claims with the support of trade unions. According to these trade unions, there are significant factual obstacles for workers posted to Germany to enforce their minimum wage entitlements. For these workers the exercise of their rights is sometimes difficult due to insufficient language skills and a lack of legal knowledge, as well as no longer being in Germany.

Nevertheless, a significant number of minimum wage claims are enforced in Germany on the basis of this liability arrangement, usually with the help of the trade unions. From 2004 to 2007 (the most recent figures), trade unions EMWU and IG BAU together claimed a sum of € 1,200,000 against principal contractors on this basis. Due to the strict liability provisions (in § 14 AEntG) many of these claims can already be settled out of court, meaning that it usually does not come to judicial proceedings. Typically, the principal contractors involved are aware of the fact that they will have to pay the owed wage gap in the end and that court proceedings would produce no other result.

The matter might be complicated by the fact that these migrant workers often fall outside the trade union's field of vision. The unions often have difficulties in reaching and organising foreign workers who are posted or otherwise working in the country (e.g. France, Italy, Sweden). Positive experiences in this respect were however mentioned in some countries, especially in the United Kingdom. The introduction of considerable numbers of migrant workers through outsourced contracts and temporary agency work has been quite challenging for the UK trade unions (e.g. the actual proportion of migrant workers in the public sector was estimated at 13 per cent of all staff in 2010 and in the social care area at nearly a fifth of all workers). The public sector codes of practice (withdrawn by now) were not reported to have been used by or assisted the union in its work with migrant workers. Although the workforce codes and procurement statutes have not been successful in supporting migrant workers, Unison (a UK trade union) has a Migrant Workers Webpage and is dealing, through its Vulnerable Workers Unit (labelled Hidden Workforce), with all outsourced workers providing public services. Many of these workers are migrant workers. Furthermore, in 2005 a Migrant Workers National Working Party was established to coordinate policy and to share best-practice.

Finally, even if the foreign workers are prepared to commence proceedings, other obstacles remain (apart from the abovementioned lack of legal knowledge and language skills of these workers). It might, for instance, be uncertain who the responsible employer (Germany) is. In Austria, the obscurity regarding the identity of the liable contractor is considered to be a serious information problem. It is often unclear to posted employees which party is the liable contractor, as within the posting there is no real information obligation in this respect. However, this problem might be tackled in the near future by establishing a database for construction sites where a certain number of subcontractors will have to register. The Italian system of protection of posted workers' rights is weak and (in the opinion of all the actors interviewed) not effective. In the cross-border context, the disclosure of the real nature of the contractor undertaking and the relationship between him and the posted workers is indicated as the greatest difficulty by the inspectors, given the diversity of regulation between States and the absence of collaboration with the competent authorities in the home State. This especially happens in case of workers posted from East European Member States.

A lack of (reliable) information – supervision based on inspecting documents, certificates etc.

The non-availability of official data makes it, at the very least, difficult to have a clear picture of the extent of, and problems relating to cross-border subcontracting (Italy). Moreover, a lack of information – notably in cross-border situations – often hampers the effectiveness of the rules on protection of workers' rights in subcontracting chains (e.g. Finland, Spain, Sweden). This problem occurs especially when the supervision of the rules is mostly based on inspecting documents and additional information, or if the liability arrangements impose such information obligations on the principal contractors.

The cross-border sharing and controlling of information hampers the effective impact of the Liabilities Act (the key piece of legislation in the protection of workers' rights in subcontracting in Finland) in cross-border situations. Some serious deficiencies as to the compliance with these rules were reported. The supervision of the Act is mostly based on inspecting documents and additional information which the authorities possibly receive from the parties. However, the information given by the parties is often defective. The reliability of the information received cannot always be settled to a sufficient extent by the authorities. This hinders an adequate supervision, especially in cross-border situations. Other problems regarding the Liabilities Act are its limited scope of application (the obligation to check only applies in relation to the direct contracting partner) and the ignorance of the Act among (sub)contractors.

Although the overall assessment of the stakeholders in Spain is that the legislative measures on the protection of workers in subcontracting seem to be reasonably effective, some practical problems were mentioned regarding the chain liability for wages and social security payments. These problems relate to the obligatory and preventive checks and certificates which the client/principal contractor has to undertake/obtain. For instance, regarding the certificates on the absence of debts (which the

client/principal contractor must request from the Social Security Treasury), necessary to be exonerated from back-payment duties, application problems have arisen. The main reason for these application problems is the lack of a precise regulation on these certificates. According to the interviewees of the Social Security Treasury it is unclear who can request these certificates, what documents must be produced, etc. Another practical problem is that there is no properly systemised registration of the issued certificates, which could probably be helpful in monitoring the compliance with the liability rules. Moreover, there is no clarity as to the range of responsibilities for which the client becomes exonerated by means of this certificate.

In Sweden this problem is reported in relation to the trade union's right to negotiate and eventually veto the engagement of a certain contractor (Co-Determination Act). Although this arrangement works reasonably well in purely domestic situations, especially in the construction sector, it is far less effective in cross-border situations (foreign enterprises providing services with posted workers in Sweden). This is attributed to the fact that it is more difficult for both employers and trade unions to check the reliability of foreign contractors (but also to the fact that most foreign workers are not members of the Swedish trade union).

Registration/notification/declaration formalities

The demand for better insight in the (numbers of) foreign subcontractors and workers active on the national labour market runs like a common thread through the national reports. The presence of registration or notification obligations are assessed as very positive (Belgium, France), whilst the absence thereof is seen as a serious problem as regards the effectiveness of the existing mechanisms in cross-border situations (Ireland, United Kingdom).

In Belgium the LIMOSA registration – the mandatory registration of foreign workers temporarily working in Belgium – is considered a valuable means, since it does not put a disproportionate burden upon the players on the market and serves a clear purpose. This registration system at least allows the inspection services to have an idea of which foreign workers are working where in Belgium, and should therefore facilitate control by inspection services. Negotiations are taken place to introduce a registration notification in the construction sector. In order to be able to control the compliance with the French joint liability rules (for the payment of salaries, taxes and social security contributions) in case of cross-border subcontracting, the controlling agents need to have some knowledge of the posting of workers. This is why the declaration formality is of pivotal importance: when an undertaking established abroad temporarily posts workers to the French territory for the provision of services, it must declare the posting of workers to the Labour Inspection.

On the other hand, the lack of recordkeeping obligations is regarded as a serious problem in cross-border situations in Ireland. Irish law proceeds on the basic assumption that rights, obligations and attendant liabilities are founded in the direct contractual relationship between a worker and his or her employer. Moreover, Irish law, in terms of workers' rights, generally tends not to distinguish between indigenous and foreign national workers, as long as the workers are legally working within the jurisdiction. As such, the interpretation, implementation and enforcement of many of the relevant (liability) mechanisms is the same in the context of both domestic and cross-border subcontracting processes. However, practical impediments to effectiveness do arise, especially in cross-border situations. A serious problem for the monitoring and enforcement agencies is that an employer established outside Ireland is neither required to keep records relating to posted workers on site in Ireland, nor to have a designated representative in Ireland. Virtually all of the national informants made reference to the fact that free movement of services rules put restrictions on the extent to which undertakings established in other Member States could be burdened with administrative obligations, but it was felt that more stringent recordkeeping obligations should be imposed. Also in the United Kingdom the lack of regulation and registration and, therefore, of accurate data on movement, is deemed to be an obstacle. The migration that followed the accession of the A8 countries in May 2004 and in particular the introduction of Polish workers is seen as the largest ever

single migration to the UK. These incoming 'A8 workers' were obliged to register in the Worker Registration Scheme (WRS), but this obligation did not apply to self-employed and posted workers. It is reported that many did not register and indeed were not even aware of the scheme. The WRS closed on 30 April 2011. With regard to the posting of workers, the UK has no system of registration and little is known with regard to numbers of posted workers.

The Complexity and continuous transformation of the rules

Both in Italy and Norway the complexity of the rules and/or the uncertainty of the regulatory framework are regarded as obstacles to their effective impact.

Almost all stakeholders have highlighted the structural problems of a general nature reducing the effectiveness of the existing measures in Italy. One of these general problems is the continuous transformation of laws, which makes it very difficult to know and apply, let alone enforce, statutory obligations. The uncertainty increases in cross-border situations, even for the complexity of European law, which must be taken into account to interpret and apply national law. An overall view shared by actors among both sides of industry in Norway is that the statutory regulation in total is both comprehensive and complex, making it difficult to apply and therefore may hamper its efficiency in practice. However, actors generally consider that the joint and several liability rules of the General Applicability Act (GAA) have worked effectively with regard to both of their objectives. Social partners and public authorities consider the rules to have contributed to having contractors be more discriminate in choosing subcontractors, ruling out dubious undertakings and elaborating contract provisions to attend to legal requirements and potential liability.

Fragmentation and other difficult features of the industrial relations system

Another structural problem of a general nature in Italy is the fragmentation and "dwarfism" of the Italian industrial relations system.

As an illustration of this fragmentation, in the construction sector almost half of employees working at construction sites is made up of self-employed workers and micro artisan undertakings; many of them are created by migrants. It follows that a great part of the persons working on construction sites are not guaranteed by the rules to protect workers within subcontracting chains. The excessive number of firms (due to the fact that "anyone can open a company in Italy and sign the register at the chamber of commerce"), is also denounced by the employers' associations.

Especially against the background of the described features of the economic system, all stakeholders (albeit with significant differences) agree that the discipline of joint and several liability for wages, social fund payments and social security contributions – the main measure to ensure workers' protection in subcontracting processes within the Italian legal order – is an important instrument to protect workers and to impose on clients a responsible conduct in the choice of contractors and subcontractors and in monitoring their activities. Considering the objective of the joint and several liability in place (the protection of workers' rights), its effectiveness – as generally assessed for domestic situations – is created by its way of operating "objectively" and without limits; hence the impossibility for the client (and for each contractor) to avoid it. The extension of joint and several liability to the entire subcontracting chain entails the multiplication of persons liable regarding employees of subcontractors. Such an extension is useful to force the client (the first link of the chain) to use the highest level of attention in their choice of contractors and subcontractors; this level of attention is to be used not only in awarding the contract, but during the entire period of its execution. This is the reason why the chain liability, as settled in Italian law, is considered extremely effective as regards the purpose it was adopted for. It is not certain whether this joint and several liability system is also applicable to cross-border situations. In practice, however, the liability is not applied to cross-border contracts, in the opinion of the actors interviewed its use by workers posted in Italy is nearly zero.

In the United Kingdom, the fragmentation of especially the construction sector, which is one of the largest sectors in the UK, is also seen as a complicating feature. This fragmentation makes it hard to gain an inside into the extent of and problems relating to (cross-border) subcontracting. For instance, over ninety per cent of the 270,000 active enterprises in this sector has fewer than 10 employees, with 72,000 being one-man operations. Within this are contingent forms of labour such as bogus self-employment, which makes for a fragmented industry. Not surprisingly, there is limited primary data on the actual operation of a supply chain, from client engagement of a main contractor, to its procurement of a number of work packages to the number of tiers involved in this process.

The Swedish system is not always effective in cross-border situations, due to its specific features. The trade union's right to negotiate and eventually veto the engagement of a certain contractor (Co-Determination Act) works reasonably well in purely domestic situations, especially in the construction sector (where social partners have agreed on simplified procedures that are used as an alternative to the statutory procedure). Although the right to veto is hardly ever used in practice, the employer still has to take up negotiations before he engages a contractor or hires labour from a temporary work agency. However, in cross-border situations – foreign enterprises providing services with posted workers in Sweden – some of the necessary prerequisites are not at hand. The rules on the trade union's right to negotiate/veto only apply if the employer and the trade union are bound by a collective agreement that covers the work to be performed, which constitutes a serious problem in cross-border situations. In addition, most foreign workers are not members of the Swedish trade union; and – after the Posting of Workers Act was amended in order to comply with the Laval judgement of the ECJ – a trade union is deprived of the means to force a foreign employer to enter into a contractual relation with it even regarding the absolute minimum conditions, which severely impairs its capability to enforce the substantial rights of the subcontractor's employees.

Employment status – bogus self-employment

Another common application obstacle is that the major part of the rules on protection of workers' rights in subcontracting processes only apply to employees and can thus be relatively easily evaded via the concept of self-employed workers. This problem was mentioned for Belgium, Luxembourg, the Netherlands, Norway, Poland and the United Kingdom.

The phenomenon of bogus self-employment is well known in Belgium as a means of escaping the protective labour law rules. The case law on this subject has been a source of inspiration for the Labour Relationship Act, which lists a number of criteria to determine whether a person is an employee or a self-employed person. The attractiveness to be able to work with cheaper self-employed persons and this way avoid that minimal social conditions and standards have to be complied with in the country of temporary employment involves the risk of an increase in (cross-border) bogus self-employment, where persons act as an employee, but are registered as a self-employed person. Moreover, the forms of bogus self-employment have become increasingly sophisticated in the past few years, which is a tendency to be observed in the whole of Europe. In the United Kingdom this problem is all the more pressing, since the exact employment status of a 'worker' may not be determined unless and until a claim is made to an employment tribunal. The level of protection depends on them being an 'employee', a 'worker' or 'self-employed'. Several cases show how groups of workers believe that they are employees or workers of a contractor, only to find that when they make a claim for deductions of wages or holiday pay, the contractor argues that they are self-employed.

In the Netherlands, the problem of bogus self-employment is high on the political agenda. The conclusion that the majority of the protective rules do only apply to employees and can therefore be evaded via the concept of self-employment, is all the more important since the amount of people working as a 'self-employed person without staff' (a so-called ZZP) is still increasing in the Netherlands.

In 2010, their number increased by 4% (27,000) compared to 2009. The total amount of ZZP's in the Netherlands is 704,000, which means that already 10% of the working population is self-employed. Two

important trade unions (*FNV Bondgenoten* and *FNV Bouw*, the largest trade union in construction) report that bogus self-employment is indeed a serious problem. These unions note that it is far too easy to obtain a declaration of the status of a ZZP (Declaration Working Relationship, the so-called VAR). They report that fixers successfully submit dozens of VAR requests at the same time and there is hardly any control.

The problem of bogus self-employment also occurs with regard to labour migrants from the CEE countries. This could be especially tempting as regards Bulgarian and Romanian workers, for whom a work permit is still required (until 1 January 2014). By presenting these workers as self-employed workers (while in fact they work as employees of an employer), the liability for employing a foreigner without a working permit and the other (liability) rules of the Foreign Nationals Employment Act are circumvented. A related problem is that self-employed workers are free to set their own tariffs. These tariffs are sometimes fixed below the Dutch statutory minimum wage, leading to underpayment and unfair competition on the labour market. This problem occurs especially in cross-border situations, notably as regards workers from the new Member States (who are willing to accept lower remuneration, since this is still higher than in their home country).

The Dutch government is determined to combat bogus self-employment. The tax authorities examine the status of Bulgarians and Romanians who claim they are self-employed. This results in approximately 1,600 screenings on an annual basis. Moreover, the fight against bogus self-employment of Bulgarian and Romanian workers is one of the main aims of the Labour Inspectorate. This means that, during all inspections in the context of the Foreign Nationals Employment Act, the Labour Inspectorate examines whether the self-employed status of Bulgarian and Romanian workers is correct. If it turns out that these workers are actually employees, the employer is fined for illegal employment. Furthermore, the SIOD (Social Intelligence and Investigational Service) carries out criminal investigations into constructions with bogus self-employed workers from the CEE countries.

In practice it might be hard for (principal) contractors to distinguish between real and bogus foreign self-employed workers (employed by the subcontractor), also because these workers themselves have often little to gain with a judicial procedure about their status.

Also in Poland the employment status of a worker (being an employee or not) is of crucial importance and is a serious problem in practice. This relates to the fact that worker's rights in subcontracting chains are only protected in an indirect way, namely by labour law in general. The Polish Labour Code is ambiguous about the criteria for determining the status of a worker (it is uncertain whether the will of the contracting parties or the actual features of the relationship is the decisive factor). In practice, the possibility of questioning the legal relation between the contractor and the subcontractor is seriously limited. In this context it is noteworthy that, as regards social security, the legal situation of individuals executing a contract (subcontract) on the basis of civil law agreements has been equalised (in 2000) with the situation of those employed as employees. The persons performing work in Poland under an agency agreement, a commission agreement or another agreement on providing services are subject to the obligatory retirement, pension or accident insurance, if remuneration under the agreement is their only source of income.

Only in Norway the employment status of a worker does not seem to be really problematic. Although the joint and several (chain) liability of the General Applicability Act (GAA) only applies with regard to employees of the subcontractor, the problem of bogus self-employment is minimal in the building and construction sector. According to the Norwegian report, this might be attributed to case law in which self-employed persons were deemed to be employees in legal terms.

Social clauses in public procurement laws

It is notable that the practical relevance of the existing employee protection in the context of public procurement seems to be rather limited in the selected countries. This was for instance reported regarding the social clauses within the public procurement laws in Germany. According to the German trade unions, there are problems implementing the rules in practice. The low figures of initiated administrative fine procedures show that there is a need for improvement in terms of enforcement and control (see Chapter 4-III). In Ireland, almost all informants had an extremely negative perception of how public procurement standards are applied, or more accurately not applied, in practice. Although most public contracts do contain these clauses (which is not mandatory), the informants state that the compliance clauses are not applied in practice. The problem seems to be most acute in the construction sector. According to the Construction Industry Federation, it is only where unions are present and raise issues with clients/principal contractors on public jobs that action is taken. Some principal contractors and clients increasingly rely on 'certificates of compliance' provided by private companies. According to the union informants, large Multinational Companies almost always engage the services of such companies to ensure compliance on works projects; such companies were said to be extremely anxious not to suffer bad publicity, or delays relating to industrial action, that could result from engaging non-compliant (sub)contractors.

In Poland, the legal provisions on joint and several liability, applicable to construction works, for the benefit of the subcontractor himself can be made ineffective quite easily and this liability can be circumvented even more easily in the context of public procurement. It suffices that the client does not approve the subcontractors; in that case the conditions for creating joint and several liability will not be fulfilled. Moreover, the Public Procurement Act enables an awarding entity (client) to decide in advance which scope of works will be performed by subcontractors, establishing its co-liability in that respect only. However, the use of foreign subcontractors is rather rare in Poland.

The construction of the Baltic Arena stadium, built for the European Football Championship in 2012, may serve as an example. Out of 120 subcontractors actually working on this project, the awarding entity made the written approval and consequently assumed joint and several liability only in relation to ten of them. Among these 120 subcontractors there was only one foreign subcontractor.

Temporary agency work and other forms of labour only subcontracting

Although temporary agency work will be discussed in more detail in Chapter 4-V, we will pay attention here to the situation in Luxembourg, where these rules seem to have a more general relevance as regards the protection of workers' rights in subcontracting processes. In Luxembourg, the highly restricted possibility to make use of temporary employment agencies and "the hiring-out of labour" is deemed an important factor in combating abuse in subcontracting processes. It often happens that the "subcontracting relationship" is actually temporary agency work or the temporary hiring-out of labour, but does not comply with the framework provisions on temporary work or the temporary hiring-out of labour. Notably, the hiring-out of labour does not include employees working for another firm under a contract of provision of services. However, the courts do have a wide discretion to 'reclassify the labour relationship'. As the two notions are quite close, labour courts are sometimes brought to reclassify a contract of provision of services into an illegal hiring-out of labour. The concept and the provisions relating to the illegal hiring-out of labour allow the Labour Inspectorate (ITM) to sanction almost all situations of fraudulent hiring-out of labour taken in its broader sense. Although there is no system of chain liability in the context of subcontracting, such a mechanism does exist regarding the illegal hiring-out of labour: the user and the person who put the employee at the disposal of the user are jointly liable for the payment of remuneration, as well as of social security charges and related tax (sanctions apply to both the user and the employer).

A more general relevance might also be attributed to the introduction of the Gangmasters (Licensing) Act in the United Kingdom. The successful introduction of this Act in 2004 is seen as a first step towards a more comprehensive policy framework in order to protect vulnerable workers from exploitation (see also Chapter 4-VI)

B. Health & safety arrangements

Next to being regulated under different European instruments, the area of occupational health and safety is also heavily regulated by national measures implementing these instruments. According to these provisions, the principal contractor has a large number of safety obligations towards the subcontractor's workers (prior inspection, workers' information, general coordination plan, etc), which often are of a preventive nature.

Migrant workers are particularly vulnerable

However, this does not exclude that in practice accidents often particularly occur in subcontracting situations, which is demonstrated in many reports. In France, it has been reported that work related accidents are far more frequent in subcontracting undertakings than in client-provider undertakings. According to the same report, the reason for the increased accident risk is probably that a subcontractor's workers are under more pressure and take more risks than the workers of a client-provider. In Sweden, the inspection authorities report that the work performed by foreign workers often entails a big risk for accidents and ill health, and that some accidents, among them accidental falls, have proved fatal. Many foreign workers are not aware of risks and safe working methods, and especially in the construction sector the safety standard can be very poor. In the UK as well it is highlighted that migrant workers were more likely to be working in sectors, such as construction, with a heightened health and safety risk. A report provided statistical evidence that almost a fifth of construction fatalities in 2007-2008 concerned migrant workers. Overall, the report highlighted a fourfold rise in migrant worker construction fatalities since the accession of the A8 countries. It follows from a report commissioned by the department of Social Affairs and Employment in the Netherlands that during the years 2007-2009, in 13 % of reported accidents, the victim was a foreign country national. A striking result was that almost half of the foreign victims were temporary workers. According to the Labour Inspectorate, inspections have pointed out that the bad working conditions of foreign nationals are more related to the mere fact that they are temporary workers, rather than to the sectors they work in.

Similar trends can be noticed in Italy. The elusion of the rules of health and safety is greater in small and micro undertakings, where the representative of the workers for health and safety is often lacking. It is stressed that the problem of a lack of safety in the workplace is not as such related to legislation (overall satisfactory), but more to the economic and industrial context that leads to infringement. It is considered a dangerous trend that "almost exclusively self-employed and family workers, often charged directly by the client" work at the building sites, whereby the provisions on health and safety are less rigid and easier to avoid.

Are health and safety Regulations efficient?

To what extent are the health and safety regulations efficient? Some countries are rather positive about the application of the Health and Safety Regulations. In Ireland, for example, most national informants were of the view that levels of compliance with health and safety legislation are relatively high. It is often seen that there is a stronger culture of compliance with health and safety rules relative to many other areas of labour law. Due to the often 'technical' nature of health and safety responsibilities (e.g. the provision of proper equipment or having adequate fire prevention facilities) it is considered easier for the authorities to monitor and enforce compared to other areas of labour law. It was felt that this is partly because compliance is a 'board level' issue; breaches of the Safety, Health and Welfare at Work Act 2005 are criminal offences and the Act provides that when an offence under health and safety legislation is committed by an undertaking and the acts involved were 'authorised or consented to, or were attributable to connivance or neglect' on the part of either a director, manager or other similar officer, 'that person as well as the undertaking will be guilty of an offence and liable to be proceeded against and punished as if the person was guilty of the offence committed by the undertaking'. Also in the UK it is believed that health and safety regulations have been effective in improving coordination and reducing accident figures in the construction industry from the mid-1990s onward. Employers are legally obliged to consult their

workforces with regard to health and safety. Also in Italy the actors generally have a positive opinion about the legislation and security rules on the effectiveness in the sense that the planned measures are considered necessary and useful to reach the aim for which they are adopted. This does however not imply that these rules are sufficient. It is however noticed that the elusion of the rules of health and safety is greater in small and micro undertakings, where often the workers' representative for health and safety is lacking. Especially in small undertakings legal obligations are only fulfilled through the formal drafting of the documents requested by the legislation (DVR, DUVRI and POS) thanks to the services of private legal consultants. Legal obligations to be performed are often pointed out by the client to contractors and to subcontractors, who sometimes ignore them.

Various other reports have however indicated that various problems make some of these provisions less effective. Apart from the legal issues discussed below, some other countries refer to problems related to the control of compliance with the provisions and problems with the enforcement. These problems are further discussed under Chapter 4-III B.

Legal issues

Some countries refer to certain legal issues. In Spain, the regulations on health and safety in subcontracting are considered too complex by some interviewed stakeholders such as employers' associations (FADE) and labour inspectors. They point out that these rules involve many documentary and bureaucratic obligations, and that in practice this leads to a merely formal fulfilment, which does not contribute to an effective and real observance of the protective aims. Furthermore, the complexity of the standards is considered a handicap for their practical compliance.

Also in Belgium the biggest problem for an effective implementation of a possible joint and several liability system results from legal uncertainty. Indeed, although the legislation seems to establish a kind of joint and several liability system, further provisions in the legislation seem to undermine this system. Depending on the case, the project supervisor responsible for the project, the contractor or the subcontractors have the obligation to exclude the contractors, subcontractors or self-employed persons of whom they may know that they do not comply with the obligations imposed by this legislation. This sentence seems to refer to an obligation for a particular party to exclude its direct contracting party. This does not seem to point into the direction of a chain liability, but rather seems to limit the responsibility between different parties. To the same extent, it is written that every contracting party has to conclude an agreement with its contractors, which in particular implies that their contracting party will comply with safety and health requirements on temporary mobile construction sites. In case the contractor or subcontractor or self-employed person does not comply with the health and safety requirements, the project supervisor responsible for the execution or the contractor may him or herself take the necessary health and safety measures at the expense of the person in default. Furthermore, a general obligation is provided for the project supervisor responsible for the execution or the contractor or subcontractors to take the necessary measures themselves if the contractor or subcontractors or self-employed persons do not or inadequately comply with safety and health obligations, after having sent these contractors, subcontractors or self-employed a notice of default. This implies that first a notice has to be sent and that secondly, in this last option, the expenses cannot be charged to the person in default. This last system is in particular applicable in case the contracting party has not concluded any agreement. In practice, it can be noticed that problems arise with what should be understood by a notice of default. How should this be done? Should this be done by registered letter? Preferable so, it seems, although in practice it is not always very accurate due to the very short duration of certain activities or certain tasks. There also seems to be a difference. In case an agreement has been concluded, the party could immediately take the necessary measures without the need to first send a notice of default. The most problematic element therefore relates to the main articles which mention a joint and several liability, whereas the articles that further implement this liability rather seem to choose for a direct liability obligation. A few additional remarks could be made here. Firstly, there is an important difference between working with self-employed persons and working with subcontractors. For self-employed persons, only the direct contracting party is responsible. This could be an important instrument,

e.g. for male fide contractors who see that a dangerous job will have to be performed at some later stage and presume that this might be done in irresponsible circumstances. Working with self-employed persons could then be interesting, as one can therefore exclude his or her responsibility. All this seems to contradict the general system of joint and several liability, according to which a contractor is responsible for a sub-contractor who does not comply with the health and safety measures. Furthermore, Article 29 foresees the possibility that a party can limit its responsibilities by concluding an agreement with the direct contracting party, which basically implies that the contracting party can state that it has taken its responsibility, exactly by concluding the agreement which transfers the responsibility to another party. In addition, the law also provides that the employer is obliged to comply with all measures laid down for the implementation of the health and safety measures and to enforce these measures on his or her workers. Therefore, the system of joint and several liability rather seems to be an empty shell. The only interesting element to conclude an agreement is that a contractor knows that if his or her co-contractor does not take the required measures him or herself, he or she can take measures on behalf of this co-contractor and does consequently not have to pay. It is compulsory to conclude an agreement and the non-conclusion of an agreement leads to criminal sanctions. Not complying with the agreement is however not foreseen to lead to criminal sanctions. For this reason, health inspectors argue that it is very difficult to look for a situation of healthy working circumstances.

The interpretation by the Courts

Several reports have somehow indicated to what extent the Courts have recognised a possible liability. In Italy, the criminal courts repeatedly recognised the responsibility of the client (solely or together with the contractor) because of his or her omission of control (*culpa in eligendo*), for his or her interference in the work, or for allowing work to be performed despite the presence of danger. Recent case law has recognised the right of every worker inside the workplace to be informed (Cass. Pen. 20 August 2010, *Igiene e sicurezza del lavoro* 2010, 602). Many judgements (always by criminal courts) deal with the obligation of “cooperation and coordination” between the client, the contractors and the subcontractors for the implementation of prevention measures (Article 26, paragraph 2). Such an obligation involves an active behaviour of interference by the client, the lack of which exposes him or her to criminal liability. According to this case law, courts also clarified the meaning of “specific risks” of the activity of contracting undertakings (which is excluded from the obligation of cooperation) (Article 26, paragraph 4). In recent rulings, e.g. Fincantieri (a public company leader in the shipbuilding sector) (Cass. Pen. 3 February 2011 and 21 December 2010, *Igiene e sicurezza del lavoro* 2011, 172), the Court of Cassation defines “specific risks” as risks which “impose precautions dictated by rules requiring a specific sector and technical skill, generally lacking in those who work in different areas or that involve the knowledge of specific procedures or the performance of specific techniques”. According to this definition, the client was judged responsible for an employee of the contractor falling from a roof caused by the fragility of the slabs of cement. Furthermore, several times courts recognized the nullity of contractual clauses relating to the exemption and transfer of the client’s liability.

In Ireland, Section 12 of the 2005 act sets out the duty that employers, including the self-employed, owe to those who are not their employees, but who may be exposed to risks at the workplace during the performance of work. An example is the case of DPP v JRD Developments, whereby the defendant, the principal contractor, was fined € 25,000 for a breach of section 12. This was as a result of an accident of an employee of a subcontractor who was electrocuted by overhead power lines and sustained injuries. The subcontractor was acquitted on the grounds that he had undertaken a risk assessment in relation to working near overhead power lines and details of this were contained in the safety statement. He had also provided his employees with appropriate training and instruction.

If illegal/undeclared workers work in violation of immigration laws, both the employer and the worker are operating in contravention of a statute. First, the policy of the enforcement authority (the Health and Safety Authority – HSA) is to prosecute employers for breaches of health and safety rules, even in respect of illegal workers. This, however, still leaves the workers to pursue a civil claim. According to national

informants, in practice, the employment tribunals tend to allow claims by illegal workers where the point is not expressly argued before them (it will usually not, of course, be in the employer's interest to raise the illegality as a defence to a claim). In *Panuta v Watters Garden World Ltd* it was held that a company had discriminated against a Moldovan national on the grounds of race for not providing him with safety documentation in a language he could understand or not providing him explanations about the documentation from an interpreter or other competent third party. However, the company was also found to have discriminated against the worker because he failed to obtain a work permit in respect of his employment at the time of employing him. The company, on discovering that the worker had lodged a claim with the Equality Tribunal and was initiating a personal injuries action, had approached the immigration authorities and reported the lack of a work permit. This was regarded as victimisation under equality legislation and the claimant was awarded a compensation. .

In France, in practice the infringement of the preventive measures which the principal contractor has towards the subcontractors' workers, rarely engage the client's liability, unless it constitutes gross misconduct (*faute inexcusable*) and has caused a work related accident. In effect, the responsibility for health and safety at work lies with the employer (subcontractor) and is only exceptionally transferred to the principal contractor (in that sense, Cass. 2nd civ. Ch. 19 February 2009, n°07-21413). With respect to temporary agency workers, the Social Chamber or the French Supreme Court (Cass.soc. 20 November 2010, n°08-70.390 *Roye c/ Sté Barreault Lafon*) decided that the user undertaking and the temporary work agency have an absolute safety obligation (*obligation de résultat*) towards the temporary workers. Both of them have to ensure the effectiveness of their (preventive) safety measures. In other words the user and the temporary work agency are co-employers of the temporary workers regarding health and safety at work.

In case of work related accidents, victims are paid a lump sum compensation by the social security institutions, which frees the employer from any further liability with the exception that he or she might be forced to pay higher contributions in the future, because of the accident. However, in some exceptional cases the employer is not the only one to bear (through the increase of his or her contributions) the financial consequences of a work related accident. Article L.241-5 of the Social Security Code, (Statute No. 90-602, 12 July 1990, OJFR 13 July 1990) provides that when a work related accident involving a temporary worker occurs in a user company, the user may also see his or her civil liability engaged. In effect, the user will be held liable for one third of the total cost of the accident (taking into account monthly allowances or a lump sum compensation, Article R.242-6-1).

In effect, according to Article L.452-1 of the Social Security Code, if the work related accident is due to the employer's gross misconduct or to that of another person (legal or natural) who replaces the employer in directing the work, the victim or his or her family are entitled to complementary compensation from this person. Article L.412-6 of the Social Security Code provides that the employer remains liable for the payment of this complementary compensation although he or she can recover the relevant sum from the user company guilty of the gross misconduct. The 2nd Civil Chamber of the French Supreme Court has estimated (Cass. 2nd civ. Ch., 21 June 2006, n°04-30.665) that the fact that the temporary worker had not been offered reinforced training, although he held a position representing specific risks, constituted gross misconduct on the user's behalf (see Article L.4154-3 of the Labour Code). However, the court went on to say that the employer remained liable for the additional compensation towards the social security, even although he or she should be wholly guaranteed by the user company responsible for the accident. If the accident is due to a third person (Article L.454-1 C. soc. sec), the victim or his or her family can bring a civil liability claim against this person for complementary compensation. The user company is however not a third person with regard to the temporary worker (in that sense, see Cass. Soc. 2 March 1983, No. 81-16.015, *Sté Manpower France c/ CRAM de Bourgogne, Franche-Comté*). By contrast, it seems that Article L.454-1 of the Social Security Code can be used in order to engage the liability of the principal contractor/client where the infringement of the compulsory preventive measures has contributed to a work related accident. In effect, although the principal contractor is under a legal obligation to comply with

certain preventive measures, he or she is in principal not responsible for the workers' work conditions. As a result the courts cannot object, as they did for the user, that the principal contractor/client is not a third person with regard to the subcontractors' workers (In that sense, Cass. 2nd civ. Ch. 11 October 2011, No. 04-19.692; Cass. Crim. 2 June 2004 No. 03-86.102). However as the law does not provide clear-cut sanctions in case of infringement, it will hardly be the case that the violation of these preventive measures would engage the principal contractor's liability.

Just like in France, in Austria the General Social Security Act precludes the liability of the perpetrator (employer), provided that the injured employee may assert a claim within the statutory accident insurance. However, although the Social Security Act only mentions employers, the relief from liability is extended by case law to a third party with which an employment relationship does not exist, but, if only on a short-term basis, with whom the employee is on tight cooperative terms and whereby he or she is integrated into the company of the third party as an employee of its own. In this case, the current case law requires the willingness of the employee to submit to the directions and guidance of the third party. This tight cooperative relationship within the temporary work is affirmed towards the user company: therefore, in case the user company ignores safety precautions and based on this violation the agency worker suffers an injury at his or her workplace, the user company as well as the temporary work agency, as the actual employer are directly exempted from liability. However, in the case of a contractor, it depends on the particular case. Normally, the client and the principal contractor may not be subsumed under Section 333 of the General Social Security Act, because neither appeal to the individual employees of the subcontractors. However, the precondition for the use of the application of Section 333 of the General Social Security Act is in any case that the employment relationship displays the necessary legal cases involving a domestic element (internal cases) according to Regulation 883/2004/EC, is subject to the General Social Security Act in the first place. Therefore, employees of foreign subcontractors will not lose their entitlement for liability claims by applying Austrian law. Nevertheless, the importance of the liability of the contractor in the framework of the technical industrial safety is minor. It is noticed that such claims are hardly made due to practical elements like e.g. lack of knowledge of entitlements, the German language, the fear of loss of employment if the employee sues the client of his or her employer, etc.

However, liability cannot only result from a violation of the legal obligations, but can also follow from common law actions, certainly in the case of health and safety.

In the UK, actions for breach will generally be brought in tort. Health and Safety Law and tort law have always been broader in their scope, contrary to the non-compliance with other labour conditions where one has to look at the employer, whereas the tortfeasor (negligent person who caused the injury) may not always be the employer. An employer is vicariously liable for the torts of his employees. A contractor may be under an obligation to take reasonable care for the safety of the plant and machinery to be used by independent contractors. In the Case *Nelhams v Sandells Maintenance Ltd and Gillespie (UK) Ltd* ([1996] PIQR P 52, CA), a painter complained to the contractor about the absence of a worker to foot the ladder; he was told that nobody was available and the ladder slipped. Both the employer and the contractor under whose supervision the employee was working were held liable.

Within the construction sector the contractual relationship of the labourer is irrelevant. Whoever has to 'control' the particular aspect of the work or the construction site is the one upon whom the duty is imposed. There are two aspects to this 'control': firstly, the control over the people at work, which could be done by the employer or a contractor; secondly, the control over the construction site and the work equipment itself. The question of 'control' is a question of fact (see *Makepeace v (1) Evans Brothers and (2) Alfred McAlpine* [2001] ICR 241). *Makepeace* was distinguished by the Court of Appeal in *McGarvey v (1) Eve NCI (2) NG Bailey* [2002] EWCA Civ 374, where the subcontractor was found two-thirds liable for having failed to train the claimant properly, but the contractor was held one-third liable for requiring the claimant to use the wrong equipment. The code of practice at paragraph 9 states that the duties to comply with the regulations are held by contractors who actually carry out the work, irrespective of whether they are

employers or self-employed. Furthermore, duties are also held by persons who do not perform construction work themselves, but who supervise the way in which the work is done. The result is that the employer of the worker will not always be the liable party.

In Ireland, common law actions for personal injuries, however, are relatively rare in the context of occupational health and safety, particularly in relation to workers based in another jurisdiction. This is without any doubt attributable to the often high costs and long delays in taking action before the civil courts.

III. Enforcement of the implemented norms and instruments – specifically in cross-border situations

This section deals with problems in monitoring and enforcing the norms and instruments in place in the selected Member States and Norway. The objective of this part of the research is in the first place to describe and analyse the difficulties and obstacles encountered by the workers if they intend to enforce their rights, as well as the difficulties experienced by monitoring authorities in the host Member States when controlling the compliance with the rules directed at the protection of workers' rights in subcontracting processes. In the second place, also the positive issues regarding the monitoring and enforcement of the existing mechanisms will be highlighted and examined.

First, the enforcement of protective measures regarding wages and other employment conditions will be scrutinised (Chapter 4-III A), followed by an analysis of the enforcement of the health and safety arrangements (Chapter 4-III B). In the three following subsections attention will be paid to the collaboration with foreign actors and institutions (Chapter 4-III C), the relevance of EU level cross-border legal instruments in force allowing foreign administrations and other creditors to be paid (Chapter 4-III D) and the place and role of the measures in the overall system of enforcement of labour law (Chapter 4-III E).

A. Wages and other employment conditions

Problems regarding inspection services

An important prerequisite for an effective application and enforcement of the rules is a sufficient monitoring and control system. The call for strong inspection services with sufficient capacity and monitoring tools runs like a common thread through the national reports.

For instance, in Belgium all stakeholders are in favour of strengthening inspection services and giving them the means to effectively monitor and enforce the legislation in cross-border situations. The LIMOSA registration (mandatory registration of foreign workers temporarily working in Belgium) is in that respect considered a valuable means, since it does not put a disproportionate burden upon the players on the market and serves a clear purpose. This registration system at least allows the inspection services to have an idea of which foreign workers are working where in Belgium, and should therefore facilitate control by inspection services. Negotiations are taken place to introduce a registration notification in the construction sector.

In Italy, serious problems arise from the ineffectiveness of the inspection system. These problems are caused by the lack of tools that enable an effective control over foreign companies and working conditions of posted workers, and by the fact that the enforcement mechanisms are weak and unable to provide an adequate deterrent effect. The presence of various competent bodies that are badly coordinated further complicates the exercise of the inspection activity. An important obstacle regarding the French joint liability in case of recourse to illegal work is the fact that this liability scheme demands a special effort from the

part of the control agents, e.g. informing and advising the workers concerned, whereas these agents are under huge time and target pressure. The control agents therefore do only what is necessary to authorise the French social security institution and the Inland Revenue to recover the evaded sums from undertakings established in France and thus easy to pursue (compared to the foreign subcontractor).

In the Netherlands the protection of workers' rights in (cross-border) subcontracting is obstructed because the Labour Inspectorate, who plays an important enforcement and inspection role regarding e.g. minimum wages and illegal employment, has a serious lack of enforcement capacity. A specific problem considering the inspections of the compliance with regard to the payment of minimum wages, is that it is hard to prove underpayment of minimum wage: inspections demand major (calculating) capacity, whereas they do not always have effect. Therefore, such inspections are only applied on indication and are also simplified. As a consequence, the Labour Inspectorate only focuses on serious cases of underpayment. The problem of the labour inspection's limited monitor and control capacity was also mentioned in Norway. The Norwegian Labour Inspection Authority, which supervises the compliance with terms of wages and employment following from decisions concerning general application (under the GAA), cannot monitor and control all undertakings in the country on a continuous basis. However, monitoring and control measures are also carried out through the collective agreement and trade union machinery; especially trade unions at local level play an active role in the day-to-day monitoring and enforcement of rules.

By contrast, the Luxembourg study reports rather positive about the proactive (though general) controls executed by the inspection authorities. Since there are no specific provisions or penalties on subcontracting in Luxembourg, the Labour Inspectorate (ITM), in close collaboration with the Customs and Excise Administration, by means of proactive controls or as a result of a complaint, checks if the provisions on e.g. pay and working conditions are met in respect of all employees, whether as part of a "classic" working relationship or under subcontracting, and for national and cross-border situations alike. In case of cross-border subcontracting, the ITM pays particular attention to the application of the minimum provisions of employment law to posted workers. It also checks whether the formalities linked to the posting of workers are completed.

Finally, a serious difficulty regarding the enforcement of the rules in the United Kingdom, is the presence of several employment inspectorates that are each responsible for the enforcement of a part of the rules. According to some, the five main UK employment inspectorates (Gangmasters Licensing Authority [GLA], National Minimum Wage, Agricultural Minimum Wage, Employment Agency Standards Inspectorate and Health and Safety Executive) form an 'incomplete patchwork' for enforcement, and the enforcement is hampered due to a lack of coordination and information sharing between these inspectorates. Therefore, some actors plead for a single Labour Inspectorate that is independent, has a clear enforcement role and is focused on the protection of workers' rights. Underfunding and staff cuts as regards these enforcement agencies were mentioned as another threat to effective enforcement.

Lack of information, especially in cross-border situations

The enforcement of the rules, especially in case of cross-border subcontracting, is often hampered because of a lack of information (Finland, France, Germany, Sweden).

The enforcement of the Finnish Liabilities Act in cross-border situations is difficult, since the supervision of the Act is mainly based on inspection documents and the – often defective – additional information which the authorities possibly receive from the parties. The reliability of the information received cannot always be settled to a sufficient extent by the authorities. This makes the exercise of the supervision difficult and harms the efficiency of the supervision, especially in cross-border situations. Spanish Labour Inspectorate agents complain that it is sometimes difficult to establish the number and identity of workers involved in a contract/subcontract (especially when their investigation takes place after its execution), which can be an obstacle for imposing sanctions.

In Germany, domestic principal contractors are, in practice, regularly held liable under the joint liability mechanism for minimum wages and holiday fund contributions (§ 14 AEntG). There are no significant differences between purely domestic situations and cross-border issues. Cooperation with foreign institutions is currently not deemed necessary. However, the fact that a claim under § 14 AEntG in practice requires the knowledge of the identity of the principal contractor (the client), might be problematic in cross-border situations according to a major trade union in the construction sector (SOKA-BAU). German undertakings often appoint foreign subcontractors, who send workers to Germany (in order to carry out their employers' contractual obligations). If the generally binding collective agreement of the German construction sector applies to a subcontractor, he is obliged to submit a written application to the competent authority of the customs administration in Germany before starting construction works. This, however, does not include the obligation to provide information as regards the principle contractor (client). Therefore, SOKA-BAU often depends on voluntary information (about the principal contractor) provided by the subcontractor. The situation is made somewhat easier for large(r) construction projects, since the name and address of the principle contractor can often be found on the internet. In addition, the principle contractor could be found in these documents, for example bidding documents or other building contracts. In individual cases, SOKA-BAU also receives information about the client from the customs administration by means of so-called inspection reports, which are made after an inspection at a construction site. Besides (due to an amendment to social security law), it is now possible in individual cases to obtain information about the principal contractor (client) from the data centre of the Deutsche Rentenversicherung Bund (that collects data from the A1 certificate according to Regulation 883/2004, which also contains information about the principal contractor). As far as it is being considered at EU level to establish uniform application forms, SOKA-BAU suggests that these forms should be made complete with information about the principal contractor (client) in order to avoid the problem described above.

In order to enforce the French joint liability rules in case of recourse to illegal work, the declaration formality is of pivotal importance: when an undertaking established abroad temporarily posts workers to the French territory for the provision of services, it must declare the posting of workers to the Labour Inspection. However, it is estimated that only one in two, or one in three posted workers are declared, which makes it difficult in practice to enforce the rules effectively. Also in Sweden the supervision and enforcement of the applicable rules (of the Co-Determination Act) are obstructed in cross-border situations due to a lack of information about the presence of foreign workers and enterprises in the country. This is considered to be a big loop hole in the legislation. In order to solve this problem, a draft proposal of the Swedish Ministry of Labour (June 2011) puts forward rules on registering and on contact persons of foreign enterprises that post workers to Sweden.

Subsequently, the relevant stakeholders and actors in several of the selected core countries held the absence of registration/notification formalities regarding foreign workers and (sub)contractors present in the country to be a serious problem for the monitoring and enforcement agencies. We refer to Chapter 4-II A for more detailed information on this issue.

In Spain, the information rights of the Works Council may safeguard the provision of such information (to a certain extent). The Spanish works councils play a key role in monitoring and enforcing the rules on subcontracting. In particular, they have far-reaching rights of information. For instance, if the client/contractor wants to subcontract part of its 'own activity', he is obliged to inform the works council in advance. Trade unions could also be relevant actors in the application and enforcement of the rules on workers' rights in subcontracting processes, in particular by means of trade union representatives at the workplace, who also have general information rights that can be used regarding subcontracting. However, they usually act in this field through their presence in Works Councils and as workers' representatives.

Procedural difficulties

The problem that it is often the underpaid (or otherwise abused) workers themselves who have to take the initiative to enforce their rights was already addressed in Chapter 4-II. This may severely hamper the effective impact of the protective rules in cross-border situations, since especially foreign workers are usually either unable or reluctant to stand up for their rights. Therefore, proactive and organised assistance by actors such as trade unions might increase the enforcement of the rules. In that respect, it is noteworthy that the Spanish trade unions may assist workers in their legal action. In lodging claims of joint and several liability with regard to back-payment of wages, trade unions may represent their own affiliates, or even other employees, before the courts, under general provisions of procedural law. The stakeholders in Norway agreed that the mechanism that has proved the more effective, especially within the construction industry, is trade union activity – also with regard to non-Union members. In case of infringement of regulations issued under the General Applicability Act by an employer, not only the employees concerned, but also their trade union(s) may bring criminal proceedings in which wage claims can be adjudicated.

On the other hand, in the United Kingdom the low percentage of trade union membership and the difficulties to recruit site union representatives is regarded as a serious enforcement challenge. Moreover, where the enforcement of one of the main agreements in the construction sector, the National Agreement Engineering Construction Industry (NAECI), has generally been good and workers' rights have been protected, this seems to relate more to British than to foreign workers. Unions have recently found it difficult to engage with posted workers. Perhaps not surprisingly, the main source of anxiety in the engineering sector, giving rise to unrest and industrial disputes, is the fear of 'social dumping' through posted workers. However, a positive development is the recently negotiated NAECI audit of posted workers' wages and conditions, which provides a fact based transparent process where unions, stewards and indigenous workers can be sure that agreed rates of pay and conditions of service are being followed. Indeed, according to the author of the French Report, the most important obstacle to the protection of posted workers' rights is the lack of information and assistance as regards the foreign workers. According to French law, posted workers are supposed to be advised by the Labour Inspection and accompanied by trade unions. However, in practice many trade unions do not engage any action at all in favour of posted workers. Almost all stakeholders, especially the labour inspectors, agree that the joint liability (in case of recourse to illegal work) is difficult to put in operation for the benefit of workers in general and posted workers in particular. It figures that most of them consider the new rules on the protection of illegal workers (employed without a work permit), which do not require a court action, a positive development.

The abovementioned problem (regarding the initiative to start litigation) is exacerbated if the wage claim proceedings take a considerable period of time, which may discourage (especially foreign) workers even more. Indeed in Ireland lengthy wage claim proceedings – probably in excess of 4 years (from the time of the infraction to the achievement of finality) – were reported as an important enforcement problem regarding civil law sanctions. While it is open to all workers who have been the victim of labour law breaches whilst working in Ireland to pursue claims in the Irish courts and tribunals, in practice this is a time-consuming and difficult process. This problem is exacerbated by the fact that binding orders of the employment tribunals in Ireland (the Labour Court, the Employment Appeals Tribunal, etc) themselves must be enforced by the Circuit Court (as the tribunals are not courts of law); this is an additional step workers must take in order to recover monies due. It might be interesting to note that in August 2011, the Minister for Jobs, Enterprise and Innovation published a consultation paper on a fundamental reform of the State's employment rights and industrial relations structures. The proposals aim to make the redress system for workers less legalistic and allow for speedier resolution of disputes (preferably at workplace level).

Another serious difficulty regarding the enforcement of the rules, especially in cross-border situations, was mentioned in the Irish report. It concerns the dependence on collaboration of the accused (sub)contractor for a successful enforcement. Criminal law sanctions can be imposed for breaches of e.g. REAs and health and safety rules. However, it is difficult for the authorities to enforce, or even prosecute such offences,

unless the accused undertaking remains within the jurisdiction and engages with the process. Essentially, the authorities rely on the accused to 'show up in court', which is often unlikely if the subcontracted work has come to an end. This problem is aggravated by the fact that Ireland has not yet implemented Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.

A comparable weak spot in the enforcement system is the strong reliance of inspection authorities on receiving information regarding suspected non-compliance. For instance, in Ireland the two inspectorates, the HSA (responsible for the enforcement of health and safety laws) and NERA (responsible for the enforcement of labour legislation in general) do have wide inspection powers, but they rely heavily on receiving information on suspected non-compliance. As a result, trade unions, where they have a presence, play an important role in ensuring that measures are enforced. However, trade union density in Ireland has declined in recent years and they also struggle to attract and act on behalf of migrant workers (who sometimes do not want trade union interference out of fear for their work permits etc), which puts extra strain on the resources of the State enforcement authorities. Also in the United Kingdom the difficulty that the enforcement of many rules relies on worker information was mentioned. Moreover, this information is shared by all authorities, including the Border Agency. This means that, when migrants rights are violated, third country workers are conscious of the danger of deportation.

Sanctions

The successfulness of enforcement is also dependent on the sanctions imposed on violations of the rules. Next to their deterrent effect, also the (criminal or administrative) nature of the sanctions plays a role.

The problem of the insufficient deterrent effect of sanctions may be illustrated by the (former) Austrian practice. Until 1 May 2011, employers in Austria did not run any risks if they did not pay the minimum wage to their employees, because of the lack of a real, additional penalty; in the very few cases where the employees had the courage to demand their minimum wages, the employer was obliged to pay the wages he had to pay anyway.

However, recently the employer can also be punished with a penalty up to €50,000 if he does not pay his employee the basic wage, or at least what is due to him according to statute, enactment or collective agreement (this constitutes a criminal offence). According to the trade unions this is an important improvement. The compliance with the obligation for the payment of the minimum wage is to be monitored by the financial police (belonging to the Federal Ministry of Finance), and also by the supervisory bodies of the social security bodies including the Construction Workers' Annual Leave and Severance Payment Fund; disclosed infringements are to be reported to the district administration authorities. Although it is obviously too early to assess the impact of the introduction of this criminal offence, it is interesting that since 1 May 2011 63 notifications of suspicion of wages below the minimum wage were reported. The monetary penalty also applies to foreign employers, thereby ensuring that these employers do not achieve unfair competitive advantages by wage dumping. Hence, in the view of all stakeholders, Directive 96/71/EC with its concept of "equal pay" will be effectively realised. However, this criminal offence only affects the employer/subcontractor directly and not the contractor. The contractor/user company may only be affected by the bail according to the Act, which was implemented to ensure this new criminal offence, as threat of punishment is ineffective when foreign subcontractors/temporary work agencies will not fear criminal prosecution in their country of origin.

Let us now turn to the criminal or administrative nature of the sanctions in place. In Belgium, the large majority of possible violations of social law provisions are nowadays settled through the procedure of administrative fines. Administrative fines (which are no criminal sanction) do not fall under the Framework Decision 2005/214/JHA on mutual recognition of financial penalties. It can therefore be concluded that several obstacles are encountered in the effective sentence of foreign companies. On the one hand, it may occur that only a small number of criminal records leads to proceedings, in particular when public

prosecutors are of the opinion that a possible success of a prosecution is rather low and are therefore sometimes reluctant to start an effective procedure. If the foreign company is in the end sentenced by the court, the execution of the fines leads to enormous problems. The administrative way, on the other hand, also causes problems as administrative fines cannot always be executed abroad.

By contrast, the experiences in Norway regarding criminal sanctions are very positive, probably because of some special features. Inobservance of regulations issued by *Tariffnemnda* under the General Applicability Act (GAA) by an employer creates criminal liability, in fines. A unique feature in this context is that employees affected, as well as their trade union may institute criminal proceedings. This procedure includes the possibility to have civil law claims, e.g. for wages, adjudicated as a part of the criminal proceedings. In this respect, trade union activity, also with regard to non-Union members, has proved to contribute to an effective enforcement, notably within the construction industry.

Social clauses in public procurement laws – public works projects

The practical relevance of social clauses within the public procurement laws seems to be rather limited in Germany. According to the trade unions, there are problems implementing the rules in practice. The low figures of initiated administrative fine procedures show that there is a need for improvement in terms of enforcement and control. Most of the federal states have no control unit to check the compliance with the public procurement laws. Nevertheless, some federal states are making developments towards increased control. Hamburg may serve as an example: here, a special unit was created to monitor the compliance with social clauses in public procurement laws. The experience with this unit was described as very good.

In Ireland, most of the major disputes involving cross-border subcontracting in recent years have been in relation to public works projects. Indeed, the Labour Inspectorate (NERA) has identified two categories of employers that present a particularly high risk of non-compliance: (sub)contractors based in Northern Ireland, which come across the border to carry out work of a short or transient duration (often returning home at the end of the day); and foreign construction (sub)contractors that mainly employ foreign national workers. The problem, according to national informants, is in large part due to the non-enforcement of public procurement contracts.

The fragmentation of the industrial relations system

The influence of a fragmented industrial relations system (see Chapter 4-II A) on enforcement is clearly illustrated by the UK case. In the United Kingdom this fragmentation relates especially to the construction sector. The enforcement of the two main agreements in the construction industry (the Working Rule Agreement (WRA) and the National Agreement Engineering Construction Industry (NAECI)) seems to differ significantly. As the civil side of the construction sector is fragmented with the increasing use of contingent forms of labour, the enforcement of the WRA is also fragmented. By contrast, the enforcement of the NAECI has been successful. It must be added that the features of the engineering construction sector are quite different: it by far has some of the largest companies in construction and the workforce is mainly highly skilled and well organised. Here, workers' rights have been protected, although this seems to relate more to British than foreign workers as unions have recently found it difficult to engage with posted workers (see above).

B. Health and safety

Control and enforcement problems

Some countries refer to problems related to the control of the compliance with the provisions. In Norway, it is a common understanding that the Labour Inspection Authority cannot monitor and control all undertakings in the country on a continuous basis, which is amply illustrated by statistics. The number of undertakings in the country is probably some 250,000 – 300,000, whereas in 2010 the Labour Inspection Authority carried out a total of 15,000 inspections, including a little over 3,000 focusing especially on the

prevention of 'social dumping'. Additionally, monitoring and control measures are carried out by means of the collective agreement and trade union machinery. The organisations at national level are essentially not involved in the application or enforcement of rules other than if disagreement pertaining to a collective agreement emerges at the local workplace level. This is generally true within a workplace or a company that is bound by collective agreement. Furthermore, mostly in the larger cities, local trade unions may have their own inspectors who will actively look for workplaces which are suspected of having sub-par terms and conditions. If infringements are found, they will alert the labour inspection and as a rule also assist individual workers in getting their rights.

Also in Italy it is mentioned that exactly in micro-undertakings, where many violations are noticed, these violations of the obligations by employers are favoured because of the lack of workers' representatives who have a key role to ensure the implementation of the measures laid down by law. Especially, but not only, in small undertakings legal obligations are fulfilled merely by the formal drafting of the documents requested by the legislation (DVR, DUVRI and POS) thanks to the services of private legal consultants. Inspection bodies report that the spread of standardised documents, which are "written in a generic form, without specific reference to the particular service/work executed" are a problem. This inhibits to perform control on the behaviour of undertakings involved in the subcontracting chain. Furthermore, the fragmentation of the competence between the several responsible persons for health and safety makes it difficult for the social inspectors to assess the legal requirements. Often, control also depends on knowing who is working on the site. In this respect, in Italy a widespread practice is believed to be the possibility for bilateral bodies (*entibilaterali*) to request a copy of the prior notification to the Local Health Unit (ASL) that the client (or the project supervisor) must make before starting work on a construction site. Thanks to this practice, the union is informed of the exact "composition" of the construction site.

An interesting procedure was installed in Sweden. The social partners developed a private authorisation for temporary work agencies, committing themselves to uphold high ethical and professional standards as employers and commercial undertakings. The employer's responsibility for the workers' health and safety is one of the items on the agenda of the authorisation programme that all companies have to attend. According to this, it is incumbent on the client to e.g. take any other necessary precautions to protect the agency worker from ill health or an accident; to provide safety equipment except when specifically agreed otherwise. Furthermore, the agency and the agency's safety delegate are entitled to visit the client at any time during the assignment to check whether the work environment is acceptable. If this is not the case, the agency is entitled to immediately withdraw the workers and terminate the contract after consulting the user's safety delegate.

At construction sites a coordinator is appointed whose task is to prevent the specific risks that can arise due to several enterprises working side by side. This should benefit all workers at the workplace, irrespective of who employs them. The Work Environment Authority has decided to make use of this function more often than before if workers are involved who are employed by foreign companies.

Different means of enforcement are used in different situations. For example, in case there is an immediate risk for the workers' life and health, the Work Environment Authority will issue a prohibition to continue the work for as long as the risk has not been eliminated. A typical situation is construction work being performed on a roof without any safety devices that would prevent workers from falling. In a situation where the risk is not that serious and immediate, the Work Environment Authority can issue a notification or an injunction where it instructs the employer/the responsible subject to take certain measures before a set date. These rules are applicable in their entirety from day one to all persons who work in Sweden, irrespective of whether it is permanently or temporarily. Thus, in principle they should be applied equally in relation to workers employed by foreign contractors as in relation to the workers of domestic companies. A particular problem arises with respect to this prohibition in case of cross-border subcontracting. A prohibition (as well as an injunction) must be addressed to the subject who is responsible according to the legislation, and who this person is depends on the status of the worker. Is he or she an independent

contractor or an employee? If the worker is an employee, is he or she an agency worker? And if he or she is not an agency worker, who is his or her employer? All these questions have to be answered in order to decide to whom the prohibition should be addressed. If it is at all possible to sort this out in spite of language problems, the following problem is how to serve the decision if it should be served to a person in another country. If there is an immediate risk for the workers' life or health, the decision cannot wait. As a consequence, the Work Environment Authority has developed alternatives to the normal methods of inspection for situations where employees of foreign enterprises or persons with an unclear status are subject to imminent danger to their lives or health.

- If the worker is an employee of a foreign employer, but no representative, for the latter who is authorised to sign for the company is present or able to get there in due time, the inspector will address the prohibition to the individual worker.
- The same applies when the inspector cannot find out if the worker is an employee or a self-employed person.
- In the event of imminent danger to life and health at a construction site where more than one employer/contractor is present, the inspector can address an injunction to the building work environment coordinator and order him or her to organise fall protection devices. At the same time prohibitions against the continuation of the dangerous work can be addressed to independent contractors, employers and individual workers (if the prerequisites above are at hand).

If the provisions of the Work Environment Act could be enforced equally to foreign and domestic companies, the former would also be subject to injunctions and sanctions to the same extent as domestic companies. However, most of the penalties/fees that will hit enterprises that infringe the act do not fall under the definition in Council Framework Decision 2005/214 concerning the execution of financial penalties, which means that they will not be enforceable in another Member State. The problems in cross-border situations do not relate so much to the interpretation of the rules as to their application and enforcement. It is true that the Authority can get information on foreign enterprises through the Knowledge Sharing Site (KSS) within the SLIC cooperation, but this will not suffice in an acute situation where workers are exposed to an imminent risk for life and health. Part of the problem is also that there are no information, declaration, notification or registration requirements that must be fulfilled by service providers that post workers to Sweden. It is perfectly legal for both the enterprise and its employees to stay in the country for long periods without informing any authority of their presence.

C. Collaboration with foreign actors and institutions

The importance of cross-border cooperation between inspection services and other relevant authorities/actors for an effective enforcement of the rules in cross-border situations was mentioned by the stakeholders of nearly all selected countries. In the great majority of the core countries the collaboration with foreign counterparts was held to be truly problematic and many stakeholders urged the need for improvement of this cross-border collaboration (Austria, Belgium, Finland, Germany, Ireland, Italy, Luxembourg).

For instance in Belgium all stakeholders pleaded for an urgent and significant enhancement of cross-border cooperation between inspection services in order to fight unfair competition and social dumping. From the moment there is a cross-border element to a case, inspection services – or, as the case may, be clients or contractors – will need information from their foreign counterparts or foreign competent administrative authorities, in order to verify the foreign subcontractor is a bona fide player and to verify the accuracy of the information he provided. Although various legal instruments call for, or implement, cross-border cooperation, this cooperation relies mostly on the goodwill of foreign inspection services or competent administrations concerned. For instance, no binding terms for the exchange of information have been put into force and an administrative body of another Member State cannot be sanctioned when it refuses to

cooperate. In most cases, it often takes months before a request for information is answered, if answered at all. Furthermore, the answers given are often inadequate.

In Ireland, all stakeholders agreed that there is a need for better information sharing and administrative co-operation on an EU-wide basis. Also In Italy the absence of collaboration with the competent authorities in the home State, as well as the diversity of regulation between States were mentioned as an important obstacle to enforce the rules in cross-border situations, especially in relation to workers posted from East European Member States.

Also in Austria and Finland the lack of a (serious) cross-border co-operation with foreign actors was mentioned. In Austria, this is considered problematic especially with respect to Framework Decision 2005/214 on mutual recognition to financial penalties. With respect to the collaboration of the Customs Administration with foreign actors, the most fundamental problem endangering the effectiveness and functionality of the system is, also in Germany, related to the question to what extent Framework Decision 2005/214 could serve as a legal basis for cross-border enforcement of fines and penalties (see below). According to the relevant authorities (Customs Administration) there are some fundamental difficulties in the international collaboration with foreign authorities. They stress the need for optimisation in the field of legal and administrative assistance with foreign institutions. At present, requests take a long time and the different requirements for privacy policy in the Member States form an additional problem.

In Luxembourg, the difficult cross-border collaboration was mentioned as an important obstacle regarding the (implementation) legislation on cross-border posting. Problems concern, besides the language barrier, the identification of the foreign competent authority, the sometimes long time it takes to get a response and in some cases the very absence of a response from the foreign competent authority (these specific problems were also reported for Belgium and Germany). Besides, the bilateral agreements signed with other countries do only cover the aspect of information exchange. These agreements do not allow taking coercive measures for the payment of amounts due, for example, in respect of the remuneration.

As regards such bilateral agreements: Austria has a bilateral agreement of mutual administrative and legal cooperation with respect to administrative matters (only) with Germany; this enforcement cooperation with the German authorities works smoothly so that the prosecution of German employers is ensured. The collaboration of the German customs administration with foreign institutions is based on Directive 96/71/EC, Regulation 883/2004 and Regulation 1408/71, as well as on particular bilateral agreements with Bulgaria, France and the Czech Republic regarding the combat of undeclared work. The customs administration is the liaison office for the mentioned Directive, Regulations and bilateral agreements.

On the other hand, the stakeholders in the Netherlands, Norway, and the United Kingdom sound more positive.

In the Netherlands, the Labour Inspectorate is the liaison office on the basis of Article 4 of the Posting of Workers Directive (96/71/EC). In 2010, the Labour Inspectorate requested information from liaison bureaus in 12 different Member States 55 times. According to the interviewee from the Labour Inspectorate, the liaison offices' activity mainly concerns the control of minimum wages. The experiences with the liaison offices are positive. The Labour inspectorate considers it a big step forward that there is only one contact point. Also the Dutch government is positive about the possibilities of international information exchange which the liaison bureaus offer. In the United Kingdom, the collaboration of the Gangmasters Licensing Authority (GLA) with other European Union agencies is even considered to be a best practice. For instance, when confronted with poorly treated Bulgarian workers, the GLA worked with Bulgarian authorities to identify bogus posted workers (who were employed by licensed and unlicensed Bulgarian recruitment agencies). This good practice is now part of a more formal agreement between Bulgarian and UK authorities. The partnership approach of the GLA has invariably uncovered instances of cross-border

exploitation of migrant workers from other EU and third countries. An important series of cross-border cases have involved the GLA working with authorities in Bulgaria.

The Norwegian Labour Inspection Authority has bilateral agreements with its counterparts in Poland and in Estonia, Latvia and Lithuania on the exchange of information on applicable rules and on undertakings. This cooperation appears to function smoothly, but does not significantly impact on the actual enforcement of rules domestically. National trade unions collaborate at the Nordic level, as do national employers' associations, as well as at the European level – also on matters concerning cross-border activity and social dumping. In the construction sector there is a rather unique cooperation agreement between the Norwegian and the Lithuanian trade unions. Under this agreement, members of the Lithuanian trade union coming to Norway, in their individual capacity or as posted workers, are granted a status that is equal to the status of members of the Norwegian union for the duration of their stay, implying that they have access to all benefits and assistance due to ordinary members of the Norwegian union.

D. The relevance of EU level cross-border legal instruments in force allowing foreign administrations and other creditors to be paid

In many of the selected core countries administrative sanctions are attached to infringements of the rules on protection of workers' rights in subcontracting processes. In several countries, criminal sanctions have been replaced by administrative sanctions in the form of fines, since the latter are considered to be much more direct (by comparison to lengthy and uncertain criminal proceedings) and therefore more efficient (e.g. Belgium, the Netherlands, France). However, this often constitutes a serious enforcement problem in cross-border situations, since it is uncertain to what extent administrative fines fall within the scope of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition of financial penalties.

The large majority of possible infringements of Belgian social law provisions are nowadays settled through the procedure of administrative fines. This constitutes a problem in cross-border situations, since such administrative fines cannot always be executed abroad as they do not fall under Framework Decision 2005/214. In Germany, the question to what extent Framework Decision 2005/214 could serve as a legal basis for the cross-border enforcement of fines and penalties is even regarded as the most fundamental problem endangering the effectiveness and functionality of the system. It is currently discussed to what extent the fines of the liability system fall within this framework decision, due to their administrative character. The same problem was reported for the Netherlands. Notwithstanding the Council Framework Decision, there seems to be no legal basis for the (international) collection of the Dutch administrative fines. This is related to the fact that it is questionable whether the Dutch practice of administrative enforcement through imposing administrative penalties falls within the scope of Decision 2005/214, which focuses mainly on criminal enforcement. Only 15% of the foreign claims are paid. Since it is important that there is a legal basis for the enforcement of administrative fines, the Dutch Government has raised this problem at European level.

Finally also in Austria, the question is to what extent the sanctions foreseen under administrative criminal law fall under the Council Framework Decision. A clarification, for instance by making an explicit reference in Article 5 of Framework Decision 2005/214 to Directive 96/71/EC, is explicitly required by all stakeholders. Interestingly, however, there seems to be an alternative in Austria, namely the bail which ensures the prosecution by officially taking resources from the foreign employers' export revenues. This bail is seen as the Austrian reaction to the deficiencies of the Council Framework Decision and, according to the Austrian Federal Economic Chamber, provides another security net against wage dumping.

E. The place and role of the measures in the overall system of enforcement of labour law

The place and role of the measures aiming at the protection of workers' rights in subcontracting chains in the overall system of enforcement of labour law differ considerably in the selected Member States.

In some countries there are no specific labour law provisions regarding the protection of workers' rights in subcontracting. In these countries, especially Luxembourg and Poland, employees involved in subcontracting chains may benefit (solely) from the general protective labour law. Since there are no specific provisions or penalties on subcontracting in Luxembourg, the Labour Inspectorate (ITM), in close collaboration with the Customs and Excise Administration, checks through proactive controls or through complaints that the provisions on e.g. pay and working conditions are met in respect of all employees, whether as part of a "classic" working relationship or under subcontracting, and for national and cross-border situations alike. In case of cross-border subcontracting, ITM pays particular attention to the application of the minimum provisions of employment law to posted workers. It also checks whether the formalities linked to the posting of workers are completed. However, this is an indirect protection of posted workers as part of a subcontracting chain, since this situation was not specifically mentioned at the moment of the implementation of the Posting Directive by Luxembourg. An important factor in combating abuse in subcontracting processes, is the highly restricted possibility to make use of temporary employment agencies and 'the hiring-out of labour' (see Chapter 4-V).

In other countries, notably Belgium, there are indeed specific measures on protecting workers' rights in subcontracting chains, but they play a marginal role in the overall system of enforcement of labour law. Even in the 1987 (Putting at disposal of workers) and 1996 (Health and Safety) legislations, the fact that all obligations are sanctioned under criminal law seems far more important than the specific joint and several liability clauses introduced. Furthermore, such legislations are rarely used in practice in case of cross-border subcontracting.

By contrast, in Spain the measures on protecting workers' rights in subcontracting processes may be considered as part of the core regulation of Spanish labour law. As such these measures have an important position in the overall system of enforcement of social legislation. Enhancing and reinforcing the protection of workers' rights in subcontracting was a specific aim of the legal policy that in the year 2006 inspired the amendment of Article 42 of the Workers' Statute by Act43/2006 and the approval of Act32/2006 on subcontracting in the construction sector.

Under German labour law, the principal contractor's liability, which acts as a mechanism for enforcing claims, is rather an atypical mechanism in view of the overall system of enforcement. Liability generally exists only within the contractual relationship. In the Netherlands, on the other hand, although the basic principle is also that liability exists only between direct contracting parties, there are many exceptions to this general rule, especially to protect workers' rights in subcontracting chains; for instance, the two different liabilities regarding (minimum) wages for principal contractors and/or user undertakings, several liabilities regarding health and safety and industrial accidents, and the chain liability regarding social security contributions and income tax.

The Dutch legislation considering the protection of workers' rights in (cross-border) subcontracting consists of public as well as private elements. Generally speaking, this is in line with the system of enforcement of labour law in general; the Dutch social system traditionally consists of a mixture of public and private enforcement. It is interesting to note that, contrary to the policy of the last decades which focused on decreasing the role of the government and increasing the role of the social partners (with the liability scheme of Art. 7:692 Civil Code and the voluntary NEN certification as a clear illustration), there are also developments in the direction of the strengthening of public enforcement. For example, the obligation to register in the Placement of Personnel by Intermediaries Act and the introduction of public enforcement of the Minimum Wages Act illustrate a focus on public enforcement.

IV. Social fund payments

In this section we take a closer look at the application and enforcement of the rules regarding social fund payments. The practical relevance of the rules as well as the difficulties encountered in practice will be assessed for Austria, Germany and Italy.

The German system of joint liability with respect to holiday fund contributions and minimum wages (§ 14 AEntG) currently plays the most important role in ensuring the payment of holiday pay fund contributions (to SOKA-BAU, a major trade union in the construction sector), which are determined by collective agreement. As part of the holiday pay fund procedure, inspections are carried out to see whether subcontractors comply with their contractual obligations for the payment of holiday pay fund contributions. Every year some 300 cases in cross-border situations are initiated against the principal contractor, who is required to fulfil the claim in accordance with this system. Slightly more than half of these cases are usually settled out of court. Overall, in the period 2006-2011, SOKA-BAU was able to safeguard holiday pay fund contributions for the amount of €18,600,000 due to this liability mechanism. It is believed that without § 14 AEntG, the contributions to SOKA-BAU would decline significantly. It is noteworthy that in practice the holiday pay fund deals almost exclusively with domestic principal contractors. Consequently, undertakings located outside of Germany are usually not subject to the fund's claims. Generally, it is considered that the cross-border enforcement of domestically obtained titles is inefficient.

One of the most important difficulties encountered in the application and enforcement of this system relates to a lack of knowledge of the principal contractor (the client). Subcontractors are under no obligation to provide the holiday pay fund with information regarding the principal contractor (no matter whether the latter is established in Germany or abroad). Therefore, the holiday pay fund often has huge difficulties identifying the principal contractor.

An additional problem for the holiday pay fund is that subcontractors often carry out construction works for several principal contractors at the same construction site, where it is nevertheless required to assign the individual obligations regarding the payment of the holiday pay fund contributions to the proper principal contractor, as the latter is only liable for the obligations arising from the construction work which he himself has commissioned. In such cases the liability rules are hard to enforce, SOKA-BAU reports. SOKA-BAU reported cases in which the principal contractor – with the intention of avoiding a claim by SOKA-BAU – asserts that the construction work was commissioned by another principal contractor. The subsequent elucidation of the facts is often very costly.

The German holiday fund offers domestic and foreign construction companies an information service, according to which the fund will inform the principal contractor under certain conditions whether the subcontractor who is being used for a specific building project is properly participating in the holiday pay fund procedure. However, such information can only be given to the principal contractor after the subcontractor has authorised the fund to do so. The denial to give such an authorisation may have as a consequence that the subcontractor will not be commissioned again by the principal contractor.

In situations of cross-border subcontracting, the Italian trade unions are active in order to persuade undertakings posting workers in Italy to join the funds. It is however uncertain whether these undertakings are obliged to pay the contributions (under EU law) and therefore the union action does not result in litigation. A significant recent case can be reported concerning an important public contract for works on a highway: the undertaking established in another Member State refused to register into the Local Construction Fund and trade unions brought an action against the Italian client, who finally paid the contribution for the posted workers instead of the foreign employer. Also employers' associations deem the registration of foreign undertakings on the Construction Funds necessary. The National Association of

Construction Undertakings (ANCE) observes that, in practice, it is really difficult to compare benefits provided for by funds in other Member States, in the absence of close cross-border cooperation.

Finally, in Austria the Construction Workers' Annual Leave and Severance Payment Fund reported difficulties in the enforcement of the bail on the basis of Sect. 14 of the Temporary and Agency Workers Act. This bail only involves entitlements of the individual temporary agency worker concerned, and exactly this causes the difficulties, for the Fund has to prove the assignment of the agency worker to the user company.

V. Temporary agency work

In some countries, the supply of labour is still restricted, like for instance in Belgium, Italy, Luxembourg, Norway, while in other Member States the supply of manpower via temporary work agencies is quite common and indeed regarded as an acceptable flexibility tool for employers, notably in the Netherlands.

In this section, the relevance and effectiveness of the existing mechanisms directed at the protection of workers' rights will be examined for the specific case of temporary agency work. It might be that particular application and enforcement problems do arise in relation to this special form of subcontracting ("labour-only subcontracting"). Moreover, some Member States, especially Belgium and the Netherlands, have adopted rules that specifically aim at protecting temporary agency workers (involved in subcontracting chains); the effective impact of such mechanisms will be examined.

Special liability arrangements

The Netherlands have a special joint and several liability for user undertakings as regards the payment of the statutory minimum wage to the hired agency workers. Since this liability arrangement was only introduced in 2010, it is not yet possible to assess the efficiency of the system. Nevertheless, all stakeholders agree that the risk of being held liable for outstanding minimum wages certainly stimulates user undertakings to exclusively deal with reliable partners (in order to escape their liability). This new liability has been assessed as very positively especially by the employers' organisations and the authorities. They have high expectations for the preventive effect of this liability scheme, especially in combination with the proposed registration obligation for all temporary work agencies supplying manpower in the Netherlands, so including foreign temporary work agencies. The trade unions, however, are less enthusiastic. In their view, the liability for minimum wages and the proposed obligation to register are (too) limited in effect. The liability applies, for instance, only to the minimum wage and is therefore of little use in sectors, like the construction sector, where CLA wages are higher than the statutory minimum. In their view, the scope of this liability should also be extended to all kinds of subcontracting (instead of only temporary agency work). Furthermore, the unions argue that it is still the abused foreign worker who must be ready to institute an action (possibly via a trade union) against his employer and/or the user undertaking, which is often not the case, for instance out of fear for immediate loss of his or her job.

The Belgian federation of temporary work agencies reports more and more foreign suppliers of workers posing either as subcontractors or project agencies, or workers themselves posing as self-employed persons providing services, and thus circumventing the legislation in force. This is a form of unfair competition and a disturbance of the market with workers' rights being violated on multiple domains (wages, occupational health and safety, working hours, etc). However, inspection services as well as competent administrations and judicial authorities are very reluctant to apply the 1987 legislation on temporary agency work – including joint and several liability clauses for wages and social security contributions – to these cross-border cases; in fact this legislation is rarely used in practice in case of cross-border subcontracting. Reasons for this are, on the one hand, the fear of contravening European Law, and on the other hand, the conviction that a cross-border investigation, prosecution or execution of fines will in

most cases prove to be a futile undertaking. Verifying whether the situation where a person is put at the disposal of a third party is illegal (according to Belgian law, where working with third party personnel is very strictly regulated), is not an easy task due to several amendments of the law. Furthermore, the sanctions foreseen under this legislation (the application of Belgian social security legislation) would be contrary to Regulation 883/2004. Although inspection services consider this an efficient deterrent, this sanction is not applied as such in practice. Only in case of excessive situations (in which for instance pure fraudulent gangmasters are involved) this system is still applied. The federation of the temporary work agencies advocates the upholding of the licensing system for temporary work agencies.

Little regulation of temporary agency work (but license requirements)

There is little regulation (outside of health and safety) of the employment agency sector in Ireland. However, agencies established in Ireland are required to be licensed, but this requirement is not imposed on agencies established in other jurisdictions. It seems relatively rare, although it does occur, that temporary agency workers are placed by agencies established abroad. Most agency workers, regardless of their country of origin, are placed by employment agencies established in Ireland. There are no requirements on the client or the principal contractor to undertake checks of, or make investigations into the agency itself. In general, according to national informants, the only checks undertaken by clients are credit checks on the agency (and vice versa). Legislation has been published, but not yet passed, on tightening the rules around the licensing of employment agencies (including non-Irish agencies). All stakeholders agree that there is a need for better regulation of employment agencies and they support the proposed Agency Regulation Bill.

In the construction sector, agency workers are not covered by the terms of the REA (Registered Employment Agreements). This is a significant factor, as it means that agency workers are only legally entitled to the national minimum wage, which is considerably lower than the REA minimum rate. Indeed, the NERA (National Employment Rights Authority) informant cited instances of agencies advertising the fact that potential user undertakings would not be required to pay REA rates. The construction unions and the Construction Industry Federation (CIF) have a legally non-binding collective agreement covering such workers. According to the national informants, this agreement is generally adhered to on larger sites, where unions have a presence and principal contractors are fearful of attracting negative publicity, but less so where unions cannot carry out a 'policing' role.

Finally, the Irish social partners have sharply divergent views on the likely effectiveness of the Temporary Agency Work Directive 2008/104. The unions welcome the Directive, particularly in the construction sector, arguing that it will help address the problem of agency workers being exploited, while employer representatives (particularly in the SME sector) feel that it will hamper flexibility and harm the temporary agency work sector. Negotiations between the social partners on the transposition of this Directive are ongoing. There is some concern in the agency sector that the sole liability for guaranteeing equal treatment of agency workers will rest with the agency. This appears to be a sticking point in the negotiations on transposition at present. The industry representative pointed out that this would probably lead to the insertion of more indemnity clauses into agency contracts, aimed at protecting agencies who are misled by user undertakings as to the comparable, permanent employee's terms and conditions of employment.

In the United Kingdom, the overall working practice of the Gangmasters Licensing Authority (GLA) and its engagement with other European Union agencies is seen as a good practice. The GLA maintains compliance with the licensing standards of the Gangmasters Licensing Act through a proactive enforcement approach which involves information exchange with other government departments and inspection of companies, and interviews with workers and the client. Information to undertake this approach is received from NGOs, trade unions, exploited workers and the general public. This partnership working has invariably uncovered instances of cross-border exploitation of migrant workers from other EU and third countries.

Restrictive regulation of temporary agency work

The situation in Belgium, where temporary agency work is strictly regulated, has already been discussed above. In Italy, the hiring out of workers is still generally forbidden as an illegal form of supply of labour, and is punished with the transfer of the entitlement of the employment relationship to the final user and with criminal sanctions for both employers involved. However, recent reforms have made the notion of “lawful” contract more flexible not to hamper contracts for labour intensive companies. Especially in case of service contracts, the protection of workers also depends on the legal requirements discerning “real” contracts from unlawful cases of labour supply. The case law on the rules on unlawful contracts and illegal supply of labour is very rich and complex. The question on the lawfulness of the contract (in the opinion of the actors involved) is mainly relevant when the subcontractor is a “cooperative” providing services, capable of offering the client lower labour costs. The vagueness of the legal criteria to identify a lawful service contract and the resulting uncertainty of their application when the service requires little or no use of “hard” assets, facilitate contracts with such organisations, but it also involves a high risk of litigation. The situation is particularly alarming in some regions in the South, where the percentage of undeclared work is very high (especially in construction and agriculture) and where the activities of illegally hiring immigrants is sometimes controlled by organised crime. The legal rules in these contexts are widely disregarded and workers are hardly able to act to obtain the legal status for their employment relationships. Despite the use of fictitious contracts and the rich case law on this topic, all the actors interviewed note that very few legal actions are instituted by workers claiming an employment relationship with the user undertaking. In fact, the proceedings are rarely commenced on the initiative of individual workers, especially lower qualified workers. The question of the lawfulness of a contract is raised (as well as by inspection authorities) by the unions, whose aim is to turn the workers’ situation in compliance with the rules in both contractual and legal frame: these often remain then employed by the “contractor”. The apparent contradiction between these data and the numerous judgements published on the topic can in the first place be explained by considering the widespread diffusion of contracts and subcontracting chains in the Italian labour market: indeed the numerous judgements concern a very small percentage of workers, potentially involved (in the opinion of the stakeholders) in unlawful contracts. Secondly, many judgements concern workers with higher qualifications and skills (such as those working in the computer industry) and not unskilled workers engaged by cooperatives in transport.

The highly restricted possibility to make use of temporary employment agencies and ‘the hiring out of labour’ in Luxembourg, is considered an important factor in combating abuse in subcontracting processes. The concept and the provisions relating to the illegal hiring out of labour allow the Labour Inspectorate (ITM) to sanction almost all situations of fraudulent loan of labour taken in its broader sense (see Chapter 4-II). However, according to a representative of Tempo Team (a temporary work agency), controls should be strengthened, as many companies put employees at the disposal of other companies without meeting the legal requirements for temporary agency workers and/or the hiring out of labour. Apart from the fact that it is unfair competition, the rights of employees are not guaranteed in these cases.

Contrary to the situation in Luxembourg, in Poland the rules on temporary employment agencies are failing in practice, because it is also possible to hire workers through employers that do not have the status of a temporary work agency. These companies de facto provide the same services as temporary work agencies, but are outside any legal control. The problem is that, on the one hand, the exclusiveness to supply manpower is nowhere guaranteed to temporary work agencies, whilst on the other hand, the rules on temporary employment do only apply to undertakings with the legal status of a temporary work agency, and only these undertakings are subject to consequences such as deletion from the register by the registry authority.

It might be added that recently (24 January 2010) the Act on employing temporary workers has been amended to the disadvantage of workers. Since then it is lawful (and this happens frequently) that workers who have been made redundant under the collective redundancies act, return to their previous job positions, but now as temporary workers. According to the trade unions the imperfections of the regulation

on the temporary work agencies could be significantly reduced by (extended) collective labour agreements. That would be the most effective and optimal measure of workers' rights protection. However, the obstacle of entering into such (extended) collective labour agreements is the weak organisation of the employer side.

VI. SMEs

Although this study does not particularly focus on SMEs, the majority of contractors operating in the relevant sectors (construction industry, transport etc) belong to the category of small and medium-sized enterprises⁹⁶ (SMEs).⁹⁷ This is not surprising since more than 99% of all enterprises in the European Union are SMEs (providing over two third of total private employment),⁹⁸ and since the majority of SMEs are active in sectors such as distribution, construction, manufacturing and transport & communication.⁹⁹ For instance, in the Czech Republic and Sweden SMEs predominate in construction, whilst in Ireland it is estimated that up to 80% of SMEs operate in the service sector, with the remainder mainly in construction and manufacturing.¹⁰⁰

In subcontracting chains SMEs often operate as subcontractors, while the principal contractor (or client) is often a large(r) undertaking. However, an SME subcontractor may of course subcontract part of its work to another SME subcontractor. It is estimated that about 3.7 million SMEs in the EU (representing 17% of all SMEs in the EU) are engaged as subcontractors. Some 54% of the EU-27 SME subcontractors combine their role as a subcontractor with a role as contractor.¹⁰¹ Most of the European SME subcontractors are only involved in domestic subcontracting (i.e. they operate with client enterprises located within their own country). About 26% also have clients in other EU and EEA countries and are thus (as subcontractors) involved in cross-border subcontracting practices.¹⁰²

In this section we concentrate on the question whether there are any specific problems for SMEs with regard to rules on liability in (cross-border) subcontracting processes. What are, for instance, the level of awareness and the suitability of the rules for SMEs and are SMEs especially affected by liability systems? Although the questionnaire did not specifically pose such a question, some national reports raised this topic, as well as the study carried out in 2008 by the European Foundation for the Improvement of Living and Working Conditions (Dublin) on 'Liability in subcontracting processes in the European construction sector' ('the Dublin study'). Next to this, we rely on literature and policy documents for this section.

⁹⁶ SMEs are understood here as enterprises employing less than 250 employees. Among SMEs the following size classes are usually distinguished: micro enterprises (employing less than 10 persons), small enterprises (employing between 10 and 50 persons) and medium-sized enterprises (employing between 50 and 250 persons). See, for instance, EIM Business and Policy research, *Do SMEs create more and better jobs?*, Zoetermeer, November 2011, p. 27. Nevertheless, it would be advisable to use a combination of criteria to determine the size of a company (also the annual turnover or the total on the balance sheet), see Recommendation 2003/361/EC, EC Official Journal 2003 L 124/36 (C(2003) 1422).

⁹⁷ Dublin Study, p. 41.

⁹⁸ The pivotal role of SMEs in the EU economy is recognised by the European Commission and laid down in the Small Business Act (SBA) of 2008, which establishes a comprehensive SME policy framework for the Union and its Member States. In 2011, a Review of the Small Business Act for Europe was published (COM(2011)78).

⁹⁹ EIM Business and Policy research, *Do SMEs create more and better jobs?*, Zoetermeer, November 2011, p. 19 and p. 27 and Report European Commission, *Minimizing regulatory burden for SMEs. Adapting EU regulation to the needs of micro-enterprises* (COM(2011) 803 final), p. 2.

¹⁰⁰ Eurofound, *SMEs in the crisis: employment, industrial relations and local partnerships*, 2011, p. 4-5.

¹⁰¹ EIM Business & Policy Research and Ikei Research and Consultancy, *EU SMEs and subcontracting. Final report*, October 2009 (hereinafter: *EU SMEs and subcontracting 2009*), p. 21-22.

¹⁰² *EU SMEs and subcontracting 2009*, p. 13 and p. 101.

Level of awareness of the rules

One of the findings of the Dublin Study was that the level of awareness of SMEs regarding the liability rules differs considerably in the Member States.¹⁰³ In the Austrian and Spanish construction sector SMEs were clearly less well-informed than larger companies about legislation in the area of liability and subcontracting. In contrast, in Belgium, France and the Netherlands SMEs seemed to be well aware of the liability rules applicable to them.¹⁰⁴

Less financial, administrative and legal capacity and the consequences thereof

SMEs – especially micro and small enterprises – are in a specific situation since, generally speaking, they have less financial, administrative and legal capacity than LSEs (large scale enterprises).¹⁰⁵ This explains why SMEs in general and SME subcontractors in particular are more affected by issues such as high levels of bureaucracy (red tape procedures and regulations) and late payment by clients,¹⁰⁶ and have more problems in complying with regulation. Indeed, the study on SMEs and subcontracting in the European Union identified *differences in national legislation and practices* as one of the major problems for SMEs involved in cross-border subcontracting (especially regarding working conditions of employees of subcontractors).¹⁰⁷

Some examples taken from the Dublin Study might be illustrative here. The Austrian employer representatives called for special attention for this group regarding the suitability of the rules for SMEs, and emphasised the need for clear and manageable rules. They stated that in general SMEs, particularly small enterprises, do not have a structure to deal with complex legal matters, such as a legal department. Although the French employer organisations held that legal provisions on liability do not seem to have adversely affected SMEs, they also observed that it is more difficult for SMEs to comply with legal provisions as they do not have legal advisors. The Belgian employer organisations observed that their liability system (although less complicated than the old system) was perhaps still too complicated for SMEs.¹⁰⁸

Having to comply with many (procedural) rules regarding liability in subcontracting processes can heavily tax the financial, administrative and legal capacity of SMEs.¹⁰⁹ Indeed, a significant volume of cost comes from completing or keeping paperwork and records, or from being inspected to demonstrate compliance.¹¹⁰

As stated above, SMEs most often operate as subcontractors, but regularly combine their role as a subcontractor with a role as contractor. Many liability systems oblige a contractor, who subcontracts part of the work to another subcontractor, to do *certain checks and verifications* on his subcontractor (in order not to be liable etc). In light of the typical features of SMEs as described above, this raises the question whether such systems impose extra (perhaps disproportionate) problems on SME contractors (who have to produce the required documentation etc in order to escape liability) and SME subcontractors (who have to provide their contractor with the required documents etc).

¹⁰³ The Dublin Study covered eight Member States (Austria, Belgium, Finland, France, Germany, Italy, the Netherlands and Spain), focused on chain liability and was limited to the construction sector.

¹⁰⁴ Dublin Study, p. 41.

¹⁰⁵ S.S.M. Peters, *Diluted labour law. Differentiation according to company size in the fields of employee participation, sickness and dismissal (Verdond sociaal recht. Onderscheid naar ondernemingsomvang bij medezeggenschap, ziekte en ontslag)*, Deventer: Kluwer 2006, see English Summary, p. 676, 678-679.

¹⁰⁶ Eurofound, *SMEs in the crisis: employment, industrial relations and local partnerships*, 2011, p. 36-37 and *EU SMEs and subcontracting 2009*, p. 51.

¹⁰⁷ *EU SMEs and subcontracting 2009*, p. 94 and p. 103.

¹⁰⁸ Dublin Study, p. 41-42.

¹⁰⁹ Eurofound, *SMEs in the crisis: employment, industrial relations and local partnerships*, 2011, p. 37; S.S.M. Peters, *Diluted labour law*, 2006, p. 678.

¹¹⁰ Report European Commission, *Minimizing regulatory burden for SMEs. Adapting EU regulation to the needs of micro-enterprises (COM(2011) 803 final)*, p. 3-4.

See, for instance, the many checks a contractor (client) has to do on his subcontractors in Italy. In the Italian report some practical examples of control activities by contracting undertakings are given by describing the specific case of an Italian SME (a medium-sized company) operating in the construction and electromechanical sector.

Altogether, considering both the documents required by law and by contractual obligations, the contractors are required to present about 40 documents (original or certified copy), including: a registration document from the Chamber of Commerce certifying that the company has not been subjected to bankruptcy proceedings over the past 5 years; the DURC; a statement of the average annual manpower and of the collective agreement applied; a detailed list of equipment and tools to be used; an accident register, stamped and signed on each page; a copy of the LUL (the Single Social Document); the list of personnel who will enter the site, with a relative recruitment communication note to the Employment Office (Centro per l'impiego); medical certifications on suitability to perform the job of the staff present in the site; the minutes of the election of the workers' representatives; certificates of participation to training courses for workers and designated workers for protective and preventive activities; the appointment of the foreman for each subcontractor; a statement of the worker's representative declaring he or she has viewed the security plans drawn up by the contractor and the clients. Apart from this, a lot of information and documentation is required on a monthly basis as well (especially documents providing information about the contributions and tax payments made monthly and the total number of workers and working hours reported). Usually this company periodically requires a copy of the receipt of payment of wages to the workers by bank transfer, bank draft or other item objectively confirming the payment.

This is a significant example of the types and numbers of documents clients may require in order to avoid the consequences of joint and several liability.

According to the Irish Small and Medium Enterprises (ISME), SMEs (which also make up the vast majority of undertakings operating in Ireland) have a particular resistance to systems of joint and several, or chain liability. This is because, the ISME argued, owner-managers or self-employed contractors have a particular 'mindset' that both resents what would be seen as 'interference' in their business affairs and, correspondingly, makes them extremely reluctant to 'interfere' in the affairs of other undertakings. This, at least in part, explains why such undertakings are resistant to private (non-state) monitoring or checking mechanisms. The ISME noted that practical issues could emerge where one private entity is required to demonstrate compliance to another (the disclosure of sensitive commercial information, for example).

Sometimes the rules create a lighter regime for SMEs (tailor-made approach) or contain certain options in order to facilitate matters for SMEs with a view to their specific situation. See, for instance, the recent Irish guidelines on facilitating SME participation in public procurement. These guidelines set out, as one of the guiding principles, that contracting authorities should allow tenderers at the time of tendering only to declare that they have the relevant and proportionate capacity (as specified in the contracting authority's tender documentation) which is necessary to undertake the contract. The contracting authority should seek verification or evidence of such capacity only in the event that a tenderer is shortlisted or comes under consideration for the award of the contract. Contracting authorities are also encouraged to divide larger contracts into 'lots' to facilitate SME involvement. Sometimes, liability rules only apply to specific sectors in order not to burden SMEs in sectors where such liability rules are less urgently needed (in the view of the legislator). See, for example, the Belgian liability system regarding social security contributions (Article 30bis of the Act on social security of 1969), which is in principal limited to contractors of works in the construction sector. One of the reasons to confine the scope of application of the joint and several liability legislation to the construction sector was to limit the possibly severe consequences for SMEs. After all, they would be obliged to register and the heavy responsibility for clients could result in them appealing less to subcontractors.

Power asymmetries in the client-supplier subcontracting relationship

One of the problems of SMEs is the existing power asymmetries in the client-supplier subcontracting relationship. Some SME subcontractors, especially those lower in the subcontracting chain, are heavily dependent on their contractor(s).¹¹¹

In this regard a recent initiative at national level in France – the Charter of good practice in the relations between large order providers and small and medium enterprises – is worth mentioning. This initiative was launched in February 2010 by the “Business Credit Mediator”¹¹² and is under the supervision of the Mediator for inter-enterprises and subcontracting relations and the Minister of Economy, Industry and Employment. This (soft law) initiative has gained the support and adherence from 128 big clients in France. The principle aim of the Charter is to improve the cooperation between large clients/order providers and small and medium suppliers (subcontractors). The Charter includes 10 commitments on behalf of the large order providers for responsible buying. The Charter does not deal with workers’ rights as such, but seeks to make sure that big clients do not abuse their dominant position in their relations to their suppliers and subcontractors by cutting down prices or by abusive termination of contracts. As a result this initiative stimulates good industrial relations and may (in an indirect way) have a positive effect on employment stability in the subcontracting sectors.

Liability rules with possibly negative consequences especially for (foreign) SMEs

One of the major problems and challenges identified for SME subcontractors is the *problem of late payments*.¹¹³ Many SMEs do not have large financial reserves. If they act as subcontractors in a project, they have to pay their workers, the materials, the interest on their equipment, taxes, etc. If the contractual payments by the main contractor are delayed, they may run into problems. When problems arise, subcontractors are disinclined to take legal actions against the main contractor, as they do not like to destroy previously good relations or jeopardise future business. In France, in public contracts, subcontractors are directly paid by the client, which is positively assessed by the European Builders Confederation EBC (representing craftsmen and SMEs in the construction sector).¹¹⁴

Certain liability systems may particularly cause problems for SMEs in this respect. This applies especially to systems in which the (principal) contractor may pay part of the invoice on a blocked account in order to escape liability.

A clear example is the Dutch chain liability regarding social security contributions and wage tax. This liability is laid down in Articles 34 and 35 of the Collection of State Taxes Act 1990 and was introduced in 1981 by the Liability of Subcontractors Act (Wet Ketenaansprakelijkheid (WKA)). According to the Building Contractors’ Federation Netherlands¹¹⁵ (representing SMEs in construction industry) the administrative and financial burden of the WKA is considerable, especially for SMEs. The principal contractors try to pay a (too) large part of the invoice on the G-account¹¹⁶ of the subcontractor, because for this sum they are indemnified against liability. This part is often higher than the tax and contributions due by the subcontractor, which means that the subcontractors cannot freely make use of a considerable part of their

¹¹¹ EU SMEs and subcontracting 2009, p. 13-14 and especially p. 42-44, where a classification of different level subcontractors is made based on the subcontractors’ importance to the contractor (specialised subcontractors versus capacity subcontractors). In short: first-tier subcontractors (especially LSEs), second-tier subcontractors (LSEs and SMEs) and third-tier and lower-tier subcontractors (capacity subcontractors, especially micro and small enterprises).

¹¹² See also p. 26 of this Final Study.

¹¹³ EU SMEs and subcontracting 2009, p. 103.

¹¹⁴ EU SMEs and subcontracting 2009, p. 95-96.

¹¹⁵ ‘Aannemersfederatie Nederland Bouw & Infra’.

¹¹⁶ 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, and is then protected against liability for the portion paid.

earnings. Unblocking the deposit takes time and administrative processing. The annual costs resulting from the WKA for specialised building contractors are estimated to amount to 22.5 million euros (this includes administrative processing (18 million) as well as lost capital proceeds (4.5 million) – which corresponds with an average annual cost of 410 euros per employee.¹¹⁷ This may explain why, by contrast, the main association of building contractors¹¹⁸ (predominantly representing principal contractors) was quite content with the G-account system, since it prevents liability of (principal) contractors.¹¹⁹ The preventive G-account system will be replaced by a deposit system (as is stipulated in the ‘Act on Incentive Tax Measures’¹²⁰). One of the reasons for this amendment of the law is to improve the situation for SMEs.¹²¹ Under the new system the (principal) contractor or user company pays the tax and contribution component of the invoice directly to the so-called indemnity account (*vrijwaringsrekening*) of the Inland Revenue, on behalf of the deposit of the subcontractor or TWA. The Inland Revenue credits the amount to the deposit of the agency or subcontractor concerned. The provision regarding the deposit system is expected to come into force not earlier than in 2014.¹²²

It is an often heard allegation that liability systems do de facto discriminate against foreign service providers, in particular SMEs. This would especially apply to systems which demand a pre-qualification, a certification, NEN-norms etc, for such systems oblige foreign (SME) subcontractors to obtain these certificates and the like in the country in which they intend to contract for work. Especially for subcontractors involved in cross-border subcontracting in different countries this might be a heavy burden, since they have to apply for different certificates. This obviously applies to SME subcontractors in particular, given their limited financial, administrative and legal capacities.

Sometimes this burden is somewhat reduced by making it easier for foreign (SME) subcontractors to obtain such a certificate or NEN norm. This seems to be the case regarding the joint and several liability for user undertakings for the payment of the statutory minimum wage to the hired agency workers in the Netherlands (Article 7:692 CC). This liability system strongly stimulates user undertakings to exclusively deal with certified TWAs (in possession of the quality label ‘NEN-norm 4400’), for then the user undertaking is exempted from liability. While the TWAs established in the Netherlands can acquire the quality label ‘NEN-norm 4400 Part 1’ (since 2007), TWAs established abroad can acquire the similar ‘NEN-norm 4400 Part 2’ (since 2008). Information about this NEN-standard is published in English on the internet.¹²³ According to this information the standard is “readily applicable also to smaller companies” (in the case of smaller companies, for instance the procedures, which will be checked, may also have been agreed verbally instead of in writing). According to the Dutch government this NEN-procedure is not a burden, since it is limited in time and the costs would be fair, also for smaller companies. Moreover, equivalent foreign certificates/permits will be recognised.¹²⁴

¹¹⁷ Figures extracted from EIB (Economic Institute for the Building Industry), Report *Kostendruk van wet- en regelgeving in het gespecialiseerde aannemingsbedrijf*, March 2008 (published on <http://www.eib.nl/kostendruk.pdf>).

¹¹⁸ ‘Bouwend Nederland’.

¹¹⁹ This information is taken from M.S. Houwerzijl & S.S.M. Peters, *Liability in subcontracting processes in the European construction sector – Netherlands*, <http://www.eurofound.europa.eu/publications/htmlfiles/ef08877.htm> (research commissioned by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), published January 2009), p. 14.

¹²⁰ Act of 1 July 2009, Stb. 2009, 280.

¹²¹ Dublin Study, p. 41-42.

¹²² See Kamerstukken II 2010/11, 31 066, no. 98 (7^e halfjaarsrapportage Belastingdienst).

¹²³ <http://www.normeringarbeid.nl/Applications/getObject.asp?FromDB=1&Obj=1002066.pdf>.

¹²⁴ Kamerstukken II, 31 833, no. 3, p. 7 (Explanatory Memorandum).

Liability rules beneficial to SMEs

Some argue that (chain) liability rules are, on the contrary, beneficial especially to SME subcontractors. Without these rules mala fide (principal) contractors are free to profit from (too) low costs of work, to the detriment of particularly SME subcontractors and their employees, as was mentioned in the Polish report. This applies especially to SMEs with a weak negotiating position as subcontractor, since they do compete on efficiency and low costs instead of innovative or modern technologies.¹²⁵ This refers to one of the major problems of SMEs subcontractors (already mentioned above), i.e. the existing power asymmetries in the client-supplier subcontracting relationship; especially micro and small subcontractors lower in the subcontracting chain are often heavily dependent on their contractor(s).¹²⁶

Similar considerations led the German legislator to adopt the principal contractor liability of § 14 AEntG. This liability was the response of the legislator to the massive and constant bypass of the AEntG in the construction industry. Many contractors deliberately preferred subcontractors who could keep their costs low by failing to pay the mandatory minimum wages, to be paid according to the AEntG, and by keeping their contributions to the holiday pay fund low. The German government saw the principal contractor liability as a means for establishing fair conditions of competition from which especially small and medium-size enterprises could profit.¹²⁷ The German liability provision for minimum wages also aims to protect German SMEs against unfair competition by subcontractors from 'cheap wage countries'.¹²⁸

In Ireland the SME representatives (as well as the labour inspectorate NERA) highlighted a growing perception (and frustration) amongst small subcontractors (particularly in the construction sector) that they are being undercut in tendering processes by undertakings from outside the jurisdiction that are not fully compliant with Irish labour rules. Besides, the SME employers' representatives complained that the penalties for non-compliance are not sufficiently deterrent, particularly in the case of large principal contractors, where offenders simply 'pay up and move on'. There are no barriers, for example, to such undertakings tendering for, and being awarded, future state contracts or no extra responsibilities placed upon them to ensure compliance in the future. For such undertakings, many informants suggested, the danger of engaging non-compliant subcontractors (or being less than thorough in checking the subcontractors engaged) does not sufficiently register as being a 'risk factor' that warrants adequate attention.

Next to this a specific category of liability rules is beneficial especially to SMEs, namely rules on the liability of the main contractor/client to pay his subcontractors (France, Poland, Ireland). This is a different kind of liability than the liabilities discussed above: here the contractor is liable vis-à-vis the subcontractor in case the former does not comply with his obligations (especially payment) regarding the subcontractor.

According to the Irish employers' representatives interviewed, the best way to protect workers' rights in subcontracting chains is to protect the employer subcontractor. At present, given the dire economic climate in Ireland, the focus of much policy attention, particularly in the important SME sector, is on measures to guarantee payments to subcontractors owed by principal contractors/clients. This has been particularly (although not exclusively) an issue in construction, where many large companies have become insolvent, leaving the (SME) subcontractors unpaid. As a result, the employers' representatives tended to emphasise this (rather than the protection of subcontractors' employees per se) as the pressing issue to be addressed. Although some legislation has been proposed in the construction sector (the Construction Contracts Bill 2010), the problem remains acute. The French law contains a chain liability for the benefit of

¹²⁵ Conclusions of the panel discussion during a conference organised by the Institute of the Research on the Market Economy, 21 May 2011, Poland; among the participants were the Polish Minister of Labour and Social Policy, Members of Parliament, representatives of local authorities, employers' organisations and a member of the EC.

¹²⁶ EU SMEs and subcontracting 2009, p. 42-44.

¹²⁷ Koberski/Asshoff/Eustrup/Winkler, Arbeitnehmer-Entsendegesetz, § 14 AEntG No. 4.

¹²⁸ Dublin Study, p. 12.

subcontractors in case of insolvency (Loi n° 75-1334), first introduced in the middle seventies. The objective of this law is to protect small and medium construction businesses against bankruptcy of big and general construction “order providers”. In Poland, subcontractors of construction works benefit from special measures such as a guarantee of payment for construction works and a joint and several liability of a client and a contractor for payments due to the subcontractor. However, the legal provisions in question can be made ineffective quite easily (it is sufficient that a client does not approve subcontractors, in that case the liability conditions will not be fulfilled).

Finally, it is interesting to mention that in Italy legislation has been published (the Construction Contracts Bill 2010) attempting to improve dispute resolution procedures where (sub)contractors’ payments are delayed or denied – and thus protecting subcontractors – in the construction sector. Similar measures for other sectors are under discussion.

VII. A comparative examination of positive issues, problems, deficiencies or shortcomings

This section highlights the positive issues, problems, deficiencies and shortcomings – as identified by the actors involved – of the systems in the fourteen countries. A comparative overview will be provided of the positive and negative issues regarding the interpretation, application and enforcement of the existing mechanisms to protect workers’ rights in subcontracting chains. In this overview, also recommendations of the actors involved will be presented. The focus is once again on the application and enforcement of the rules in cross-border situations.

Desirability of mechanisms of joint and several liability

In several countries, the assessment of the desirability of mechanisms of joint and several liability differ considerably for both sides of the industry. Generally speaking, in these countries employee representatives and labour inspectorates are in favour of, whereas the employer side is opposed to such mechanisms (Belgium, Ireland, Luxembourg).

In Belgium, employees' organisations are convinced advocates of these mechanisms, since they provide workers with an extra claim when their rights have been violated. The opponents (especially the employers’ organisations) argue that it is impossible for a bona fide contractor to scrutinise his potential subcontractors beforehand – especially in cross-border situations. Furthermore, opponents fear a negative impact on the economy when introducing joint and several liability mechanisms without at the same time introducing effective means of controlling the reliability of the subcontractor as well as a clear procedure to fulfil the obligations in order not to be liable for a subcontractor’s fault or malice and an effective means to have recourse to the subcontractor when one is held liable for the subcontractor's fault – even more so in cross-border situations. Without such flanking measures these mechanisms will deter bona fide players much more than mala fide players, since there is no absolute means to make sure a subcontractor is of good faith or not, while mala fide players easily find means to escape liability, for instance through the use of different legal persons. In short: joint and several liability mechanisms put a disproportionate burden upon all the players on the market while not deterring mala fide players, who will simply find a means to circumvent such rules. According to these opponents these mechanisms are being introduced solely as a way of trying to solve a European problem nationally. The cure, they argue, threatens to be worse than the disease.

Such different views were also displayed in Ireland. The trade unions together with the Labour Inspectorate NERA are in favour of some kind of liability mechanism, whereas employers stress that this would lead to unwelcome privatisation of enforcement. NERA argues that the existing threats of criminal prosecution or fines, or civil orders for arrears of pay are not a sufficiently deterrent. NERA sees the withholding of payments due to principal contractors, if evidence of abuse of workers’ rights in subcontracting chains is discovered, as a much more effective and efficient method of securing compliance by contractors,

particularly those established in other jurisdictions, which are more difficult to subject to the legal process. This view was echoed by the union representatives, who argue that the best way to ensure better compliance by (sub)contractors is to 'hit them in the pocket'. However, different views were expressed as to how such a mechanism might be implemented. Union representatives are in favour of some system of joint and several, or chain liability (along the lines of health and safety regulation). They argue that by making the issue of labour law compliance a greater "risk factor" for undertakings (in respect of their own workers and those of subcontractors they engage), more stringent monitoring will take place. The Labour Inspectorate (NERA) advocates withholding of payments mechanisms in the context of public procurement; NERA does not consider an equivalent system in relation to purely private contracts to be practical in enforcement terms. However, employer informants feel that the most stringent measure desirable would be some sort of self-certification system on the part of principal contractors. This would not expose such contractors to liability in the event of abuses of the rights of subcontractors' workers, but would increase awareness of labour law obligations. It was pointed out that SMEs have a particular resistance to systems of joint and several or chain liability.

Also in Luxembourg the stakeholders have widely differing views on the desirability of mechanisms of joint and several liability. Whereas the Labour Inspectorate (ITM) proposed a range of possible measures to specifically protect employees at the end of a subcontracting chain, the employer side is strongly opposed to such mechanisms. The Labour Inspectorate suggested for instance: a joint and several liability of the various subcontractors to pay employees who are actually performing the work contracted out (similar to the liability in the Social Security Code in social security law); an obligation of the client to carry out certain checks before contracting with the subcontractor (as regards e.g. the payment of salaries); a joint and several liability (as to the wages due) of the company that commissioned the work to a foreign company and the latter in respect of employees sent in the territory where the work is carried out, as provided for in German labour law; and possibly also a limitation of extensive subcontracting, as required for example by the Spanish Act 32/2006, which allows, in principle, only two levels of subcontracting. However, the Union of Luxembourg Enterprises (UEL) argues that such "far-reaching solutions" are disproportionate and would ruin the mechanism of subcontracting. Especially the mechanism of joint and several liability, including payment of the remuneration of workers of the subcontractor, would be totally disproportionate, whether at national or European level. The UEL considers it unlawful to impose on the client obligations regarding workers who are not his employees and with regard to whom it neither has authority nor control, or only part of the employer's authority and control. The "joint and several liability" between companies in relation to subcontracting, envisaged in the resolution of the European Parliament of 2009 as a means to fight abuse, is an extreme solution according to UEL. This employers' organisation deems also it fairly unrealistic to ask the client to make inquiries about the practices of his subcontractor in respect of his workers (see also below). Finally, the requirement for the contractor to open a guarantee account to guarantee the payment of wages is an unfair formality and an unfair burden for contractors who comply with social legislation.

In other countries the employers are less negative or even in favour of joint and several liability (France, Germany, Italy, the Netherlands, Norway), for instance because they consider it in their own interest that employers/contractors are stimulated to carefully choose and check their subcontractors and/or because there are feasible ways to escape the liability. The opinions and recommendations of the relevant stakeholders in these countries is presented below.

The French employer organisations consider the possibility of their members to escape the joint liability (in case of recourse to illegal work) by doing the necessary verifications positively – even although verifications constitute a necessary burden. Trade unions argue that recourse to subcontracting needs to be legally restricted, for instance to first tier subcontractors. Alternatively, they propose to introduce chain liability (going down the chain of subcontractors). By contrast, employers argue that it should be up to the client/owner contractor to restrict recourse to subcontracting depending on the complexity of the working site. Another solution would be that in case of recourse to subcontracting a part of the price of the work

which corresponds to the salaries owed by the subcontractor to his workers for the provision of services should be placed on a special deposit account for the benefit of the workers (according to the author of the French report).

In Germany, the principal contractor's liability (with respect to minimum wages and holiday pay fund contributions) is considered to have a significant preventive effect. Exactly in order to escape liability it is in the interest of the main contractors themselves to carefully choose their subcontractors and to keep checking them in the course of the contractual relationship. As mentioned by the vast majority of the interviewees (including an employers' organisation in the construction sector, ZDB), the main prerequisites for the effectiveness of this liability are the absence of the requirement of fault and the fact that the whole subcontracting chain is covered. Although all interviewees deemed this liability effective as regards its objectives (i.e. to establish fair competition and to ensure social protection of workers), it must be added that it is almost impossible to measure the impact of the liability provision (§ 14 AEntG). The employer side is of the opinion that the contractual hedge against the risk of liability is difficult and that indemnity or penalty clauses or even collateral securities by the subcontractor in the form of deductions or guarantees are generally taken into account. However, in practice such contractual clauses are difficult to enforce. The conclusion of the author of the German report is that only the strict and unlimited liability (§ 14 AEntG) brings about the important preventive effect within the critical branches.

Also among Italian employers the usefulness of the instrument of several and joint liability (for wages, social fund payments and social security contributions) is acknowledged, albeit only for domestic situations, because it encourages greater attention to the selection of contractors, penalising less transparent undertakings. However, many employers complain of the objective nature of the joint and several liability, which exposes clients to the risk of claims notwithstanding checks carried out before and during the contract. The contacted companies, for example, report that, despite the checks, they are currently involved in (lengthy) legal litigation. It is observed that there is a risk that such rules discriminate against virtuous companies this way. In their view, this mechanism imposes an excessive burden on undertakings. Despite its many limitations, the unions believe that the rule on joint liability represents an indispensable instrument for protecting workers' rights, balancing the situation of extreme fragmentation of the economic system which characterises both the labour intensive services and (even more) the building and transport sectors. Clients generally perform checks on their contractors and subcontractors, both prior and during the execution of the contract, to avoid the consequences of joint and several liability. The absence of mechanisms for exemption from liability induces many companies to require documentation not requested by law, in order to minimise the risks of legal actions by workers. According to a well-established practice, clients insert in the contract an obligation for the contractor to submit, at least quarterly, the DURC (Single Insurance Contribution Payment Certificate) related to his own employees and to any employees of his subcontractors. However, the DURC is rarely considered a sufficient guarantee, so the client undertakings normally require additional documentation. The joint and several liability rule (under which the Italian "employer" may be held liable) is in theory also very useful to cross-border posted workers, because of the difficulty of ensuring the fulfilment of contractual obligations by the employer/subcontractor established in the home State. The possibility for the inspector to use the warning act even against the jointly and severally liable Italian "employer" should strengthen the effectiveness of the measure. However, in practice, foreign workers do not use such tools, and there is certainly no trace of that in case law (see also below).

In the Netherlands, the recently adopted joint and several liability for user undertakings regarding the payment of the statutory minimum wage to hired agency workers is assessed quite positively by all stakeholders. Nevertheless, the interviewed trade unions consider most Dutch liability schemes inefficient in practice. In their view it is necessary to hold recipients responsible for the compliance with the rules, which should be achieved by introducing a legislative system of chain liability for wages and other employment conditions (set by law and generally applicable CLAs) in the Netherlands. Furthermore, to make the market more transparent, the interviewed trade unions favour a registration system (see below).

Generally, the Norwegian stakeholders consider that the joint and several liability rules (of the General Applicability Act (GAA) have worked effectively. Some actors on the employer side consider the General Applicability Act to have proved an effective measure attaining its objectives. However, the trade union side considers the GAA insufficient in the sense that it is too difficult to use. The procedural and substantive requirements involved when requesting regulations to be adopted are too complicated and strict and this is even more true when it comes to maintaining regulations once they have been adopted. According to the trade unions and the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime, the joint and several liability of the GAA should be extended to include the client, the 'head' of the contracting chain. For in many (cross-border) cases there is no 'subcontracting' in the strict sense, only a client-contractor relation. Furthermore, in subcontracting chains where the principal contractor and all or most subcontractors are foreign undertakings it is deemed important that there should be a domestic undertaking responsible and liable (see below).

Finally, all stakeholders in Spain (trade unions, employers' associations, labour inspectors) describe the legal framework as disperse, complex and/or uncertain. The social security agents complained about the lack of clearness of and the differences between the diverse liability regimes. For instance, the chain liability of Article 42 of the Workers' Statute (regarding wages and social security contributions) only applies to subcontracting related to the "own activity" of the client. However, other protective regulations in the field of subcontracting have a wider scope of application. The coexistence of different types of responsibilities under diverse legal regimes with a differing coverage may lead to misunderstandings. While the employers' associations deem the information obligations (under the diverse liability regimes) excessive (see below), the trade unions plead for a higher level of protection. They stress the need for a better definition of terms such as contract, subcontract, client, contractors and subcontractors. Trade unions also criticise the narrow interpretation of "own activity" by the courts. They think that the rules on protection of workers in subcontracting processes should apply not only to the activities "inherent" to the client's production cycle, but also to any other complementary activities needed for the achievement of the client's productive aims. In fact, they have made a proposal for amendment of Article 42 of the Workers' Statute in this sense. Some labour inspectors agree with the idea of giving the same treatment to every case of subcontracting, regardless whether it belongs to the "own activity" of the client/contractor or not.

The desirability of registration and notification obligations

All Belgian stakeholders are in favour of strengthening inspection services and giving them the means to effectively monitor and enforce the legislation in cross-border situations. The LIMOSA system (the registration of foreign employees temporarily working in Belgium) is in that respect considered a valuable means: it allows the inspection services to have an idea of which foreign workers are working where in Belgium. This should facilitate control by inspection services, whilst not putting a disproportionate burden upon the players on the market. However, the employers deem this system, according to which every end user and client is responsible for supervising the compliance with the registration obligation for all posted workers of all subcontractors in every level of the subcontracting chain, a very drastic supervision obligation for Belgian enterprises. Besides, at this moment negotiations are taking place to introduce a registration notification in the construction sector. In the Netherlands the interviewed trade unions are in favour of a registration system such as the Belgian one in order to make the market more transparent. Because of the lack of such a system in the Netherlands, it is obscure how many foreign workers are at work in the country, in which sectors etc.

The same problem was reported by the Swedish trade unions. Currently, the unions' supervision and enforcement of the applicable rules is obstructed by the lack of information about the presence of foreign companies and workers in the country. This is considered to be a big loop hole in the legislation. Therefore, Sweden should introduce a duty for foreign companies to register before they post workers to Sweden and provide all types of information which is necessary to monitor and enforce the application of labour law and tax and social security legislation. In addition, it should be mandatory for foreign companies to designate a contact person in Sweden who is authorised to receive legal and extra-legal documents on

behalf of the enterprise. All the actors involved, authorities as well as social partners and clients, would benefit from such a rule. Actually, such rules on registering and on contact persons of foreign enterprises that post workers to Sweden have been presented in a draft proposal from the Ministry of Labour (June 2011). Similar recommendations have been made by the Norwegian trade unions and the National Authority for Investigation and Prosecution of Economic and Environmental Crime. In their opinion, in subcontracting chains where the principal contractor and all or most subcontractors are foreign undertakings, a domestic undertaking should be responsible and liable. The difficulties relating to cross-border posting and subcontracting – viz. uncovering the relevant facts, communicating with the foreign employer and imposing sanctions – could also be addressed by making it obligatory to have a responsible authorised representative in the host country.

It is interesting to add that in 2011 the Finnish labour administration has established a working group with a task of coordinating the monitoring of the foreign workforce, which might contribute to the supervision of the Liabilities Act and the Posted Workers Act at the local level. The authorities have pointed out that the supervision (of the Liabilities Act and Posted Workers Act) could be more efficient if foreign undertakings were under obligation to make a prior notice of postings to Finland.

The desirability of certificates and the like

All Italian interviewed stakeholders considered the DURC an important novelty in the Italian regulatory framework. It is seen as a useful instrument for controlling in advance that contractors and subcontractors are in compliance with social security obligations and, for this reason, that they are reliable undertakings. The usefulness of DURC is demonstrated by the fact that it is commonly requested by clients and contractors even if not required by law (hence also in other sectors than the building sector). On the other hand – as was highlighted by all actors, including the employers – the effectiveness of DURC is limited since it just attests the regular contributions in relation to workers who the (sub)contractor declares to use. For this reason the DURC does not enable the client to have a substantial control over workers employed in the chain and therefore it does not represent an effective measure against undeclared employment. In sectors other than construction, trade unions have an even more critical opinion, because in the construction sector the Local Funds play a more effective control than that ensured by social security institutions.

The Luxembourg Labour Inspectorate (ITM) suggested a range of possible measures to specifically protect employees at the end of a subcontracting chain. Among these were the possibility of requiring a certificate of good conduct or of payment of a subcontractor or a temporary work agency, but also the requirement for the subcontractor to open a guarantee account to guarantee the payment of wages.

The problem of gathering (correct) information by employers and authorities; cross-border cooperation

The liability mechanisms (in which the contractor is liable for mala fide behaviour of his subcontractor) often assume that the contractor is able to do checks on his subcontractor(s). This assumption, however, is challenged by the social partners in several countries, in particular as regards cross-border situations (BE, FI, SE, LU). In Sweden, this problem of gathering information on foreign subcontractors is also a problem of the trade unions. Finally, the Spanish employers' associations protest against the "excessive" information obligations imposed on employers under the diverse liability regimes.

While the Belgian employees' organisations are strong advocates of joint and several liability mechanisms, the employers' organisations argue that it is impossible for a bona fide contractor to scrutinise his potential subcontractors beforehand – especially in cross-border situations. They pose the rhetorical question how a contractor working with a foreign subcontractor can be expected to get information even inspection services or competent administrations can hardly get their hands on in cross-border situations.

The problem of gathering (correct) information from foreign subcontractors is also stressed by the Finnish social partners. In their view it is particularly difficult for the client to fulfil his obligation to check in cross-border situations and to get the required documents from foreign subcontractors. With regard to the

obligation to check, the employers' side emphasises that in case of foreign subcontractors information on these enterprises should be received easily from national registers of authorities etc. The European Commission should settle this issue in more detail and the current situation in different Member States should be improved. According to the employees, the biggest problem is that the legislation is national. A solution would be to develop an EU wide client's liability so that the client is responsible also for the neglects of the subcontractors (taxes, wages, social payments). The establishment of an EU labour protection agency could also be a good idea in this respect.

Also in Luxembourg the employer side (Union of Luxembourg Enterprises (UEL), in reaction to proposals of the Labour Inspectorate) deems it fairly unrealistic to ask the client to make inquiries about the practices of its subcontractor in respect of its workers. Unless it has powers of investigation, which is inconceivable, the client company will have to be satisfied with the (possibly false) information, if any, delivered by the subcontractor (certificates of pay, good conduct, etc). According to the UEL such requirements would also be contrary to the principles of administrative simplification.

Regarding the trade unions' right to negotiate/veto in Sweden, the unions observe that in cross-border situations it is obviously more difficult for them (and the employers) to make the necessary investigations and make a correct assessment regarding a foreign contractor, especially when it is not registered for income tax in Sweden. According to an Association of Building Contractors it could be helpful, if a foreign service provider had to apply for a F-tax card (which can be obtained even if the company is not liable for income tax in Sweden), since then the Tax Agency will have checked the company's tax record with the authorities in its home State. The Building Workers' Union is however doubtful about the Tax Agency's possibilities to procure correct information from abroad.

Finally, the employers' associations in Spain think that the information obligations (under the diverse liability regimes) are excessive, and want them to be reduced, at least for small contracts not involving great amounts of money or large numbers of workers. Especially regarding cross-border subcontracting, employers claim, firstly, that they are in need of more information on the legal obligations they must meet. Secondly, they complain about the difficulties caused by the different languages in which they have to communicate not only with the employees, but also with the authorities involved.

The abovementioned problem of contractors, trade unions and authorities to collect correct information in cross-border situations already indicates the need for enhanced EU level information sharing and collaboration in this field. This was especially stressed by the Irish stakeholders, who all urge the need for a stronger enforcement of existing laws and better information sharing and cooperation between responsible State agencies. This applies both domestically and, particularly in relation to information sharing and administrative cooperation, on an EU wide basis. As regards the EU level information sharing and collaboration the following instruments or measures were mentioned:

- an EU wide register of undertakings found to have been non-compliant with labour rules to be maintained and made available to national authorities;
- notwithstanding rules on free movement of services, a requirement that specified records be kept (or made available on request) at the workplace in the Member State in which the work is being carried out and/or that a designated and competent representative of an undertaking established outside the jurisdiction be notified to national authorities;
- easier and more accessible ways for orders (criminal and civil) to be enforced in other Member States (which obviously stretches beyond the boundaries of labour law).

Controlling and monitoring authorities (Labour Inspectorates etc.)

A serious problem regarding the French joint liability in case of recourse to illegal work is the fact that this liability scheme demands a special effort from the part of the control agents (e.g. informing and advising the workers concerned), who are however under huge time and target pressure. These agents therefore do

only what is necessary to authorise the French social security institution and the Inland Revenue to recover the evaded sums from an undertaking established in France and therefore easy to pursue (compared to the foreign subcontractor). According to the author of the French Report, the most important obstacle to the protection of posted workers' rights is indeed this lack of information and assistance as regards the foreign workers. Furthermore, in the opinion of some labour inspectors it would be better if the sanctions imposed on illegal work were not only of a criminal nature (criminal offences), but also of an administrative nature; since administrative sanctions in the form of fines are much more direct (by comparison to lengthy and uncertain criminal proceedings) and therefore more efficient.

In the joint opinion of the Italian social partners (unions and employers), the less known undertakings usually escape the controls; these undertakings frequently change their names, use fictitious locations and formally employ only two or three workers but are actually using many more. The inspection system is generally considered ineffective and this promotes elusive practices and the use of illegal labour. The competent inspection authorities act against foreign undertakings posting workers in Italy on the basis of their normal powers. The inspection activity is obstructed by the lack of clear rules on keeping social documents by the contractor providing services from another Member State (see above). The Italian rules on social documents are not applicable to undertakings established in other Member States. The act implementing the Posting of Workers Directive does not oblige the service provider to designate a representative, or to hold and keep social documents in Italy (except the E101 (now A1) form). Also the "fragmentation" and volatility of undertakings involved in the chain hinders the inspection activity, as it often does not allow inspection bodies to easily identify the persons responsible for the workers. There are no adequate means to counteract non-cooperative behaviour of employers: the penalties for failure in delivering all the documents are clearly not sufficient. The inspection activity is also frequently hampered by the evasiveness and/or incomplete statements of the workers themselves in case of inspection. Finally, as regards the payment of wages, the application in practice of the "warning assessment act" is interesting. In case of non- or partial fulfilment of wage obligations by the employer, the Italian inspectors can adopt the "warning assessment act". The law identifies the employer as the only recipient of the act. Nevertheless, the Ministry for Labour has recently instructed the inspectors to also notify the jointly liable client/contractor – in order to facilitate and promote the posted workers' action against the client/contractor established in Italy. The adoption of this act by the inspector, however, is not always easy in cross-border situations. Not only because the very legitimacy of the adoption of the act against the guarantor is doubtful, but mainly because the inspectors have difficulties with the legitimacy requirements prescribed by law (it is hard to exactly value the outstanding amounts). It is also uncertain whether the warning act can be adopted against both employers involved in an unlawful contract, on the basis of the joint liability.

In Ireland the inspection and enforcement process by the Labour Inspectorate NERA (which may ultimately end up in the courts) was assessed as relatively slow and cumbersome; this is of particular relevance in terms of NERA's utility to cross-border workers, who are in the country for only a short period. NERA has not put in place any particular monitoring and enforcement procedures for such workers. Information sharing and joint investigations by State agencies are seen as important advances in securing better compliance rates. The inspection system was also assessed quite negatively in the United Kingdom, especially the fact that the rules are enforced by several (i.e. five main) employment inspectorates, with a lack of cooperating and information sharing. According to some actors there is an overwhelming need for a single labour inspectorate that is independent, has a clear enforcement role and is focused on the protection of workers' rights (see also Chapter 4-III A).

Procedural issues (initiative, trade unions' assistance, sanctions)

In Chapter 4-III A, the procedural difficulties were already highlighted. Here, we focus on the opinion of the relevant stakeholders in the selected countries on this subject. As a result of several (procedural) features of the enforcement systems, the rules on the protection of workers' rights in subcontracting processes are,

especially in cross-border situations, not efficient. These problems in cross-border situations, which will be elaborated upon below, may be outlined as follows:

Underpaid workers do not stand up for their rights, because:

- a. The foreign workers do not protest against wages and other employment conditions below the mandatory (minimum) level, because it is still better than what they receive in their own country.
- b. Lack of information (of the foreign workers) regarding:
 - their rights;
 - the identity of the liable (principal) contractor.Often this problems stems from the non-availability of the information in the language of the workers concerned.
- c. The foreign workers themselves must litigate by civil law and they are reluctant or unable to start proceedings, because:
 - of fear to lose their employment, and/or their housing, and/or of fear of deportation;
 - they are no longer in the country.
- d. The foreign workers have no 'trade union consciousness', nor do they belong to the target group of the trade unions in the Member State concerned.

All interviewees in the Netherlands (especially the trade unions) deem many rules that aim at the protection of workers' rights in subcontracting ineffective in cross-border situations, since the foreign workers do not know their rights or do not dare to claim them, since they fear the loss of their jobs, their housing etc. In that respect, Directive 2009/52 could be a helpful instrument, although only with regard to illegally staying third country nationals. Under this Directive, the Netherlands have to ensure that the employer (and, if the employer is a subcontractor, under certain conditions also the principal contractor and intermediate contractors) is liable to pay the applicable CLA wage (normally higher than the statutory minimum wage). Furthermore, it obliges the Netherlands to systematically and objectively inform these workers on the possibility to institute an action to recover wages, including in cases in which they have (been) returned. Currently, the payment in conformity with the CLA (or on market terms) is a matter of private law between the trade unions and employers or employee and between employers themselves.

The same applies to the Italian instrument of several and joint liability (for wages, social fund payments and social security contributions) in cross-border situations. The posted workers from the East European countries (where labour costs are significantly lower than in Italy) feel privileged to work in Italy and do not want to cause trouble to their employer or the Italian client. In the opinion of the trade unions, these posted workers have no knowledge of existing instruments and rules and have no trade union consciousness either. Even when they are contacted by the union, they refuse to act against both the employer and the jointly liable contractor. Considering this, it is clear that even the adoption of the "warning assessment act" does not change the situation, also because, at the end of inspections, posted workers have often already returned to their home country.

According to French law, posted workers are supposed to be advised by the labour inspection and accompanied by trade unions. However, in practice many trade unions do not engage any action at all in favour of posted workers. Almost all stakeholders (especially the labour inspectors) agree that the joint liability (joint liability in case of recourse to illegal work) is difficult to put in operation for the benefit of workers in general and posted workers in particular. Most of them consider the new rules on the protection of illegal workers (employed without a work permit), which do not require a court action, a positive development (see also Chapter 4-III A).

The stakeholders in other countries are more positive.

In Norway, broadly speaking, actors consider that the joint and several liability rules (of the GAA) have worked effectively, notwithstanding the fact that these rules do not fall within the competence of the

Labour Inspection Authority, but have to be enforced by the individual workers. According to local trade unions positive results are achieved when workers' claims are pursued, without a necessity to instigate legal proceedings. Some trade unions have been active in supervising wage issues for foreign workers and acting in support to invoke the joint and several liability. Although the Polish trade unions have no competences to influence the selection of a subcontractor, their powers do include the constant cooperation with the Labour Inspectorate ("PIP") and a possibility to notify any infringements of employment rights – which competence is often exercised by the trade unions. Finally it should be noted that in the United Kingdom, apart from employment inspectorates and social partners, NGOs play an important role in the protection of workers' rights as well. Especially the London Living Wage Campaign should be lauded for the way they have protected workers' rights. The work done was with those migrant workers who are in some of the poorest paid jobs. The central objective of the campaign has been to work with those who are on the minimum or less and not to undermine existing collective agreements. The London living wage is now extensively applied, dependent on and at the same time improving on the legal minimum wage.

Circumvention of the liability rules (bogus self-employment etc)

The rules on the protection of workers' rights can be circumvented in several ways, for instance by presenting workers as "self-employed persons" (bogus self-employment), the qualification of the contract etc. The opinion of the stakeholders on this subject is presented below.

In Ireland, there is general agreement that new rules and procedures aimed at cracking down on bogus self-employment and the hidden economy are welcome and have had a positive impact. The increase in "black economy" activity (particularly in "cash-based" sectors, like construction or security) in the context of the economic downturn, is regarded as another threat to the enforcement of the rules. Measures have been taken, such as the development of the Code of Practice on employment status (see below), the strengthening of the RCT system (Relevant Contracts Tax) and the establishment of JIUs (Joint Investigation Units), which contribute to more effective enforcement of the rules, particularly in combating bogus self-employment. Whilst Irish law maintains a strict dichotomy between 'employed' and 'self-employed' status, informants noted that the relevant authorities – for instance Revenue and, particularly, the courts and tribunals – are willing to "look behind" the legal form of the relationship to establish its substance. The Code of Practice on employment status agreed by the social partners (one of the measures to combat bogus subcontracting) is seen by most national informants – especially the representatives of small and medium enterprises (SMEs) – as an extremely useful, practical tool. Most of the Irish stakeholders were of the view that the strengthened Code of Practice on employment status has been of benefit in helping (sub)contractors to correctly determine their true employment (and therefore taxation) status.

The stakeholders in the United Kingdom stress that the legal status of a 'worker' needs to be clarified from the outset of the contract, if deductions from wages or holiday pay are to be claimed. Workers need to know from the start how the contractor regards their status and need to be aware how this affects their right to claim deductions from wages etc. UK law already provides that within eight weeks of the start of the contract, an employee must be given a written statement of terms and conditions of employment. These provisions could be extended, so that all persons contracting to do any work, must be given a statement by the hirer/employer, indicating whether the relationship between them is as an employee, worker, or self-employed person. Prescribed information in the statement could also state which types of rights are available to each type of worker.

An important issue (as case law evidences) regarding the Italian instrument of several and joint liability (for wages, social fund payments and social security contributions), is the qualification of the contract: according to the letter of the provision, the application of the joint and several liability is limited to contracts (an "*appalto*" under Italian law). Both inspectors and trade unionists note that the existing rules are inapplicable when the service is not provided under a contract ("*appalto*"). For instance, in the

transport sector the law is less effective, because many contractual relations with transport companies are not formalised as contracts.

Finally, we turn to the Swedish situation. The rules on the trade unions' right to negotiate/veto only apply if the employer and the trade union are bound by a collective agreement that covers the work to be performed. This not only constitutes a problem in cross-border situations (see Chapter 4-II A), but is also a growing problem due to the emergence of new forms of business organisations. For instance, procurement through construction management companies: these companies have no building workers of their own employed and are consequently not bound by collective agreements for construction work, which means that the veto rules are not applicable.

Protection of subcontractors

Irish employer informants argue that the best way to protect workers' rights in subcontracting chains is to protect the employer subcontractor. In that respect it might be interesting to note that in Italy legislation has been published (the Construction Contracts Bill 2010) attempting to improve dispute resolution procedures where (sub)contractors' payments are delayed or denied (thus protecting subcontractors) in the construction sector. Similar measures for other sectors are under discussion.

Social clauses – public procurement

In Italy, social clauses are considered indispensable measures to prevent undertakings which do not comply with collective agreements from being favoured in the award of public contracts. This aim is pursued through the obligations settled down both by Act 300/70 (*Statuto dei lavoratori*) and by the Code on Public Contracts. Their widespread use shows that the social partners consider them necessary to prevent strategies of dumping (especially by cooperatives) through subcontracting chains, and to ensure employment. However, this does not imply that these kind of clauses have a high degree of effectiveness: it is limited by the purely "private" nature of the obligations based on the social clauses, which cannot be enforced if they are not translated correctly in the contract. The effectiveness of this mechanism is further limited by the extreme chaos and the anomalies in the Italian industrial relation system, which makes the coexistence of different collective agreements in the same sector possible. The Luxembourg Labour Inspectorate (ITM) suggested the adoption of rules for the protection of employees in public procurements as one of the possible measures to specifically protect employees at the end of a subcontracting chain.

In Poland, there are interpretation difficulties as regards public procurement law. It is unclear how such notions as "act of unfair competition", "the most advantageous tender", or "abnormally low price" must be interpreted. For instance: a Chinese overseas engineering group won the tender for constructing the A2 motorway by submitting a bid for 51% less than the maximum price. The competent Appeal Chamber did not consider this to be an abnormally low price (and consequently held that there was no basis for the rejection of the Chinese bid). The difficulties of awarding entities with establishing whether a given price is abnormally low, prompted the Polish government to submit a request on 15 April 2011 to the European Commission for defining "abnormally low price".

According to the author of the Polish report, the objective of protecting workers rights in subcontracting chains should in the first place be achieved by improving the application of the current legislation. In the legal regulations harmonising public procurement procedures, the criteria enabling to verify the credibility of the creditor(s) already at the selection stage should be introduced. Similar criteria should be applied when approving individual subcontractors. Finally, when interpreting 'the abnormally low price' of a bid, the amounts of at least minimum remuneration should be taken into account.

Chapter 5 Conclusions and recommendations

Within this chapter, recommendations are made with regard to the ways and means to ensure and/or improve the protection of the employment conditions of workers in subcontracting processes, including in cross-border situations, as well as with regard to the formulation of relevant mechanisms. In this context, we try to draw some general conclusions about the desirability of installing a European mechanism of joint and several liability. However, we first provide a schematic overview, which is based on findings from the preceding chapters. In this regard we should start by making a disclaimer: since the complexity of joint and several liability mechanisms cannot easily be represented in a matrix, the analogue answers to several questions have been reduced to digital ones. In this respect, a ‘yes’ often means ‘yes (but)’. This should be kept in mind when considering the results in the matrix.

I. A schematic overview

A. Joint and several liability mechanisms for labour conditions: a widespread phenomenon in the European Union?

Looking at all countries investigated, we can notice that only seven Member States and Norway have implemented more or less elaborated system of general joint and several liability for certain aspects *related to wages and/or labour conditions* in their legal system.¹²⁹ It would therefore be erroneous to state that general joint and several liability systems are widespread around the European Union.

	Wages	Publ. Proc.	Tax on wages	Social funds	Social Security contributions
AT	Y	Y	Y	Y	Y
DE	Y	Y	Y	Y	Y
ES	Y	Y	Y	Y	Y
FI	Y ¹³⁰	Y	Y	Y	
FR	Y ¹³¹		Y ¹³²	Y ¹³³	Y ¹³⁴
IT	Y	Y	Y	Y	Y
NL	Y	N	Y	Y	Y
NO	Y	Y	N	N	N

These systems vary considerably from country to country. Indeed, even if some mechanisms of joint and several liability do show similarities (e.g. the liability mechanisms for taxes on wages and social security contributions in Austria, Belgium and Germany), they remain *significantly different* in terms of scope, amount, possibilities for exemption of liability and actual implementation.

There is practically no Member State with a general, widespread mechanism of joint and several liability. Spain and Italy could be regarded as exceptions to this rule. However, this is mainly so in theory, since the

¹²⁹ In due course in Belgium a system of joint and several liability for wages will be introduced. The system is introduced in the new Program Act which will be accepted and published in the forthcoming weeks. Belgium already has a system of joint and several liability installed with respect to public procurement, tax on wages, social funds and social security contributions.

¹³⁰ This is not a ‘real’ liability system, but a reliability checking mechanism, sanctioned with fines, see Chapter 3-V.

¹³¹ Only regarding illegal employment/undeclared work, see Chapter 2-IV A

¹³² Only regarding illegal employment/undeclared work, see Chapter 2-IV A

¹³³ Only regarding illegal employment/undeclared work, see Chapter 2-IV A

¹³⁴ Only regarding illegal employment/undeclared work, see Chapter 2-IV A

joint and several liability mechanisms are either widely applicable in theory but not so in practice, or are put in practice only in rare cases. The Italian report e.g. points out the reasons for the relative ineffectiveness of the general Italian scheme, such as the lack of clarity of the provisions which leads to substantial doubts about its applicability in cross-border situations, the difficulties in ensuring the enforcement of existing instruments and also the lack of knowledge of the rules.

In some fields of labour law, liability mechanisms are more common and widespread than in others. Amongst those fields are occupational health and safety, the employment of illegally staying third country nationals and to some extent the domain of public procurement. The significantly higher prevalence of liability mechanisms in these fields throughout all states can easily be explained either by their nature (e.g. occupational health and safety, public procurement and temporary agency work) or by the fact that a European Directive explicitly provides for such a mechanism (e.g. the employment of illegally staying third country nationals).¹³⁵

B. Occupational health and safety

At least 17 Member States have some form of a liability mechanism in the field of occupational health and safety. This can be explained by both history and the nature of occupational health and safety, and by the fact that it calls for specific measures with regard to inspection and enforcement. Joint and several liability mechanisms play a key role in this respect. Moreover, compliance with occupational health and safety regulations is significantly easier to control and inspect than, for instance, compliance with regulations regarding minimum wages.

	Health & Safety
AT	N ^{/Y}
BE	Y
BG	Y
CZ	Y
EE	Y
EL	Y
ES	Y
FI	Y
FR	Y
IE	Y
IT	Y
LV	Y
NL	Y
PT	Y
RO	Y ^{/N}
SI	Y
SK	Y

In many countries (see e.g. Ireland, Slovenia, Sweden etc) these provisions do not only aim to protect the employees of the subcontractors who are active on the site, but also any other person working at the same place, regardless of the contractual status this person has with the contractor. Consequently, (bogus) self-

¹³⁵ And, to some extent, occupational health and safety.

employed people will often be covered as well. In the majority of Member States, the regulations with regard to occupational health and safety provide specific and stringent rules for both the user undertaking hiring a temporary agency worker as well as for the temporary work agency.

Needless to say that liability mechanisms in the field of occupational health and safety are influenced by Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). Nevertheless, *significant differences* remain. In some countries, the liability will only be limited, while in others the liability will run through the whole chain. In some Member States, liability in the field of occupational health and safety can be limited, while in others it cannot.

One should not forget that, in most Member States, violations of occupational health and safety regulations resulting in the injury or death of an employee or another person will give rise to criminal prosecution and invoke liability mechanisms that are typical within the field of criminal law. In Belgium, for instance, there is no absolute certainty about the possibility for the various (sub)contractors to limit their liability by exoneration clauses in the contracts. However, it is clear that it is impossible to limit criminal liability in case of negligence or fault, in which case those considered aiders or abettors to this negligence or fault will be held jointly and severally liable for the damage caused.

Because of the specific character of occupational health and safety matters, the field of occupational health and safety cannot be considered representative for other issues in the field of subcontracting and social law and it should at all times be treated separately.

C. Illegal Employment

Another particular sector is the employment of illegally staying third country nationals, particularly as EU Directive 2009/52/EC explicitly provides for a system of joint and several liability for the client for the wages of employees illegally employed by his subcontractor.¹³⁶ However, a considerable number of countries have not yet implemented this directive into their national legislation.¹³⁷ Some of these countries provide for other provisions that deal with the situation of the employment of illegal third country nationals. In Belgium, e.g. the rules on the LIMOSA notification system do not imply a joint and several liability for the wages of the illegal employees of the subcontractor. However, the regulation does provide for a criminal liability for the client of the contractor who did not comply with the LIMOSA regulations.¹³⁸

¹³⁶ Article 8 of Directive 2009/52/EC of 18 June 2009 of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/30.

¹³⁷ This directive should have been implemented by 20 July 2011. In several countries the process for implementation is still running, while others know a considerable delay which has led to the starting of proceedings by the Commission against three Member States (Belgium, Luxembourg and Sweden).

¹³⁸ This legislation was not introduced with the intention to control the employment of third country nationals, but has as its objective to be a system for registration of foreign employees temporarily working in Belgium. This should allow inspection services to perform the necessary controls.

	Illegal Employment.
AT	Y
BE	Y ¹³⁹ (LIMOSA)
BG	N
CZ	Y
DE	Y
DK	Y
EE	N
EL	N
ES	Y
iR	Y
HU	N
IE	N
IT	N
LT	N
LU	N
LV	N
MT	N
NL	Y
NO	N
PT	N
RO	N
SE	N
SI	N
SK	N ^(y 140)
UK	N

In the Netherlands, according to Article 2 of the Foreign Nationals Employment Act employers need a work permit for workers from third countries. According to the WAV not only the direct employer, but also the user firm or principal contractor are liable for employing a foreigner without a work permit. Moreover, the foreigner concerned may initiate a wage claim if he is not paid correctly. Furthermore, according to this article, if an employer has a foreign national perform work without a work permit, the foreign national is assumed to have worked for at least 6 months for that employer. Because of the broad definition of 'employer' in the WAV, this presumption of law can be invoked against the direct employer, as well as the user firm, the principal contractor, and every other private person or legal entity who actually employs a foreign national in the Netherlands.

In its Article 8 (3), Directive 2009/52/EC explicitly provides that a contractor that has undertaken due diligence obligations as defined by national law shall not be liable. It has to be noticed that this provision has hardly been transposed in the Member States. Apart from the fact that already more than 8 months after the final date for implementation, still a considerable number of countries have not yet transposed

¹³⁹ As such only related until now to the notification of the presence of third country nationals on the Belgian territory. This should allow to control if third country nationals are legally present in Belgium.

¹⁴⁰ Only for non EU-countries

this directive,¹⁴¹ several other countries just literally reproduce or plan to reproduce the text of the Directive without further specification and do not define due diligence (Slovenia, Greece, Estonia etc). Only a few countries foresee special provisions. In Finland it is foreseen that a (sub)contractor will not be liable for an infringement of the prohibition if the residence permit or another document granting the residence was false, unless the employer knew that these documents were a forgery. Similarly, in the Netherlands a fine will not be imposed if the employer is not culpable as he or she justly relied on false information. Using a NEN-certified firm will lead to a moderation of the penalty. Germany implemented this provision on a one-to-one basis according to which the particular requirements of due diligence depend on investigating the overall circumstances of the individual case and where the relevant circumstances may differ depending on the sector. Employers can exculpate themselves by proving that due to a thorough inquiry they were able to assume that the employer was not employing illegal workers. A similar provision can be found in the UK according to which the employer is excused by showing that he complied with any prescribed requirements, as well as in Austria, where the contractor has to call on the subcontractor to provide necessary permissions for the employed foreigners such as work permits. If the contractor has the permission from the subcontractor or has informed the coordination body of the fact that the subcontractor did not provide the permissions, he is not liable.

The employment of illegally staying third country nationals and measures in the field of occupational health and safety have in common that they are both severely sanctioned under criminal law and that their qualification as matters of public order is not really disputed.

D. The legal nature of the provisions

We observed huge differences in the legal nature of the provisions: some provisions are laid down in acts and others in collective labour law agreements. Even in Member States where the provisions are laid down in acts, *significant differences* remain, e.g. with regard to the legal scope or nature: e.g. some provisions are part of a labour code, whereas others are part of special acts.

¹⁴¹ This directive should have been implemented by 20 July 2011. In several countries the process for implementation is still running, while others know a considerable delay which has led to the starting of proceedings by the Commission against three Member States (Belgium, Luxembourg and Sweden).

Statutorily				
	Wages	Health & Safety	Publ. Proc.	Illegal Employm.
AT	Y		Y	Y
BE		Y	Y	Y (LIMOSA)
BG	N	Y	N	N
CZ	N	Y	N	Y
DE	Y	Y ¹⁴²	Y	Y
EE	N	Y	N	N
EL	Y	Y	N	N
ES	Y	Y	Y	Y
FR		Y		Y
IE		Y	N	
IT	Y	Y	Y	
NL	N/Y ¹⁴³	Y		Y
NO	Y	N	Y	N

A significant number of joint and several liability mechanisms are laid down in collective labour agreements. In some cases, these provisions and agreements are linked to an act.

CLAs				
	Wages	Health & Safety	Publ. Proc.	Illegal Employm.
BE	under debate			
BG	N	Y	N	N
CZ	N	N	N	N
EE	N	N	N	N
EL	Y			
FI	Y			
NL	Y	Y	N	N

In Belgium, there is a recent ongoing debate about the introduction of a joint and several liability mechanism in both the construction and the meat industries. The main points of discussion are the nature of the liability (direct or chain), the means of control and due diligence obligations and exoneration and the question if the measures proposed will be in accordance to the Acquis Communautaire. Not in the least, opponents of the systems proposed argue that the system will not be effective against organised forms of (cross-border) social fraud. Here as well huge differences can be found.

In Greece, where just as in other EU Member States, there is no general legal framework on joint and several liability for the protection of workers' rights in subcontracting, an interesting mechanism is the liability mechanism in respect of health and safety in the shipbuilding industry where the obligations for the

¹⁴² Limited to the payment of contributions to the accident insurance in the construction sector.

¹⁴³ No general statutory wage liability, only in case of temporary agency workers regarding minimum wages and in case of illegal employment (see Chapter 2-IV B and Chapter 3-II).

project principal (shipowner or person who orders a shipbuilding or ship repairing work) are limited when dealing with one contractor, but are widened in case more (sub)contractors are involved leading to several additional responsibilities.¹⁴⁴

Moreover, seven Member States (DK, FI, IE, IT, NL, NO, UK) are familiar with so-called ‘social clauses’ in collective labour agreements that indirectly try to protect the employees from subcontractors. These social clauses often oblige a subcontractor to comply with the sector’s national collective agreement regarding the terms and conditions of employment. Some national reports (e.g. Italy) state that, although these social clauses are considered indispensable measures, the social clauses are not always as effective, as CLAs are sometimes easily circumvented. The extreme chaos and anomia of the Italian industrial system makes the coexistence of different collective agreements in the same sector possible and thus often provides undertakings the freedom to apply a collective agreement of a different sector than its own or even to conclude a customised CLA. There is also such a thing as “pirate” agreements, signed by organisations without representativeness which, however, are fully valid and enforceable. The subcontracting chains then become a tool to reduce labour costs, by outsourcing the business to undertakings or (especially in the context of labour intensive services) to cooperative companies that are non-members of the most representative employers’ organisations, which determines phenomena of dumping internal to national market.

E. A limited scope?

As mentioned before, a lot of differences can also be found in the limitations of the scope or field of application of the provisions enacting a joint and several liability mechanism. Special provisions are mostly provided for the *construction sector* and the *temporary agency work sector*, although one cannot say this is always the case. Remarkably, but not surprisingly, even Spain, one of the few countries to have a general mechanism of joint and several liability implemented, reports that some of the rules on joint and several liability have a scope limited to certain sectors.

	Limited to certain sectors			
	Wages	Health & Safety	Publ. Proc.	Illegal Employ.
AT	N		N	N
BE		N	N	
DE	Y ¹⁴⁵	Y ¹⁴⁶	Y	Y
EL	Y	Y		
ES	Y	Y	Y	Y
FI	Y			
IE		N	N	
IT	N	N	N	
NL	Y	N		N
NO	Y	N	N	N

¹⁴⁴ See for more information on how this liability functions and how it is widened in function of the number of subcontractors involved, Chapter 3-IV B (under ‘some additional measures’), p. 74.

¹⁴⁵ Extensive list of sectors.

¹⁴⁶ Limited to the payment of contributions to the accident insurance in the construction sector.

F. Direct versus chain liability

Liability mechanisms might not only be limited to certain sectors of industries, the number of parties involved might also differ. In some countries liability is limited to the respective contract partner, i.e. the direct contractor of the subcontractor, while in other countries there is a real chain liability system according to which the liability runs down to the entire chain and a contractor becomes liable for even the employees of the subcontractors of its subcontractor.

Direct liability mechanisms can be found in different fields in different Member States:

	Direct Contract Partner			
	Wages	Health & Safety	Publ. Proc.	Illegal Employem.
AT	Y		Y	Y
BE		Y	Y	Y
BG	Y	Y	Y	Y
CZ	N	Y	N	Y
DE	Y	Y ¹⁴⁷	Y ¹⁴⁸	Y
EE	N	Y	N	N
EL	Y	Y		
ES	Y	Y	Y	Y
FI	Y			
FR				Y
IE		Y	Y	
IT	Y	Y	Y	
NL	Y	Y		Y
NO	Y	N	N	N

Mechanisms of direct liability do not preclude mechanisms of chain liability in the same Member State.

	Entire chain			
	Wages	Health & Safety	Publ. Proc.	Illegal Employem.
AT	N		N	N
DE	Y	N	Y ¹⁴⁹	Y
EE		Y		
EL	N	Y		
ES	Y	N	Y	Y
IT	Y	Y	Y	
NL		Y		Y

¹⁴⁷ Only with respect to the duty to establish occupational safety.

¹⁴⁸ As such there is no direct liability of the principal contractor for wages, tax on wages, social funds or social security contributions in the contractor chain. Other sanctions will apply as contractual penalties, termination of the contract without notice or exclusion from future public contracts.

¹⁴⁹ As such there is no direct liability of the principal contractor for wages, tax on wages, social funds or social security contributions in the contractor chain. Other sanctions will apply as contractual penalties, termination of the contract without notice or exclusion from future public contracts.

G. Possibilities to exclude liability

Although the possibility to exclude liability may be seen as a contradiction to its purposes, for instance in Belgium,¹⁵⁰ in some Member States (e.g. DE, NL) it is a common tool, especially in mechanisms that apply a chain liability, but mostly with respect to tax debts or social security contributions. In the Netherlands, the liability of user firms regarding the minimum wage does not apply in case the user firm makes use of a certificated TWA. In Germany, some systems provide for the possibility to exempt oneself from the liability obligations. Liability for social security contributions is, for instance, exempted if the contractor can prove that he or she could assume without own fault that the subcontractor was able to honour his payment obligation. This is the case if the contractor can prove a pre-qualification, which is a pre-emptive, non-commission-related inspection of proof of suitability. A similar system also exists for the minimum wage liability, dealing with the holiday fund contributions. Another possibility of exemption under the social security contributions liability is the submission of a clearance certificate issued by the Inland Revenue Office. Also the liability in the implementation of the Sanctions Directive provides for possibilities of exemption in Germany. This is the case when the contractor was not aware of the fact that a particular employer in the liability chain employed aliens without the necessary authorisation, as well when the contractors can prove that, due to a thorough inquiry, they were able to assume that the employer did not employ alien workers without the work permit. In Italy, the main preventive tool to control wages and social security obligations of contractors and subcontractors is the DURC (Single Insurance Contribution Pay Certificate), issued by social security institutions and (in the building sector) by construction funds. It attests the occurred payment of social security contributions, and (in the building sector) to construction funds. Also in Spain similar systems apply where the client and contractors in the chain are not responsible (jointly and severally liable) for social security debts of a subcontractor in case they did the required checks (i.e. request (monthly) a certificate of the Social Security Treasury).

	Exclude liability			
	Wages	Health & Safety	Publ. Proc.	Illegal Employm.
AT		Y		Y
BE	under debate	discussion		Y
DE	N	Y ¹⁵¹	N	Y
EE	N	Y	N	N
EL	N	N	N	N
ES	N	N	N	N
FI	Y			
IT	N	N	N	
NL	Y ¹⁵²	Y		Y
NO	N	n.a.	N	n.a.

However, even though most countries cited in the list above do not provide means to limit or exclude liability – certainly with respect to minimum wages - one should not forget that in practice it is sometimes

¹⁵⁰ For instance, the occupational health and safety regulations in Belgium leave room for discussion on whether they can be considered to establish a chain liability and whether they provide a means to contracting parties to limit or exclude their respective liabilities. It is for the moment subject of great debate with regard to the proposals concerning the construction and meat industries in Belgium: how can a bona fide player on the market check if he is not confronted with a mala fide player somewhere down the chain?

¹⁵¹ With respect to the payment of contributions to the accident insurance.

¹⁵² Regarding the specific minimum wage liability regime for agency work.

very easy to do so. The abuse of a legal entity as an intermediary partner often suffices to render any liability mechanism useless, especially in cross-border situations. Austria seems to be the only Member State who has enacted provisions to counter these problems. While in principle the liability for social security contributions in Austria is restricted to the direct contract partner and there is no chain liability, in two exceptional cases drastic measures can be taken against the principal contractor. The liability includes any further subcontractor of the subcontractor in case the placing of the order is considered to be a transaction that aims at circumventing the liability and that the contractor was aware of, or seriously suspected, based on obvious information, and he or she accepted it. Therefore, the fact that a contractor would interpose a subcontractor in order to escape the liability for a sub-subcontractor who is actually performing the services, does not lead to escaping liability if that contractor would know that this subcontractor does not command any staff or any appropriate resources, or if the placing of order was based on a significantly lower price, and not actually reflected market rates. In the second place, the contractor has to inform the health insurance institutions about his or her subcontractors and the subcontracted construction services. If the contractor does not provide any information he or she is deemed liable in all cases with regard to the subcontracted construction services, and takes the liability for all sub-subcontractors if no information is provided.

H. Conclusion

Joint and several liability mechanisms are *not widespread* throughout the EU Member States and Norway. In seven Member States (AT, DE, ES, FI, FR, IT, NL)¹⁵³ and Norway more or less far-reaching legal (sometimes combined with self-regulatory) mechanisms of liability/responsibility (FI) exist. Apart from FI, these are particular joint and several liability schemes concerning the clients/main contractors/user companies. *Only two* of those Member States have installed generally applicable rules on joint and several liability (ES, IT). However, in these two Member States, there tends to be a huge gap between theory and practice, i.e. between provisions in force and the *actual application* of those provisions.

Thirteen countries have exclusive arrangements in place for the construction sector, often linked to public procurement. Next to this, certain countries have some equivalents or alternative measures in place. The reports have, however, demonstrated that not all of these measures are always effective *instead of* joint and several liability, such as co-decision rights of trade unions, social clauses, limitation of the subcontracting chain, information obligations aiming at protecting - often indirectly - the employees of subcontractors.

A typical example of such an alternative information measure aimed at facilitating and making monitoring and inspection possible, is the growing use of notification schemes that now run the majority (18) Member States for cross-border service providers who post workers to their territories allowing the competent authorities to be aware of the presence of posted workers on their territory and to effectively monitor control. The Belgian notification system for registration of foreign employees temporarily working in Belgium (LIMOSA) knows some elaborated mechanism. Here, a multilevel responsibility is applicable, so that every end user and client is responsible for supervising the compliance with the registration obligation for all posted workers of all subcontractors in every level of the subcontracting. Since the LIMOSA system is extremely user-friendly, all parties involved that can be held liable can easily check if the LIMOSA obligations have been met.

The Nordic countries particularly stand out in giving an important role to trade unions. In Sweden, for example, according to the Co-Determination Act, trade unions have obtained a preventive tool through the right to negotiate and to ultimately veto the employer's plan to engage a certain (dishonest) contractor (on

¹⁵³ In Belgium, a joint and several liability system is in preparation for certain sectors, but not yet implemented, see above under Chapter 2-III A.

the condition that they are both bound by the same applicable CLA), although practice shows that trade unions hardly use the right of veto, which does not exclude the employer having to start negotiations. In Finland, when work is contracted out, also to a foreign subcontractor, the client has an obligation to gather certain evidence proving the reliability of a candidate (sub)contractor or temporary work agency, before concluding a contract with them. This reliability check is limited to for labour law gathering information on the applicable collective agreement, to social security and to fiscal law. Also here it is however mentioned that compliance with these obligations shows some deficiencies and is hard to supervise. In addition, the liability is limited to the contracting partner and not throughout the chain. Other countries apply social clauses, either outside (IT, NL) and/or within the context of public procurement (AT, BE, DE, EL, IT). On the other hand, the Dutch TWA sector clearly shows that soft law measures and self-regulation are ineffective when it comes to preventing mala fide players who circumvent mandatory rules.

II. Some general conclusions and recommendations

A. The reasons why the introduction of a system of joint and several liability for the protection of workers' rights and to fight unfair competition is called for

As became clear in the preceding chapters, the question of the installation of joint and several liability systems in the fight against fraudulent constructions has gained growing attention the last few years. Several cases of mala fide contractors and abuse in subcontracting chains leading to labour in inhuman circumstances strengthen the call for better enforcement mechanisms that could avoid situations of social dumping.

During the last years, the pan-European labour market has witnessed some fundamental changes, in particular characterised by growing flexibility and fragmentation. Outsourcing and subcontracting have taken up a key role and it is hard to imagine such economic processes being reversed. Subcontractors are nowadays common on large projects across industries. Furthermore, employers may have sound reasons for outsourcing some of their activities, e.g. the search for specialised personnel, rationalising some of their costs and cost efficiency, flexibility, etc.

In addition to the benefits, however, this growing phenomenon constitutes new challenges. The heterogeneous mosaic of subcontractors takes part in different structures, systems and components at a business site. Often, a fragmentation of the economy is the consequence of this evolution. As a result, one can see a multiplication of micro-undertakings ("dwarfism") and often one can observe bogus self-employment and bogus subcontracting proliferating. It is clear that subcontracting and outsourcing cannot be tolerated in those cases where they would lead to a circumvention of stringent legal provisions.

Although the legal situation of cross-border posted workers may have become more clear since the introduction of the Posting Directive 96/71/EC, the lack of efficient (cross-border) enforcement mechanisms and other flanking measures in this Directive as well as the fact that this Directive does not dictate any execution of punitive sanctions to the Member States, is seen as problematic.

Problems are encountered in all phases of control and from inspection up till conviction. One of the main deficiencies of current systems for the protection of workers' rights (specifically in cross-border situations) and combating (cross-border) social fraud is related to its enforcement and the lack of specific provisions on cross-border controlling and inspection activities and the lack of cooperation between foreign inspection services. Many countries reported that existing inspection and enforcement instruments and competences (apart from having an uncertain legal foundation) are not sufficient and do not permit an effective control and enforcement, especially when the foreign employer does not cooperate and the workers themselves do not provide any relevant information due to language issues or because they do not

dare, do not want or are not able (for instance, because they have already left the country) to do so. Consequently, one of the biggest needs felt is a further optimisation in the field of administrative and legal (cross-border) assistance and cooperation. For instance, in Belgium, both employers' and employees' organisations, as well as administrative, judicial and inspection services unanimously promoted the strengthening of inspection services e.g. by providing them the means to perform more inspections and to do so more efficiently in order to monitor compliance. All stakeholders agree that this specifically includes taking measures in order to facilitate cross-border cooperation between Member States in the fight against organised social fraud. One of the employers' organisations of the construction sector in particular stressed the need for the restoration of a level playing field in the sector which is under extreme stress due to unfair competition by mala fide players on the market who are making abuse of the freedom of services and of the fact that inspection and enforcement services are not provided the means and lack the legal tools to adequately fight these phenomena which, as a result of the massive unfair competition and social dumping, threaten to result in a situation of utter market failure.

The cooperation between different Member States' competent administrative, inspection, enforcement and judicial services is indeed often sluggish or laborious, which leads to difficulties in obtaining results due to problems of cooperation between the services of one Member State (internal, national cooperation), as well as due to problems of cooperation between the services of different Member States (external, international cooperation) and several issues with regard to the exchange of information necessary for the effective inspection and enforcement of mandatory rules and regulations.

Furthermore, while as a result of the free movement of services the need for cross-border cooperation and information exchange between administrative, inspection and enforcement bodies of different Member States drastically increased, these bodies are confronted with the fact that there is no free movement of inspectors or information. For instance, inspection services have no legal competence outside their national territory and therefore have to rely on the cooperation with inspection services in other countries, e.g. for the exchange of information and data.

Furthermore, the swift exchange of information is not only of paramount importance when it comes to inspection and control. In case of infringements or sheer fraud, building a case often brings forward new questions which invoke new requests for information or cooperation. As mentioned before, receiving this input from foreign counterparts or other foreign administrative authorities is often a time-consuming exercise where these services are confronted with several practical issues (e.g. the accurate identification of a natural person during inspections and on site is often difficult and can sometimes only be made until a claim is brought before an employment tribunal). Difficulties also arise when trying to get further information from foreign administrations, since many Member States do not use a unique identifier for natural persons and because of other legal impediments (e.g. what is the legal value of the information exchanged, for instance in light of privacy legislation).

Up until now, the few existing instruments that call for cross-border cooperation do not provide for legally binding terms for the exchange of information and an administrative body of another Member State cannot be sanctioned when it refuses to cooperate. While recently some initiatives were undertaken or implemented (e.g. the IMI system with regard to labour law issues) which do facilitate the exchange of information and considerably shorten the time for replies, combating social fraud asks for a multi-dimensional approach whereby administrative, police, judicial and inspection services all need to take part and cooperate in the field of administrative, social, fiscal, corporate and criminal law both on a national and an international level, since organised cross-border social fraud takes advantage of and flourishes within the gaps of both national and supranational legislation, as well as within the gaps in the legal competence of the different bodies involved.

All reports therefore refer to enforcement issues and strongly plead to strengthen the inspection services and to give them the means to effectively monitor and enforce the legislation in a cross-border situation.

Contemporary cross-border cooperation mostly relies on the goodwill of inspection services or competent administrations. As mentioned before, it can take long before a request for information is answered. Furthermore, the information given is often inadequate or brings about new questions. There is of course no sanction when a foreign institution refuses to cooperate. If bilateral agreements exist, they often cover the aspect of information exchange, but do not deal with the means for the payment of amounts e.g. in respect of remuneration. Moreover, even if an infringement is ascertained, there are significant difficulties in the practical application of sanctions, in particular against employers that neither have relevant activities nor stable interests in the host State. Often, such employers will, in case of inspections, simply cease their activities and disappear.

In several countries the inspection process ends with notifying the foreign company of the criminal acts committed and of the provisions that have not been followed, but the inspection service concerned is not responsible for what happens thereafter. This leads to situations where sanctions, even when the responsible employer is later convicted, are often not enforced or not enforceable, since one has no further control over the sanctions' enforcement in the state of establishment. It is often also mentioned that even when measures were successfully enforced, the sanctions that may be imposed are not always executed. Concerning the criminal sanctions, it is often considered to be very difficult for national authorities to enforce or even prosecute such offences, unless the accused undertaking remains within the jurisdiction and becomes a party in the criminal proceedings. This basically implies that authorities rely on the accused to show up in court, which is quite often unlikely when the subcontracted work has come to an end or certainly when dealing with smaller companies that perform an activity in the country only once.

One of the most important instruments in cross-border prosecution and execution is Council Framework Decision 2005/214/JHA on the mutual recognition of financial penalties. Enforcement in the field of sanctions on labour infringements often appears unsuccessful, in particular as nowadays these types of infringements are increasingly sanctioned by administrative fines – which are often seen as more sufficient compared to lengthy and uncertain criminal proceedings – whilst the Decision predominantly deals with criminal sanctions.

The lack of cross-border enforcement mechanisms leads to substantial difficulties in cross-border cooperation which actually impede prosecution or make prosecution impossible to some extent. This leads us to conclude that strengthening cooperation by means of bilateral or EU initiatives is a necessary tool in the further protection of workers in subcontracting processes. The idea for the introduction of a joint and several liability system is connected to these enforcement problems (cf. *infra*).

We would like to highlight here that even in those countries where a system of joint and several liability does exist, employees from subcontractors often do not enjoy protection. Indeed, it can be noticed that the number of cases dealing with liability are often rare. One of the problems is that there is a clear lack of initiative and willingness to start proceedings on the side of the (cross-border posted) workers involved. Quite often it is indicated that in case of wage dumping, the posted employees concerned do not think of this as adverse, in particular due to the differences in wage levels: a wage below the collectively agreed minimum wage in the host country is still (often even much) higher than the regular wage in their homeland. Consequently, these employees do not feel aggrieved or consider themselves victims of wage dumping. To use the words of an Italian inspector "There is a queue in Romania to come to Italy. Posted workers have no intention to cause trouble to their employer nor to the Italian client". Cases are also rare, as the employees concerned must often litigate by civil law, and because of the imminent loss of their employment there is an understandable lack of willingness, even if a protection against unlawful dismissal exists. Moreover, even if the lawsuit regarding the enforcement of the liability is not directed against their own employer, but rather against the contractor, the employees concerned often realise that the contractor could seek recourse against their employer, so the employees concerned refrain from any action. The worker is often not interested to ask for what is due to him or her, exposing him or herself to the risk of not being able to return to that host country. In subcontracting chains, subcontractors'

employees often prefer maintaining good relations with their employer to the enforcement of mandatory rules in their favour, which is much the same as with an SME subcontractor towards his client. (cf. supra).

It is also noticed that often a kind of perception exists that foreign employees are reluctant to take action in local court systems. Even if access is equal for foreign and local employees, the proceedings will be implemented in a language which is foreign to the posted employee in front of a court that is unknown to him or her. It is true that even in case of failure to pay part of the salary or in case the salary is lower than theoretically guaranteed by the collective agreements and statutory provisions in the home State. Last but not least, litigation is often expensive, even more so in a host Member State with higher minimum wages. This does of course not exclude that the foreign employees may be protected by employees' associations. In some Member States, employees' organisations have a right of action and may represent a worker before the competent courts. These organisations may, in addition, play another important role, i.e. combating the insufficient knowledge of the posted employees' rights and assisting them in bringing their (wage) claims. However, foreign workers temporary working in the country, often do not belong to the target group of the trade unions in the Member State concerned. Furthermore, it is often felt to be very difficult to make reliable legal information which is entirely correct available, e.g. on the internet. Although information might be there, it is often only written in the language of the country concerned. Moreover, although some information brochures and booklets provided by some of the trade unions or workers' funds are translated into the official languages of the sending country, often translations of the relevant legal texts of collective agreements are lacking. It might be added that sometimes even inspection services are reluctant to start a procedure due to the low success that is believed to be obtained at the end (not in the least as enforcement of possible sanctions is far from certain).

B. Arguments pro and contra the introduction of a system of joint and several liability

The possible introduction of a mechanism of joint and several liability at European level must be seen as an instrument in the broader search for the protection of workers in subcontracting processes, closely related to the enforcement issues in the implementation of the Posting Directive.

Although often as such perceived by many, not all employers are opposed to the idea of introducing a system of joint and several liability. However, most employers' organisations argue such mechanisms do have important drawbacks and it is feared they will have a considerable negative impact on economic processes. It must be mentioned that no information could be found in the reports on the development of the subcontracting market following the introduction of joint liability measures.

One of the main critiques often expressed is that by imposing (joint and several) liability mechanisms, the state actually shifts an inspection and enforcement duty to private companies, whereas these companies argue that this is done because inspection services are themselves confronted with obstacles, making it impossible for them to perform these tasks adequately, especially in cross-border situations. This critique is based upon various arguments not devoid of valid ground and needs to be addressed and taken into account. One may indeed not exclude that it is very difficult for a contractor, e.g. an SME who in itself considers subcontracting part of the project to an(other) subcontractor, or a principal contractor to verify whether a subcontractor who is working for him applies the labour conditions. It is true that a principal contractor hardly has the competence or the means to inspect or monitor whether, for instance, the subcontractor pays the correct wages to his employees. The more parties involved in a subcontracting chain, the more difficult it is for a principal contractor to carry out these controls. This is logical since in a big project one cannot always expect all contractors to be aware of all the other contractors involved.

Closely related, there is the question to what extent contractors that do undertake careful control measures might be provided the possibility to limit or exclude their liability. This raises the issue of due diligence, which will be discussed further below. Suffice it to mention here that the situation might be different when the contractors or subcontractors deliberately or knowingly work with subcontractors that

do not apply the mandatory labour conditions. In such situations, in certain countries the possibility to limit liability is not accepted (e.g. Austria). Nevertheless, one should ask the question how due diligence as well as deliberate fraud can be verified and proven in court.

Arguments considered in favour of the introduction of a system of (joint and several) liability relate to the fact that it is believed to have a positive impact on avoiding unfair competition by means of wage dumping, since it is deemed to make contractors more diligent and more careful when choosing subcontractors. It is believed that without such a system compliance with national legislation would be much worse. The principal contractor liability leads to a disciplinary action regarding the selection of potential subcontractors and has a significant preventive effect in this respect, as in order to avoid liability, the main contractors would act in their own self-interest and carefully choose their subcontractors and check up on them in the course of the contractual relationship. This is an important argument in favour, but not easy to verify.

It is clear that the absence of sufficient measures flanking the freedom to provide services has a disruptive effect in many sectors due to unfair competition, in most cases to the detriment of workers' rights. However, it remains highly uncertain that the introduction of a system of joint and several liability, be it a direct or a chain liability system, will in itself restore the level playing field which the majority of employers (the SMEs in particular) claim is so urgently needed. In this respect, the most important problem is of course to find out to what extent a specific regulation or applicable mechanism in a State is also effective, meaning that it fulfils the objectives of this regulation in practice. One might say that an important indication is the level of compliance. Empirically, it is not easy to measure the impact of a joint and several liability system, as the effects are very indirect in nature. The problem is also that quantifiable figures about the effectiveness of national systems of joint and several liability are very rare. In exceptional cases, a country report gives an indication of the amount of money that has been collected through such mechanisms, which is as such not really an indication of its success rate. This is the case in e.g. Germany where statistical data are available with respect to the collection of contributions from the principal contractor for holiday pay funds on the basis of the joint and several liability provision. The last few years, in between 300 and 400 cases a year on average the joint and several liability system was used. Slightly more than half of these cases are usually settled out of court. The holiday pension fund was able to safeguard between 2006-2011 holiday pay fund contributions in the amount of 18.6 million € under these provisions. In practice, the principal contractors are based in Germany and it is mentioned that the cross-border enforcement of domestically obtained titles is considered to be inefficient. Statistics on the enforcement of minimum wages are, however, lacking.

As figures on the application in a national context are lacking, this is certainly the case in a cross-border situation. In this respect, it may not be forgotten that in particular the systems of joint and several liability currently implemented were predominantly developed in a national context and do not explicitly refer to foreign subcontractors, although in some countries (AT, DE, NO) the measures were indeed taken in reaction to the influx of foreign workers. It is unclear to what extent a transposition can be made from a mechanism applicable in a national context to a broader European or international context. One could presume that the effectiveness is even more limited. The same could be said with respect to certain mechanisms implemented in several Member States – often a combination of public and private interventions – notably in the construction sector and the TWA sector, such as audits or certification or monitoring tools in collective agreements or voluntary codes of conduct. Although sometimes leading to positive results in a national context, their applicability and successful implementation in an international context is more doubtful. No report is able to describe the impact of liability mechanisms in the cross-border context.

Needless to say that the information about the effectiveness is therefore mostly based on a lot of subjective elements.

The effectiveness of systems of (joint and several) liability is also determined by the ease with which one can escape its application. An issue which is intrinsically linked to debates about subcontracting processes in this respect relates to what is named “bogus subcontracting”. A crucial issue regarding the protection of workers in subcontracting processes is the correct classification of such workers. Not in the least as often several labour protection measures exclude those people who do not work as an employee bound by a contract of employment, or certain rights and duties are included in the contract of employment that do not apply to contracts for services. Often differing obligations arise under income tax and social security legislation, depending on whether one is classified as an employee or not. Often in the law of torts, the contract of employment has been used to fix the scope of the vicarious liability of employers for the negligent acts of employees conducted in the course of employment. Rules of joint and several liability can therefore relatively easily be avoided via the concept of (bogus) self-employed workers. The phenomenon of bogus self-employment is a very crucial issue and problem and a means of escaping the protective labour law rules. The attractiveness to be able to work with cheaper self-employed persons and as such the option to avoid the minimal social conditions and standards to be complied with in the country of temporary employment, involves the risk of an increase in cross-border bogus self-employment, whereby persons act as an employee, but are registered as a self-employed person. There is a clear tendency that these forms of bogus self-employment have become increasingly sophisticated. By inserting a self-employed or bogus-self-employed construction, one is often in the position to interrupt the chain and to circumvent the liability. Here lies one of the biggest dangers in cross-border subcontracting fraud allowing mala fide subcontractors to avoid the application of minimum protection rules. Presumably, these mala fide contractors could never be caught, but at least the deterrent effect expected from a full chain system of joint and several liability might make getting involved with such contractors less attractive as the incentive to collaborate with them would be less.

An additional argument in favour of the introduction of a system of joint and several liability is that the European Court of Justice has ruled in *Wolff-Müller* (C-60/03) that the German liability scheme for wage payments could be assessed as being in conformity with the free provision of services and (under certain conditions) as a justified measure. Indeed, several parties often argue how difficult it is to control foreign undertakings on their territory as the free movement of services puts restrictions on the extent to which undertakings established in other Member States could be burdened with administrative obligations – made clear in the *Arblade* decision of the European Court of Justice. The introduction of a measure such as joint and several liability seems to be accepted at least in principle by the Court of Justice. In this case, the Court of Justice left it to the national court to determine whether or not the national German measure was apt to ensure attainment of the objective (ensure the protection of the worker) and that it does not go beyond what is necessary in that connection, so that it is proportionate. A few years later the German constitutional court ruled that the provision was in conformity with the German Constitution as it did not infringe the principle of proportionality.¹⁵⁴ According to the German constitutional court these measures contribute to exclude a competition of the cost of wages at the detriment of SMEs, as well as to the fight against unemployment in Germany and to confer a genuine benefit on the workers concerned, which significantly augments their social protection, as it adds another obligator who is jointly liable. Other measures or even a conditional joint and several liability system could not provide the same safeguards. On the other hand, however, in another case that deals with the Belgian scheme of joint liability for tax debts, the Court of Justice found the measure to be disproportionate and thus unjustified (*Commission v Belgium* case (C-433/04)). The difference in outcome in both cases might be explained by, on the one hand, the different assessment of the objective (the measure was based on a general presumption of tax avoidance of fraud) and, on the other hand, the automatic and unconditional manner in which the measure was applied. Thus the question about the conformity of such a measure with the freedom to provide services remains crucial.¹⁵⁵

¹⁵⁴ See BVerfG, Decision from 20 March 2007- 1 BvR 1047/05.

¹⁵⁵ See in more detail, Chapter 2-VI.

Moreover, some stakeholders argue that bona fide national undertakings in particular become the victim of such measures. A question that pops up in this respect is, taking into account that most problems arise when working with foreign subcontractors, if it might be acceptable when introducing a joint and several liability system by means of a European legal instrument to limit such a liability system to foreign (sub)contractors or to apply it only in cross-border situations? This question was not dealt with by the Court of Justice in the Wolff-Müller case. Although the Court held that the protection of workers' rights may justify a restriction to the free movement of services, it leaves it up to the referring court to determine whether this is the case. As we are now dealing with a European measure it will be up to the European Court of Justice to answer this question. Although the EU legislator has an even wider margin of appreciation than the national legislator in finding an overriding reason of general interest (such as the protection of workers' rights) as justification for a possible limitation of the free provision of services, it will have to be further demonstrated if such a measure would be proportionate.

However, it may be put forward that the introduction of such a measure might have considerable economic consequences for bona fide contractors. In particular, SMEs often fear that such measures would lead to high additional administrative and financial obligations and costs¹⁵⁶ added to the growing number of administrative tasks which undertakings are already confronted with. SMEs represent the great majority of enterprises in the EU and often operate as subcontractors (an SME may of course also subcontract part of its work). As SMEs have less financial, administrative and legal capacity than large companies, they would be particularly affected by high levels of bureaucracy and enormous paperwork (e.g. In Italy contractors are required to present 40 documents). Furthermore, for SMEs late payments by clients (as they do not have large financial reserves they may run into problems if payments by main contractors are delayed), as well as late payment due to, as a result of a liability system, contractors that may pay part of the invoice on a blocked account to escape liability can lead to additional and substantial problems, as subcontractors consequently cannot freely make use of a considerable part of their earnings, often making it even harder for those SMEs to comply with regulations (e.g. timely payment of wages). On the other hand, as mentioned above, it is also believed that liability systems can be beneficial for SMEs, since power asymmetries in the client-supplier subcontracting relationship, where SMEs are heavily dependent on their client-contractor, makes them vulnerable to unfair competition, especially in sectors where the level playing field becomes or is distorted (e.g. construction sector in many Member States). In some countries (e.g. France) rules of chain liability are introduced for the benefit of the subcontractors-employers when, in case of insolvency, the contractor does not pay the subcontractor. This system indirectly is also beneficial for the latter's employees. It has to be mentioned that, although in some countries that have introduced systems of joint and several liability SMEs form the (vast) majority of undertakings, these systems do not provide for exemptions or lighter regimes for SMEs. Only in very rare circumstances might special measures apply to SMEs, for instance in Ireland¹⁵⁷ with respect to health and safety (an employer with three or fewer employees is not required to have an up-to-date safety statement¹⁵⁸), or in Hungary where fines are applied that are lighter than normal in case an employer who is an SME works with illegal third country nationals, without altering the liability system itself, however.¹⁵⁹

C. Up to the future: How to protect the workers of subcontractors? Joint and several liability and the need for flanking measures

¹⁵⁶ See e.g. in the Netherlands, where the Building Contractors' Federation Netherlands representing SMEs in the construction sector draw attention to the fact that the administrative and financial burden of the chain liability system is considerable.

¹⁵⁷ Also in the Netherlands SMEs are allowed to organise the assistance of employees expert in prevention and protection in a different way.

¹⁵⁸ Also with respect to public procurement, at the moment it is sufficient for SMEs to, at the time of tendering, only declare that they have the relevant and proportionate capacity, while verification or evidence of that capacity only has to be demonstrated when shortlisted or awarded the contract.

¹⁵⁹ See in more detail on the position of SMEs, Chapter 4-VI.

As mentioned before, the number of Member States that have introduced a system of joint and several liability today remains limited and this due to several reasons. And whilst some stakeholders are strongly opposed to such systems, questioning the efficiency thereof, specifically in cross-border situations and when dealing with mala fide players on the market, others consider the introduction of these systems a last resort, since regular supervision and enforcement mechanisms prove ineffective. It is true that the legal situation of cross-border posted workers has become clearer since the introduction of the Posting of Workers Directive 96/71/EC. The lack of efficient (cross-border) cooperation, of enforcement mechanisms and of other flanking measures in this Directive, however, remains highly problematic. Indeed, in any way, when introducing a mechanism of joint and several liability throughout the EU, issues related to enforcement, some of them we have described above, will remain to be resolved. If not, any system of joint and several liability will at best only have a limited (preventive) effect for the protection of workers' rights, specifically in cross-border situations.

Almost all reports consider strengthening the cooperation and the exchange of information between inspection and administrative services throughout the European Union and the enforcement of sanctions as important as the introduction of a system of joint and several liability. Further initiatives on a European level are in this respect advisable.

Several actors call for the introduction of a system of joint and several liability. It is clear that, provided the issues regarding the measures flanking the freedom to provide services and provided the issues with regard to the introduction of a system of joint and several liability are resolved and depending on the nature of the system, such a system will have a massive deterrent effect and will prove a big stick for inspection and enforcement services. As mentioned before, the introduction of a joint and several liability system cannot replace the measures flanking the freedom to provide services. Most of these measures are the very same measures the lack of which the introduction of a system of joint and several liability is, by some, deemed to resolve.

Several of these flanking measures need attention:

- It should be noted that many countries promote the introduction of a *notification system*, which is seen as a very valuable means, since it does not put a disproportionate burden upon the players on the market and facilitates control as it provides the possibility to find out who or which foreign workers are working in the country concerned. In this respect, it can also be seen as a means to prevent or reduce bogus self-employment resulting from the application of the free movement of services. Further European initiatives in this domain will be welcomed by many;
- The introduction of a system of joint and several liability neither excludes nor resolves the need for the necessary cooperation between administrative and inspection services. Mechanisms should be implemented to allow inspection services to perform their controls more effectively as well as to allow the better identification of persons and exchange of information. Nevertheless, also at the moment a contractor being convicted, a system for a better cross-border execution of the judgment and the enforcement of sanctions is required;
- It has also been reported that bogus subcontracting, bogus self-employment and fraudulent constructions (often through the abuse of legal persons) often lead to a situation where (mala fide) (sub)contractors are in a position to escape liability. Several reports have indicated that mechanisms should urgently be developed to combat the phenomenon of bogus self-employment. The principle and processes of subcontracting often entail the fragmentation of economic actors and different forms of bogus self-employment. As a result of this fragmentation, even if a worker's rights are not violated, his or her position often becomes more precarious. The issue of bogus self-employment in particular will not be resolved by the introduction of systems of joint and several liability. On the contrary, it is, in our opinion rightfully, feared that bogus self-employment in its various forms will proliferate as a result of the introduction of a system of joint and several liability

- if the issue of bogus self-employment in itself is not resolved;
- In cross-border subcontracting situations, the joint and several liability imposed will in practice, at least for one of the parties concerned, require cross-border legal proceedings in another country. This raises several issues. Firstly, which court will be declared competent? Will the worker whose rights have been violated, or who considers it so, have the right to introduce his claim against a foreign contractor before the courts of his home country? Will the contractor thus be required to defend his case before a foreign court? Last but not least, what if the foreign party held liable proves insolvent and enters insolvency procedures in the country where it is established? In this study, it has also been indicated that often workers who are not being paid the minimum wage in the host country do not introduce a claim if the wages they receive are still significantly higher than the amount they would have earned in their home country. In many cases, workers will have no incentive to do so or will have incentives not to do so. How will these issues be addressed? Will workers who are not being paid the minimum wage in the host country introduce a claim? Will inspection, enforcement or administrative services of the host state have a right to claim the wages for the workers? Will social partners have a right to claim them?

In a schematic overview, the following issues have to be addressed or subsequent measures have to be taken when introducing an European wide system of liability – note the convergence with (the strengthening of) flanking measures to the freedom to provide services, urgently requested by all actors involved:

- notification system for cross-border (sub)contractors;
- improvement of cooperation between inspection services;
- facilitation of cross-border litigation for private and public actors, in particular for employees concerned;
- improvement of cross-border execution of judicial and administrative decisions and fines;
- improvement of cross-border recourse between private parties;
- improvement of information exchange
 - in particular with regard to due diligence obligations of private parties hiring foreign (sub)contractors
 - in particular with regard to information concerning
 - the establishment of legal persons in another Member State
 - (sub)contractor-employer's debts towards social security or fiscal administrations or towards its employees
 - the overall trustworthiness of foreign (sub)contractors
 - between administrative, inspection, enforcement and judicial services concerned;
- provision of information for all parties concerned (client, contractor, subcontractor, employees...) with regard to the hard core of provisions (cf. e.g. Art. 3 of Directive 96/71/EC) and obligations to be met;
- tackling the issue of (cross-border) abuse of legal entities (e.g. facilitating cross-border piercing of the corporate veil)
- ...

However, apart from all these measures, important questions have to be resolved with respect to the principle of joint and several liability itself:

- One of the most important issues is closely related to the nature of the liability system. Should it be a system of direct or of chain liability? A system of direct liability is easily circumvented through the use of a bogus intermediary. As in cases of organised cross-border fraud, the intermediary will be a legal person established in those Member States with which cross-border cooperation and information exchange proves most difficult. In case the legal person should be prosecuted or

convicted, it will in most cases prove to have gone bankrupt or prove to be insolvent, bankruptcy in any case being the only result of any proceedings or conviction. Needless to say that in such cases, a direct system of liability will always prove ineffective in the end, while at the same time placing a heavy burden of due diligence on bona fide contractors and significantly raising transaction costs. The alternative, a system of chain liability, will be much more effective. However, with no adequate flanking measures in place, such a system will run the risk of being disproportionate in an economic system where subcontracting and outsourcing are considered valid and legal economic processes. This raises the question if means of exemption should be provided or not. An unconditional liability system might also be seen as a disproportional measure for bona fide undertakings. The longer the contracting chain, the larger the need for information gathering and monitoring competences for the contracting parties higher up the chain and the heavier the due diligence obligations will weigh. However, a client or contractor should never be able to exempt liability when he knows a contractor or subcontractor violates his workers' rights and mandatory rules protecting workers' rights. This raises the question of ways of proving such knowledge or even intent exists or existed on the part of the client or contractor. Due diligence as a grounds for exoneration raises more questions. We have already noticed – the provisions of Directive 2009/52/EC being an example – that this provision is implemented differently in the Member States. Will an initial due diligence be sufficient, or will a contractor be required to constantly monitor his subcontractors during the whole collaboration? How shall due diligence be defined and by whom? Will it be national authorities in line with the Wolff-Müller Case of the European Court of Justice? In any case, can a private party be expected being able to get information in due time, whereas administrative, police and inspection services, due to, amongst others, the reasons previously described, fail to do so? In other words, the introduction of a system of joint and several liability will not resolve the issue of cross-border cooperation and information exchange.

Health and safety deserves special attention here. Industrial accidents and occupational diseases come at a high price for both victims and society as a whole. The loss is not only a personal loss for the victim and his next of kin. The loss of a skilled worker also means the loss of investment in this worker's training and education, and the loss of experience and thus of productivity. Last but not least, industrial accidents and occupational diseases often entail great costs for both the social security system and for private insurance companies. Especially the area of occupational health and safety is one of the few areas where in all countries explicit legislative obligations are placed on parties in a subcontracting chain in respect of workers who are not directly employed by the parties themselves. It should, however, be wrong to believe that also all of the countries have a joint and several liability system. Some of the arguments used against the implementation of a joint and liability system are far less valid in case of occupational health and safety regulations. Compliance with social security and tax law, minimum wages, etc cannot and should not be compared with compliance with occupational health and safety measures. They not only differ in scope, but also in consequences and in controllability. Since decades, the European legislator recognises these differences and has taken them into account when enacting, amongst others, Directives 89/391/EEC and 92/57/EEC. The institution, the duties, roles and responsibilities of the coordinators for safety and health matters¹⁶⁰ are just one example of this fact. It needs very little debate to show that controlling compliance with OSH regulations for private companies is far less difficult than controlling compliance with other legislation protecting workers' rights and the argument concerning labour inspectorates being unable to inspect or enforce does not stand when it comes to OSH regulations. Furthermore, the introduction of a system of joint and several liability will, in the field of occupational health and safety, entail no additional due diligence obligations other than those already imposed and as such will not raise transaction costs. Some reports (see e.g. Italy) explicitly highlight the importance of such a measure in safeguarding compliance with health and safety regulations.

¹⁶⁰ Cfr. Articles 5 and 6 of Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), Official Journal L 245 , 26/08/1992 P. 0006 - 0022.

Annex I: National jurisprudence on liability (core reports)

Austria

Supreme Court, 23 June 1993, 9 ObA 84/93. (Sect. 6 Temporary and Agency Workers Act)

Constitutional Court from the 24 June 1998, G-462/97(Employment of Foreigners Act)

Belgium

Constitutional Court, 20 June 2007, *Belgian Official Journal* 3 August 2007, 41005. (Article 30bis of the Act on social security of 1969)

Antwerp, 21 October 2004, *Rechtskundig weekblad* 2004-05, 1556, JURA. (The Act of 24 July 1987 on temporary work, temporary agency work and the putting of employees at the disposal of a user)

(qualification judgements)

Cass., 23 December 2002, *Journal des tribunaux du travail* 2003, 271.

Cass., 28 April 2003, *Journal des tribunaux du travail* 2003, 261.

Cass., 8 December 2003, *Journal des tribunaux du travail* 2004, 122.

Cass., 3 May 2004, *Nieuw Juridisch Weekblad* 2005, 18.

Cass., 6 December 2004, *Nieuw Juridisch Weekblad* 2005, 21.

Cass. 20 March 2006, *Rechtskundig weekblad* 2006-07, 1317; *Journal des tribunaux du travail* 2006, 276

Cass. 5 February 2007, S.06.0024.N, www.cass.be

Hasselt Criminal Court 18 January 2008, unpublished

(bogus self-employment and foreign constructions)

Ghent Criminal Court 8 April 2007, unpublished

Ghent Criminal Court, 21 November 2007, unpublished.

Ghent Criminal Court 21 September 2005, unpublished.

Louvain Criminal Court 30 January 2007, unpublished.

Louvain Criminal Court 19 June 2007, unpublished.

Court of Cassation, 2 June 2003, *Pasicrisie Belge* 2003, 1099. (The Act of 24 July 1987 on temporary work, temporary agency work and the putting of employees at the disposal of a user)

Finland

Case Louhintaliike Karpinen Oy - Labour Court TT:1980-24 (obligation is to be regarded as an obligation between the parties to the collective agreements)

Court of Appeal (Hovioikeus) (confiscation was ordered against the user company in a case concerning Chinese stoneworkers posted to Finland. This case can be considered to represent a kind of chain liability for the part of the confiscation possibility, but not with regard to real wage claims)

France

Cour Cass. 1ère Ch.civ. 23 janvier 2007, n° pourvoi 04-10897

Cour cass. Ch. Mixte, arrêt n°260 du 30 novembre 2007

Cour de Cassation, 3ème chamber civile, 30 janvier 2008, n°06-14641

Cass. Soc. 23 January 2003, Giangaspero c/ URSSAF de Haute Savoie

(Sanctions for the violation of preventive measures regarding the client's liability towards subcontractors)

Cour de Cassation, 3ème chambre civile, 13 Avril 1988, n°670-P and n°671-P

2nd civ. Chamber, 17 September 2009, n° 08-16.641 (the latter will either formally advise (mise en demeure) the client/order provider of the subcontractor's illegal practice and his/her own (the client's) negligent behaviour and therefore require payment in due course or will directly sue him/her for payment)

2nd civ. Chamber, 17 January 2008, n° 06-20.594 (the client's liability will be engaged even though his/her contractor/ subcontractor was not found guilty of a criminal offence)

(Sanctions for the violation of health and safety at work)

Cass.crim. 11 June 1987 (employer has a general duty to guarantee the workers' health and safety)

Cass. Soc. 28 February 2002, Dr. soc. 2002, p.445 (employer should take all necessary steps to avoid work related accidents)

Cass. Soc. 3 February 2010, n°08-40.144 (employer violates his/her security obligation where the previously mentioned result (accident, disease or damage) has taken place even though he/she had taken measures to avoid it)

Cass.crim 13 October 2009, Sem.soc. Lamy 2010, n°1428 (every employer is in principle responsible for the health and safety of his/her own workers)

Cass. Crim. 24 January 1989, Bull.crim. n°27 (when the principle contractor intervenes in the execution of a subcontracting agreement and gives orders to the workers of the subcontractor, he/she engages his/her liability for not making sure that working conditions were compatible with working regulations)

Cass. Soc. 12 March 2009, n°08-11.735 (In case of recourse to temporary workers the user company does not bare in principle any responsibility for accidents unless the accident is due to the user's gross misconduct. In that case the user company is liable for the financial consequences not only of the gross misconduct but also for the accident itself)

(The client's joint liability in case of the principal contractor's insolvency)

Cass. comm. 9 December 2008, n°07-20384, Renault trucks v Ateliers Mécaniques de Nuelle

Cass. 3rd civ.ch. 24 May 2011, n°10-17.252 (the mechanism only operates where the principal contractor has proceeded with the presentation of his/her subcontractors to the client and has gained his/her approval of both the subcontractors and the conditions of payment provided for by the agreements)

Cass.Com. 11 July 2006, n°05-10.293

Cass. 3rd civ.ch. 14 March 2006, n°03-17.298

Cass. 3rd civ. Ch. 6 December 2006, n°05-17.286 (regarding the principal contractor he/she remains therefore liable for the money already paid to the subcontractors)

Cass. Comm.ch.19 June 2007, n°06-15.103 (If the subcontractor omits this formality or has no proof of the simultaneous notification to the client, the direct action will not be able to produce its effects)

Cass.3rd civ.ch 16 May 2008, n°08-10.060; Cass.3rd civ.ch 20 October 2004, n°03-11.507 (If even though the client knew of the subcontractor he/she did not ask the principal contractor to proceed with the presentation and approval requirement, the client may see his/her liability engaged or even doubled as the subcontractor can require the client to pay for the works that he/she has already paid to the principal contractor (Cass. 3rd civ. Ch. 6 May 2009, n°08-16.706).

(The client's joint liability in the context of illegal work)

Cass.2nd civ. Ch., 17 September 2009, n°08-16.641 (a territorially incompetent authority with regard to the client but territorially competent with regard to the subcontractor (author of the illegal work practice) can proceed to the necessary controls in order to establish the client's liability)

Paris Court of Appeal, 12 crim. Ch. 25 January 2006, n°05/01291 (given their regular visits to the subcontractor's undertaking they "should have known" that social security and vat declarations were substantially undervalued, up to 45% for more than three years)

Cass.crim. 30 October 2001, n°01-80.507
Cass.crim. 2 March 1999, n°98-82.531

Cass 2nd civ.ch. 17 January 2008, n°06-21.961 (if the client has no possession of any of the previously mentioned documents he/she is automatically taken to have failed to comply with his/her duty of vigilance and this fact is sufficient to activate his/her joint civil liability).

Cass. Soc. 17 January 1995, n°91-43.677 (although the Court admitted that the order provider was the real employer of the workers, it did not activate the client's joint liability because there was no proof that the "subcontractor" was insolvent)

CPH Paris 19 December 1995 *Saman et Akakpossa v/Sarl Morgan, society Pim and al.*

CA Paris, 16 June 1998, *Gaspard and Laurent v/society JK Diffusion*

CA Paris, 4 July 2001, n°2000/37407 *Hafid and Humath v/ society Mod'Ecran*

If we look carefully through "legifrance" (the French official site for case law), we find only 30 decisions that involve the client's joint liability mechanism (*solidarité financière*). From these 30 decisions 26 have been initiated by social security institutions, mainly URSSAF, (among others, Cass. Soc. 21 January 1987, n°84-15.367; Cass. Soc. 26 November 1997, n°95-40.053; Cass. Soc. 4 July 2001, n°99-19.418; Cass. 2nd civ. Ch. 23 June 2005, n°02-31.080; Cass.2nd civ. Ch. 17 December 2009, n°08-20.740; Cass. Crim. 10 June 1997, n°96-82.199; Cass. Crim. 14 March 2006, n°05-83.404), one by the Inland Revenue and only three by workers (Cass. Soc. 12 November 1987, n°86-42031; Cass. Soc. 17 January 1995, n°91-43.677; CA Paris, 4 July 2001, n°2000/37407).

(The user/principal contractor's liability with regard to health and safety at work)

Cass.2nd civ. Ch. 19 February 2009, n°07-21413 (the responsibility for health and safety at work lies in principal with the employer (subcontractor) and is only exceptionally transferred to the principal contractor)

Cass.soc. 20 November 2010, n°08-70.390 *Roye c/ Sté Barreault Lafon* (the user and the temporary work agency are co-employers of the temporary workers regarding health and safety)

Cass. Soc. 28 February 2002, n°99-17.201 (Gross misconduct is interpreted by the Courts as the situation where the employer was or should have been conscious of the danger to which the worker was exposed and yet he/she did not take the necessary measures to prevent it from happening)

Cass. 2nd civ. Ch., 21 June 2006, n°04-30.665 (the Court went on to say that the employer remained liable for the additional compensation towards the social security, even although he/she should be wholly guaranteed by the user company, responsible for the accident)

Cass. Soc. 2 March 1983, n°81-16.015, *Sté Manpower France c/ CRAM de Bourgogne, Franche-Comté* + Cass.2nd civ. Ch. 30 June 2011, n°10-20.246 (Since 1983 the social chamber of the French Supreme Court rejects the pretense that the user company is a third person with regard to the temporary worker. As a result the user's liability cannot be established on the basis of article L.454-1 of the social security Code)

Cass. 2nd civ. Ch. 11 October 2011, n°04-19.692 + Cass. Crim. 2 June 2004 n°03-86.102 (the Courts cannot object, as they did for the user, that the principal contractor/client/order provider is not a third person with regard to the subcontractors' workers)

Cass. soc. 7 November 1991, n°89-18.841; Cass. Crim. 14 November 1996, n°95-86.005 (the French Supreme Court excludes the liability of "an undertaking" other than the employer undertaking but which is not necessarily the order provider where it is established that this other undertaking participated at the time of the accident along with the employer undertaking and/or along with others to a common project, had common interests and was working together with them under a "unique direction")

Cass. Soc., 23 November 1988, n°87-14.876 + Cass. Soc., 15 February 1989, n°85-17.174 + Cass. crim. 9 October 2007, n°06-88.798 + Cass.2nd civ.ch. 19 February 2009, n°07-21.413 (This unique direction principal

which tends to elude liability in case of co-activity is however difficult to prove in practice taken that the majority case law rejects the argument and establishes liability)

(The client's liability towards the subcontractors in cross border situations)

Mix Ch. 30 November 2007, n°06-14.006 (Statute n°75-1334 on subcontracting (establishing a direct action against the client for the benefit of the subcontractor), constituted a law of public order)

Cass. 3rd civ. Ch. 30 January 2008, n°06-14.641

Cass. 3rd civ. Ch. 25 February 2009, n°07-20.096 (the French Supreme Court keeps developing its case law which promotes extensive application of the joint liability mechanism in cross-border situations not only in the construction industry but also in industrial subcontracting)

(The client's/order provider's liability in the context of cross-border illegal work practice)

Cass. Soc. 31 May 1990, n°88-12.857 and n°88-10.701 (Whenever the joint liability mechanism is activated in a trans-national context it is for the benefit of the national (French) social security institutions and not for the benefit of the workers)

(Joint liability in case of a work related accident in a trans-national context)

CA Pau, soc. Ch., 5 May 2011, n°09/03118° (a temporary worker posted to a user undertaking established in France claims additional compensation on that basis of the user's proven or presumed gross misconduct)

CA Toulouse 3rd civ. Ch, 8 June 2010, n°09/01189 (user/ order provider permanently established in the French territory is not only responsible for additional compensation in case of gross misconduct. He/she is also liable for work related accidents in general with regard to posted workers but only in case the employer defaults)

Germany

Federal Social Security Court 27.5.2008 – B 2 U 21/07 R (Social Insurance Code, Title IV)

BVerfG (German Constitutional Court) Beschl. vom 20. März 2007 – 1 BvR 1047/05 – NZA 2007, p. 609ff. (restriction of the freedom of services introduced by the principal contractor liability as justified)

BAG (Federal Labour Court), 12.1. 2005 – 5 AZR 617/01 – NZA 2005, 627 ff. (undertaking was only liable for net minimum wages or the contribution to a holiday pay fund owed by the contractor if it awarded the contract in its capacity as a building contractor)

BAG (Federal Labour Court) 8.12.2010 – 5 AZR 95/10 – NZA 2011, 514; see also joined decisions: 5 AZR 111/10, 5 AZR 263/10, 5 AZR 814/09. (liability of the principal contractor set out in § 1a AEntG (today § 14 AEntG) expires at the time and to the extent of the payment of insolvency payments through the Bundesagentur für Arbeit)

Landesarbeitsgericht Düsseldorf 30.6. 2010 – 4 Sa 1481/09. (only if an employee is subject to German social security law, § 14 AEntG does not stipulate any liability for social security contributions)

Ireland

Abama & Others v Gama Construction Ireland Ltd & Gama Endustri Tesisleri Imalat ve Montaj AS (High Court, 25 February 2011; unreported)

John Grace Fried Chicken v The Catering JLC (High Court, 7 July 2011, unreported) (High Court ruled that the separate, but related, Joint Labour Committee (JLC) system in the catering sector was unconstitutional)

Connolly v Dundalk Urban District Council [1990] 2 IR 1 (In circumstances where a (sub)contractor comes

onto the employer's property and the (sub)contractor is negligent and causes injury or loss to the employer's workers, the general employer retains liability (although it may seek a contribution from the negligent (sub)contractor))

BATU v The Labour Court [2005] IEHC 109 + *Mythen Brothers Ltd v BATU* [2006] ELR 237 (It should be noted that the definition, in section 23 of the *Industrial Relations Act 1990*, of a 'worker' for the purposes of the *Industrial Relations Acts 1946-2004* has been held to include independent contractors for the purposes of coverage by the REAs)

Diageo Global Supply v Rooney, [2004] ELR 133. (the Labour Court found that an employment contract existed between a nurse and the place where she worked, even though her wages were supplied by an agency)

DPP v JRD Developments, Circuit Court, reported in (2009) 14(4) *Health and Safety Review*, p 15 + *Allied Foods Ltd v Sterio* (HSD 097/2009) (section 12 of the 2005 Act sets out the duty that employers, including the self-employed, owe to those who are *not* their employees but who may be exposed to risks at the place of work while work is being carried on + (sub)contractors who adequately fulfil their own responsibilities can be exempted from liability even where occupational accidents occur)

Mythen Brothers Ltd v BATU [2006] ELR 237.
EP Lynam Brothers LTD v BATU REA075/2007.

Luxembourg

Court of Appeal, 11 June 2009, n°34060. (Court of Appeal dismissed the application of Article 20.8 of the Collective Agreement of the building workers posted in Germany who received the "Urlaubsgeld" under a mandatory provision in Germany. The posted worker was not compelled to reimburse the payments made by his/her employer in this respect)

Court of Appeal, 3 February 2011, n°32541. (Illegal loan of labour)

Court of Appeal, 14 July 2005, n°28908; 6 November 2003, n°26971, 9 October 2003, n°27505. (False independents)

Spain

Supreme Court 22-12-2000 (app. 4069/1999) (Article 42 of the Workers' Statute does not include so-called "voluntary improvements", which are amounts paid by the employer to improve the public Social Security benefits. Therefore, pension plans are not affected by this responsibility, because neither the contributions nor the benefits are salary, according to Spanish law.)

Supreme Court 9-7-2002 (app. 2175/2001) (In general, Article 42 (2) of the Workers' Statute, as it has been interpreted by Spanish Supreme Court, provides that all employers involved in the subcontracting chain are joint and several liable (chain liability) regarding debts for wages owed by the contractors and subcontractors with employees and debts for Social Security payments during the term of the subcontracting.)

Supreme Court 23-12-2003 (app. 4525/2003) (The liability includes the unpaid wages, strictly, which excludes any other economic concepts or perceptions that do not have that nature. Therefore, the responsibility extends to the wages due for holidays not taken at the time of termination.)

Supreme Court 24-06-2008 (app. 345/2007) (Article 42 of Workers' Statute also applies to administrative concessions involving the indirect management of a public service.)

(This certification should be obtained prior to the hiring of the contractor, in order to be exonerated of back-payments liabilities)

Supreme Court (3rd Chamber) 12-7-1994, app. 9559/1990

Supreme Court (3rd Chamber) 30-7-1996, app. 755/1991

Supreme Court 28-10-1996, app. 777/1991

Supreme Court (3rd Chamber) 4-3-1997, app. 329/1991

Supreme Court 19-5-1998, app.3797/1997

(the client/principal contractor is exonerated from these back-payment duties if s/he has previously requested certification on the absence of debts to the Social Security Treasury (according to what has been explained before), and the last has issued this document or has not replied in thirty days)

Supreme Court (3rd Chamber) 12-7-1994, app. 9559/1990.

Supreme Court (3rd Chamber) 30-7-1996, app. 755/1991.

Supreme Court (3rd Chamber) 4-3-1997, app. 329/1991

(General Labour Law rules on joint and several liability have been used also by case law to extend that shape of liability to Administration bodies concerning administrative concessions for indirect management of public services by means of private providers)

Supreme Court 15-7-1996, app. 1089/1996

Supreme Court 18-3-1997, app. 3090/1996

Constitutional Court 19-10-2010, app. 3568/2006 (deals with the problem of violation of workers' constitutional rights with origin not directly in their employer, but in decisions or instructions adopted by the client for whom the first acts as a contractor or subcontractor)

Annex II: Interviewed organizations (core reports)

Austria

- ÖGB: Austrian Trade Union Federation
- BUAK: Construction Workers' Annual Leave- and Severance Payment Fund (two interviewees)
- Dienstleistungszentrum bei der Wiener Gebietskrankenkasse: Service Centre of the Regional Health Insurance Fund of Vienna
- Federal Ministry of Labour, Social Affairs and Consumer Protection (two interviewees)
- Arbeiterkammer: Chamber of Labour
- WKÖ: Austrian Federal Economic Chamber
- Austrian Federal Economic Chamber - office for construction sector
- Financial Police

Belgium

- TSW: Belgian Social Legislation Inspectorate
- TWW :Belgian Inspectorate for Well-being at Work
- National Social Security Office
- ACV (Catholic Trade Unions Organisation)
- VBO (Federation of Enterprises in Belgium)
- NAR (National Labour Council)
- Confederatie Bouw (Employers organisation Construction Sector)

Germany

- IG Bauen-Agrar-Umwelt (IG BAU, Industrial Union for the Construction Sector), Frankfurt am Main
- Bundesfinanzdirektion West (customs administration), Köln
- SOKA-BAU, Wiesbaden
- Zentralverband des Deutschen Baugewerbes (ZDB), Berlin
- German Ministry of Labour and Social Affairs (BMAS), Bonn
- Hans-Böckler-Stiftung, Düsseldorf

Finland

- Central Organisation of Finnish Trade Unions (Suomen Ammattiliittojen Keskusjärjestö SAK ry)
- Department for Occupational Safety and Health Ministry of Social and Health
- Regional State Administrative Agency of Southern Finland
- Confederation of Finnish Industries EK (Elinkeinoelämän Keskusliitto EK)

France

Employer Organisations

- FFB (Fédération française du Bâtiment)
- UIMM (Union des Industries et des Métiers de la Métallurgie)
- PRISME

Trade Union Organisations

- CGT Construction
- FNCB (Construction et Bois)

Labour Inspection – Social security authorities

- URSSAF Lorraine (illegal work)
- Direccte (les Directions régionales de l'économie, de la concurrence et de la consommation, du travail et de l'emploi; Regional Directorates Economy, competition, consumer protection, work and labour) Rhône-Alpes, Savoie (illegal work)
- Direccte Midi Pyrenées (illegal work)
- Direccte Lorraine (illegal work)
- Direccte Nord Pas-de-Calais (illegal work/ posting of workers)
- Direccte Limousin (illegal work)
- Direccte Alsace (foreign workers: work permits)

Ireland

- Irish Congress of Trade Unions - ICTU
- Services, Industrial, Professional and Technical Union - SIPTU
- Building and Allied Trades Union - BATU
- National Recruitment Federation - NRF
- Irish Business and Employers Confederation - IBEC
- Construction Industry Federation - CIF
- Small Firms Association - SFA
- Irish Small and Medium Enterprises - ISME
- National Employment Rights Authority - NERA
- Department of Jobs, Enterprise and Innovation - DEJI
- Barrister-at-Law
- Migrant Rights Centre Ireland – MRCI

Italy

Ministry of Labour

- DG Attività ispettive (DG Inspection Activity)
- DPL Bologna, Ministry of Labour on posting of workers

Labour inspectorates

- DPL Milano
- DPL Trento
- DPL Bologna
- DPL Bergamo and DPL Sondrio
- DPL Genova
- DRL Veneto
- DPL Venezia

Trade unions

- Europe Secretariat-CGIL
- FILLEA (construction federation)-CGIL
- FILCA (construction federation)-CISL
- FILCAMS (services federation)-CGIL
- CGIL- Area reti e servizi (Area networks and services)
- FILT (transport federation)-CGIL

Employer's associations and companies

- ANCE (construction sector association)- Toscana
- ANCE- Friuli Venezia-Giulia
- CNA-FITA Toscana (transport sector association of small and medium undertakings)
- FAI-CONFTRASPORTI (transport sector association)
- CONFAPI (confederation of small and medium undertakings)- Udine
- ICET INDUSTRIE SpA
- INDESIT (Danis Cipressa, legal attorney)

Luxembourg

- ITM (Labour and Mines Inspectorate)
- UEL (Employers Umbrella organization)
- Law Firm

the Netherlands

- FNV Bondgenoten: the largest trade union in the market sector (e.g. agriculture and horticulture, metal industry, transport, distribution, trade and services)
- SNCU: independent Compliance Foundation established by the temp agency sector
- FNV Bouw: largest trade union in construction
- Dutch Labour Inspectorate
- EUROCIETT: European Confederation of Private Employment Agencies
- Randstad Holding: one of the largest temporary work agencies in the Netherlands
- Bouwend Nederland: Employer association, predominantly representing principal contractors.

Norway

- Labour Inspectorate (Deputy Director and Information officer).
- Ministry of Labour (Deputy Director General and Senior Adviser).
- Norwegian Trade Union Confederation (Head of Department).
- Fellesforbundet - an amalgamated trade union covering i.a. building, meatworking, hotels, agriculture; affiliated to the Norwegian Trade Union Confederation (TUC).
- NHO - the Norwegian Confederation of Business and Industry (Director of the Law Department).
- Building Industry Employers Association; affiliated to NHO.
- Service Sector Employers Association; affiliated to the NHO.

Poland

- Gdańsk Municipal Investments Euro 2012
- Pomeranian Province Roads Authority
- Wybrzeże Theatre
- Musical Theatre.
- National Committee of NSZZ "Solidarność", independent trade unions
- Maritime Unit of the Border Guard
- Gdańsk Shipyard
- Regional labour inspectorate (PIP) Gdańsk
- Pomeranian Traumatology Centre,
- Municipal Hospital in Gdynia
- Specialist Hospital in Wejherowo
- Regional Specialist Hospital in Słupsk

Spain

- Business Organisations CEOE and CEPYME
- Trade Unions UGT and CCOO
- Labour Inspectorate

Sweden

- Swedish Enforcement Authority
- Swedish Work Environment Authority
- Public Procurement Department, Swedish Competition Authority
- Municipal Workers' Union
- Swedish Building Workers' Union
- Stockholm local government
- Swedish Electricians' Union
- Swedish Association of Local Authorities and Regions
- Association of Swedish Engineering Industries
- Swedish Transport Workers' Union
- Swedish Construction Federation
- Stockholm Association of Building Contractors

UK

- AMEC(Consultancy, engineering and project management Company)
- B&CE Benefits Scheme
- Baker Mallett (Quantity surveying project/ Project Management Company)
- BIS (labour markets) (Uk Government Department for Business, Innovation and Skills)
- CAPE (NGO for children and young people)
- ECA (Electrical Contractors Association)
- Gangmasters Licensing Authority
- HSE (Health and Safety Executive)
- JIB-ECI (Joint Industry Board)
- MITIE (Management company)
- Rift International
- Sellafeld Ltd
- Thompsons Solicitors
- UCATT(Union of Construction, Allied Trades and Technicians)
- UNISON (Public Service Union)
- UNITE (Electrical and Engineering Staff Association)
- University of Cambridge

Annex III: National legislations and liability

Austria

minimum wages:

Sect. 7a(2) and 7c of the Employment Contract Law Adaptation Act (“*Arbeitsvertragsrechts-Anpassungsgesetz*” – AVRAG)

OHS

- TAW: Sect. 9 of the Occupational Safety Act (“*ArbeitnehmerInnenschutzgesetz*” – ASchG)
- Joint Place of Work, Construction Site or External Place of Work :Sect. 8 Occupational Safety Act
- For the execution of the Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites: the Construction Coordination Act (“*Bauarbeitenkoordinationsgesetz*” – BauKG)
- Duty of care as secondary obligation: Sect. 1169 of the General Civil Code (“*Allgemeines Bürgerliches Gesetzbuch*” – ABGB)

public procurement

Sect. 72, 84 and 108 of the Federal Act on Public Procurement 2006 (“*Bundesvergabegesetz 2006*” – BVergG 2006)

TAW

Sect. 14 of the Temporary and Agency Workers Act (“*Arbeitskräfteüberlassungsgesetz*” – AÜG)
+ Act on Construction Workers’ Annual Leave and Severance Pay

Tax

Sect. 82a of the Income Tax Act (“*Umsatzsteuergesetz*”)

Social Security Contributions

Especially in the construction sector: Sect. 67a of the General Social Security Act [“*Allgemeines Sozialversicherungsgesetz*” – ASVG]

Sect. 153c – 153e Penal Code (Social Welfare Fraud)

I.E.

the Employment of Foreigners Act

Belgium

General rule

Article 1202 of the Belgian Civil Code

minimum wages:

N.A.¹⁶¹

OHS

art. 29 of the Act of 4 August 1996 on welfare of workers in the performance of their work

¹⁶¹ Under debate by the social partners for the construction and the meat sectors

public procurement

The Act of 15 June 2006 on public contracts and certain assignments, deliveries and services

TAW

Article 31 § 4 of the Act of 24 July 1987 on temporary work and temporary agency work

Tax

art. 402 Income Tax Code

Social Security Contributions

Article 30bis of the Act of 1969 on Social Security

I.E.

- LIMOSA: Articles 137 - 167 Programme Act (I) of 27 December 2006

Decree of 24 April 2006 amending the Royal Decree of 9 June 1999 implementing the foreign workers Act of 1999, as a result of the extension of the transitional provisions introduced when new Member States joined the European Union

- The Act of 30 April 1999 regarding the employment of foreign employees

- The Act of 5 March 2002 implementing Directive 96/71/EG of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, introducing a simplified system with regard to the keeping of social documents by employers posting employees to Belgium.

Bulgaria**OHS**

Art. 16(3) (1) of the Health and Safety at Work Act, Promulgated, State Gazette No. 124 of 23.12.1997, as amended

Cyprus

N.A.

Czech Republic**OHS**

Act No. 309/2006: Act on Further Requirements on Occupational Health and Safety

IE

section 319 of the Labour Code

Act No. 435/2004 Coll., on Employment

Denmark**minimum wages:**

N.A.

OHS

Consolidated Act No. 1072 of 7 September 2010 on working environment

Public procurement

Denmark implemented the EU procurement directive in January 2005 through a public order. The

implementation is therefore performed in Danish law using the reference method by which the public procurement directives directly are made to Danish law. Public procurement with value under 500.000 DKK is regulated by act nr. 338 af 18. maj 2005 om indhentning af tilbud i bygge- og anlægssektoren med de ændringer, der følger af lov nr. 572 af 6. juni 2007.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

Consolidated Act No. 1061 of 18 August 2010 (Immigration Act)

Estonia

minimum wages:

N.A.

OHS

Occupational Health and Safety Act subsection 12(3*1)

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Finland

minimum wages

Acts:

Title: Act on the contractor's obligations and liability when work is contracted out (Laki tilaajan selvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä)

Date of adoption: 22 December 2006, Law 2006/1233.

Entry into force: 1 January 2007.

Publication: 27 December 2006, Official Journal (Säädöskokoelma) 187/2006.

Title: Penal Code (Rikoslaki No 39/1889)

Liability linked to the Penal Code:

Chapter 10, Section 2 on Confiscation (Forfeiture) of the Penal Code, which was enacted by the Act amending the Penal Code No 2001/875.

Date of adoption: 26 October 2001, Act No 2001/875.

Entry into force: 1 January 2002.

Publication: 1 November 2001, Official Journal (Säädöskokoelma) 128/2001.

The implementing decision concerning the Liability's Act:

Title: Sosiaali- ja terveysministeriön päätös tilaajan selvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä annetun lain (1233/2006) valvonnan siirtämisestä Uudenmaan työsuojelupiirin työsuojelutoimistolle, Decision of the Ministry of Social Affairs and Health on allocating the supervision of the Act on the contractor's obligations and liability when work is contracted out (2006/1233) to the Uusimaa Health and Safety District, 16 January 2007, No 49.

Date of adoption: 16 January 2007.

Entry into force: 1 March 2007.

Publication: 29 January 2007, Office Journal (Säädöskokoelma) 2007, 10/49.

OHS

Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces

Public procurement

No particular provisions, public entities are subject to same provisions as private entities (application of Liability Act)

TaxP

Title: Act on the contractor's obligations and liability when work is contracted out (Laki tilaajan selvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä)

Date of adoption: 22 December 2006, Law 2006/1233.

Entry into force: 1 January 2007.

Publication: 27 December 2006, Official Journal (Säädöskokoelma) 187/2006.

Social security contributions

Title: Act on the contractor's obligations and liability when work is contracted out (Laki tilaajan selvitysvelvollisuudesta ja vastuusta ulkopuolista työvoimaa käytettäessä)

Date of adoption: 22 December 2006, Law 2006/1233.

Entry into force: 1 January 2007.

Publication: 27 December 2006, Official Journal (Säädöskokoelma) 187/2006.

France

minimum wages:

N.A. (exception in case of illegal work)

OHS

Part four of the Labour Code

1- Statute n°82-1153, 30 December 1982 (OJFR 31 December 1982, p.4004) called "Orientation Statute on internal transports", modified by statute n°2003-495, 12 June 2003 (OJFR, n°135, 13 June 2003, p.9943) and incorporated in Articles L1311-3 et L.1311-4 of the Code of Transport,

2- Statute n°91-1414, 31 December 1991 (OJFR n°5, 7 January 1992, p.319) on "preventive measures in case of occupational risks" implements Council directive 89/391/EEC of 12 June 1989 on the introduction of

measures to encourage improvements on the workers' health and safety at work.

3- Statute n°93-1418, 31 December 1993, (OJFR, n°1, 1 January 1994, p.14) on "legal provisions in the area of construction operations in order to ensure security and protect workers' health" implements Council Directive 92/57/EEC of 24 June 1992 on minimum safety and health requirements at temporary or mobile construction sites.

4- Statute n°2003-699, 30 July 2003, (OJFR n°175, 31 July 2003, p.13021), on the "prevention of technological and natural risks and damage compensations".

Public procurement

Statute n°75-1334, 31 December 1975, (OJFR 3 January 1976, p.148)

Public Procurement Code

TAW

Statute n°79-8, 2 January 1979 (OJFR 3 January 1979, p.7) "relative to temporary work agency" provides for a financial guarantee for the payment of salaries, social security contributions and compensation.

Statute n°90-613, 12 July 1990 (OJFR, n°162, 14 July 1990, p.8322), "in favour of employment stability by adapting the regime of precarious forms of work" provides that the user company may have engaged partially their liability for accidents

Tax

N.A. (exception in case of illegal work)

Social Security Contributions

N.A. (exception in case of illegal work)

I.E.

"first title" (*Titre Premier*) of the second book (*Livre Deuxième*), part eight Labour Code

1- Statute n°90-613, 12 July 1990 (OJFR n°162, 14 July 1990, p.8322) "in favour of employment stability through adaptation of precarious forms of work".

2- Statute n°91-1383, 31 December 1991(OJFR n°1, 1 January 1992, p.15) known as the law "for the reinforcement of the fight against undeclared work and for the organisation of the entrance and stay of illegal workers in France".

3- Statute n°97-210, 11 March 1997 (OJFR n°60, 12 March 1997, p.3824), "for the reinforcement of the fight against illegal work".

4- Statute n°2004-810, 13 August 2004 (OJFR n°190, 17 August 2004, p.14598) "relative to health insurance" and Decree n°2005/1334, 27 October 2005 (OJFR n°253, 29 November 2005, p.17080) "relative to undeclared work.

5- Inter-ministerial circular (SOCL0510447C, 31 December 2005 Official Bulletin of the Ministry of Employment, social Cohesion and housing, 30 March 2006 – Travail 2006/3 – Text 1/56) on chain liability.

6- Statute n°2009-526, 12 May 2009 (OJFR n°0110, 13 May 2009, p.7920), "on legal clarification and procedure simplification" introduces article 75 which became article L.243-7-3 of the Social security Code.

7 – Statute n°2011-672, 16 June 2011(OJFR n°0139, 17 June 2011, p.10290) on "immigration, integration and nationality", reinforces administrative sanctions against illegal work through implementation of directive 2009/52/EC "providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals" 18 June 2009, OJEU L168/24, 30 June 2009.

Germany

Minimum wages:

§ 14 Posting of Workers Act (Arbeitnehmer-Entsendegesetz – AEntG)of 20 April 2009 (German Official

Journal (BGBl.) I p. 799)

OHS

N.A. , exception Contribution to accident insurance: § 150 para 3 SGB VV (Social security code title VII)

public procurement

The different laws of the German Bundesländer also state an exclusion from future public contracts in case of breach of the obligations in the public procurement laws.

TAW

§ 14 Posting of Workers Act (Arbeitnehmer-Entsendegesetz – AEntG) of 20 April 2009 (German Official Journal (BGBl.) I p. 799)

Tax

§ 48 para. 1 Income Tax Act (Einkommenssteuergesetz – EStG) in the version of the announcement of 8 October 2009, (BGBl. I S. 3366, 3862) as amended

Social Security Contributions

§ 28e para. 3a Social Insurance Code, Title IV (Sozialgesetzbuch IV – SGB IV) Fourth Book of the Social Security Code – common provisions – (article 1 of the Act of 23 December 1976, BGBl. I S. 3851), in the version of the announcement of 12 November 2009 (BGBl. I p. 3710, 3973; 2011 I p. 363) as amended.

I.E.

§ 98a para. 1 Residence Act (Aufenthaltsgesetz – Aufenthaltsg) in the version of the announcement of 25 February, 2008 (BGBl. I S. 162), as amended

Greece

minimum wages:

Art. 702 of the Greek Civil Code

OHS

- Construction sector: Articles 3-5 of Law 1396/1983 (OJ/A/126/15.9.1983)
- Shipbuilding sector: Articles 4-6 of Presidential Decree 70/1990 “Health and Security of employees in shipbuilding- repair works” (OJ/A/31/1990)
- Industrial accidents: Art. 8 of Law 551/1915

public procurement

Art. 37 of Law 3669/2008 (OJ/A/116/18.6.2008)

Art. 63 of Law 3863/2010 (OJ/A/115/15.7.2010)

TAW

Art 22 par. 9 of Law 2956/2001 (OJ/A/258/6.11.2001)

Tax

N.A.

Social Security Contributions

Art. 8 of Law 1846/1951 (OJ/A/179/1951)

I.E.
N.A.

Hungary

minimum wages:
N.A.

OHS
N.A.

public procurement
N.A.

TAW
N.A.

Tax
N.A.

Social Security Contributions
N.A.

I.E.
N.A.

Ireland

minimum wages:
N.A.

OHS
- The *Safety, Health and Welfare at Work (General Application) Regulations 2007-2010* (SI No 299 of 2007 and SI No 176 of 2010)
- The *Safety, Health and Welfare at Work (Construction) Regulations 2006-2010* (SI No 504 of 2006, SI No 130 of 2008, SI No 143 of 2008 and SI 523 of 2010)

public procurement
- *Directive 2004/18* as implemented by Regulation 27 of the *European Communities (Award of Public Authorities' Contracts) Regulations 2006* (SI No 329 of 2006)
- *Directive 2004/17* as implemented by Regulation 41 of the *European Communities (Award of Contracts by Utility Undertakings) Regulations 2007* (SI No 50 of 2007)
- *Guidance Note for Public Works Contracts* (Published on the 30 April 2007 by the National Public Procurement Policy Unit of the Department of Finance).
- Circular 33/06: Construction Procurement Reform – revision of arrangements for the procurement of public works projects and for the engagement and payment of construction consultants (<http://www.constructionprocurement.gov.ie/CWMFDocs/Circulars/Circ0408.pdf>).
- Circular 1/11: Model Tender and Contract Documents for Public Service and Supplies Contracts (<http://www.procurement.ie/sites/default/files/PER%20%20Circular%201%20of%202011-1.pdf>).

TAW
N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Italy**minimum wages:**

Article 29, §2 of the Legislative Decree (D.lgs.) 10 September 2003, n.276 *“Enabling Act on employment and labour market granted by Law 14 February 2003, n.30”* (G.U. 10 October 2003, n.235) as amended.

OHS

D.lgs. 9 aprile 2008, n.81 *“Implementation of Article 1 of the law 3 August 2007, n.123 in matter of health and safety at work”* (G.U. 30 April 2008, n.108). Article 26 provides for a general rules establishing obligations related with the execution of contracts and subcontracts as amended; provisions of Title IV, section I (Articles 88-104) establish health and safety requirements at temporary or mobile construction site.

public procurement

D.lgs. 12 aprile 2006, n.163, *“Code on public works, supply and service contracts implementing Directive 2004/17/EC and Directive 2004/18/EC”* (G.U. 2 May 2006, n.100)

Articles 4-6 Decree of the President of the Republic (D.P.R.) 5 October 2010, n.207 *“Regulation on the execution and implementation of the d.lgs. 12 April 2006, n.163”* (G.U. 10 December 2010, n.288)

TAW

D.lgs.276/03

Tax

Article 35, paragraph 28 Law Decree (D.L.) 4 July 2006, n.223, *“Urgent provisions for the economic and social revitalization, for the control and rationalization of public spending, and interventions on public income and on contrast of tax evasion”* (G.U. 4 July 2006, n.153), converted into Law 4 August 2006, n.248 (G.U. 11 August 2006, n.186, s.o. n.183/L)

Social Security Contributions

N.A.

TAW

Article 23, paragraph 3 D.lgs.276/03 on *“Somministrazione di lavoro.”*

I.E.

N.A.

Latvia**minimum wages:**

N.A.

OHS

- Article 16 of the Law on Work Protection¹⁶² implements Article 6(4) of Directive 89/391
- Regulation No.92 of the Cabinet of Ministers 'Requirements on work protection in performance of construction works'¹⁶³ implements Directive 92/57.

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

Article 37(11) of the Labour Law

Lithuania**minimum wages:**

N.A.

OHS

N.A.

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Luxembourg**minimum wages:**

N.A.

¹⁶² OG No.105, 6 July 2001.

¹⁶³ OG No.33, 28 February 2003.

OHS

N.A.

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

Article 431 of the Social Security Code

I.E.

N.A.

Malta

minimum wages:

N.A.

OHS

N.A.

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

the Netherlands

minimum wages:

Minimum Wage and Minimum Holiday Allowance Act (WML).

OHS

- Art. 7:658 Dutch Civil Code

- Art. 7:611 Dutch Civil Code

- Working Conditions Act (*Arbeidsomstandighedenwet1998* (Arbowet))

public procurement

N.A.

TAW

- Art. 7:690 Dutch Civil Code
- 7:692 of the Dutch Civil Code
- Placement of Personnel by Intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs* (WAADI)).

Tax

Articles 34 and 35 of the Collection of State Taxes Act 1990 (*Invorderingswet1990* (IW))

Social Security Contributions

Articles 34 and 35 of the Collection of State Taxes Act 1990 (*Invorderingswet1990* (IW))

I.E.

the Foreign Nationals Employment Act (*Wet arbeid vreemdelingen* (Dutch abbrev: WAV))
Act on Cross-border Employment Working Conditions (*Wet arbeidsvoorwaarden grensoverschrijdende arbeid* (WAGA))

Norway**minimum wages:**

General Applicability Act 1993

OHS

N.A.

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Poland**minimum wages:**

- Act on minimum remuneration (Ustawa o minimalnym wynagrodzeniu za prace) Dz. Uz 2002 Nr 200, poz. 1679 z późniejszymi zmianami with subsequent amendments
- Labour Code

OHS

- Construction Law Act
- Ordinance of the Minister of Infrastructure of 6 February 2003 on Safety and Health when Performing Construction Works (*rozporządzenie Ministra Infrastruktury z dnia 6 lutego 2003 r. w sprawie bezpieczeństwa i higieny pracy podczas wykonywanych robót budowlanych*, Journal of Laws No. 47, item 401).

public procurement

- Act of 29 January 2004 Public Procurement Law, Journal of Laws 2010, No. 113 item 759 with subsequent amendments (Ustawa z dnia z dnia 29 stycznia 2004 r. Prawo zamówień publicznych, Dz. U. z 2010 r. Nr 113, poz. 759 z późniejszymi zmianami).
- Act of 30 August 1991 on Healthcare Facilities, Consolidated text: Journal of Laws 2007, No. 14 item 89 with subsequent amendments (Ustawa z dnia 30 sierpnia 1991 r. o zakładach opieki zdrowotnej, tekst jednolity: Dz.U. z 2007 r., Nr 14 poz. 89z późniejszymi zmianami).

TAW

Act on employing temporary workers (*ustawa o zatrudnianiu pracowników tymczasowych*) **Ustawa z dnia 9 lipca 2003 r. o zatrudnianiu pracowników tymczasowych (Dz.U. Nr 166, poz. 1608 z późniejszymi zmianami)**, Act of 9 July 2003 on employing temporary workers (Journal of Laws No 166, item 1608, with subsequent amendments).

Tax

N.A.

Social Security Contributions

N.A.

I.E.

Act on legalization of the residence of some foreigners on territory of the Republic of Poland (*ustawa o zalegalizowaniu pobytu niektórych cudzoziemców na terytorium Rzeczypospolitej Polskiej*)

Portugal

minimum wages:

N.A.

OHS

Law nr. 102/2009 of 10th of September 2009

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Romania

minimum wages:

N.A.

OHS

Law 319/2006 on labour security and health

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Spain

Minimum wages

Article 42 of the Workers Statute (Royal Legislative Decree 1/1995, 24 March)

OHS

- Article 24 Law 31/1995, 8 November, on Health and Safety at Work
- Royal Decree 171/2004, 30 January
- Law 32/2006, 18 October, on Subcontracting in the Construction Sector, contains special rules for subcontracting in the construction sector

public procurement

N.A.

TAW

Article 16 of Law 14/1994, 1 June, on Temporary Work Agencies

Tax

Article 43(1)(f) of Law 58/2003, 17 December, on General Tax

Social Security Contributions

Article 42 of the Workers Statute (Royal Legislative Decree 1/1995, 24 March)

Article 5 Royal Decree Law 5/2011, 29 April, on Measures for the Regulation and Control of Undeclared Employment and Promoting Rehabilitation of Home Buildings

Article 22(12) Royal Legislative Decree 5/2000, 4 August, on Infringements and Sanctions in the Social Order

Article 127 of the Social Security Law (Royal Legislative Decree 1/1994, 20 June)

I.E.

Directive 96/71/EC has been implemented by Act 45/1999, 29 November
(<http://www.boe.es/boe/dias/1999/11/30/pdfs/A41231-41239.pdf>)

Slovakia

minimum wages

N.A.

OHS

- Section 18 Act. No. 124/2006 Coll. on Health and Safety at Work
- Section 58 (4) of the Labour Code

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Slovenia

minimum wages:

N.A.

OHS

Safety and Health at Work Act (Official Gazette of the Republic of Slovenia, no. 43/2011)

Public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Sweden

minimum wages:

N.A.

OHS

N.A.

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

UK

minimum wages:

N.A.

OHS

N.A.

public procurement

N.A.

TAW

N.A.

Tax

N.A.

Social Security Contributions

N.A.

I.E.

N.A.

Annex IV: Summary table identifying the different types of measures and variables upon which authorities can intervene to enforce joint liability in the field of wages.

Countries that have joint liability concerning wages

AT

- Nationwide, Austrian employers, as mandatory members of the Austrian Federal Economic Chamber become subject to the collective agreement of the industry; therefore, the wage protection of the Employment Contract Law Adaptation Act usually concerns the employees of foreign employers.

DE

- ULAK is competent to claim contributions to the holiday pay funds. The existence of an unlimited liability of the principle contractor is an important means for the ULAK to effectively supervise and enforce employers' obligations enshrined in the relevant collective agreements of the construction sector.
- In order to keep liability risks in the context of the holiday fund contributions low, the construction industry instituted an "early warning system" at the ULAK or SOKA-BAU.
- ULAK simultaneously examines whether or not the domestic or foreign employer has respected the minimum wage provisions of the construction industry. ULAK can take legal action if the company refuses to pay.
- Furthermore, a legal framework was to be created for the control activities of the public inspectorates, especially with regard to reporting procedures and the cooperation among State authorities.
- Custom administration are entitled to monitor the employer's obligation to grant minimum working conditions according to § 8 AEntG. They have the same powers as the police authorities regarding the prosecution of criminal and administrative offences stipulated in the code of criminal procedure and the code of administrative offences.
- The trade union supports migrant workers in wage claims.
- Control in its proper sense is exercised by the customs administration – and within the customs administration by the FKS department.

ES

- Collective agreements can regulate subcontracting wherever to improve workers' rights, because Spanish law does not support a reduction in legal minimums. Most sector agreements contain clauses about subcontracting, although with very little innovation. Some collective agreements provide a wider responsibility than Article 42 of Workers' Statute.
- The Social Security Treasury has to give a certification on absence of debts.
- Back-payment obligations to social security can also be made effective by the labour inspectorate, which can use its general competences on this subject directly against the joint and several or subsidiary liable employers.
- Administrative and criminal law sanctions (by the labour inspectorate and governmental administration bodies).
- Besides soft law and codes of conduct, sometimes collective bargaining itself establishes obligations and conditions for socially responsible subcontracting.
- Employees' elective representation bodies (Works Councils or workers' delegates) play a very important role in enforcement and monitoring related to the rules on subcontracting. The client must inform them.
- Workers' representatives have the right of free access to the obligatory subcontracting book which, in the case of several different undertakings sharing the same workplace, must be kept properly up to date by the first of the subcontracting chain.

- Trade unions could also be relevant actors in application or enforcement of rules on workers' rights in subcontracting processes, in particular by means of trade union representatives at the workplace, who also have general information rights that can be used regarding subcontracting.
- The Workers' Statute establishes a broad information right of Works Councils (or delegates) on subcontracting processes.
- Inspectors identify and qualify infractions and address the sanction proposal (including quantification of the fine) in the so-called "infraction acts". They can also request payment of social security debts through the named "liquidation acts". Moreover, in some cases, they can call for the initiation of a judicial process if they appreciate infractions affecting workers' economic rights.
- The administration is trying to develop protocols for actions in order to regulate and coordinate the activities of inspection and of monitoring the posting of workers; besides, studies of the professional profiles of workers who are posted have been developed.

FI

- Some nation-wide collective agreements contain provisions on the principal contractors' liability.
- Supervision of the compliance with the Posted Workers Act and the Liability's Act is the responsibility of the occupational safety and health authorities.
- There are twelve inspectors who are specialised specifically in the supervision of the Liability's Act.
- The enforcement and supervision are made more efficient by the provisions in the Liability's Act (Section 6) on the obligation of the client to provide, on request, information to a representative of personnel of any contract concerning temporary agency work or subcontracted labour.
- The inspectors have the right to enter all workplaces and other locations of supervision and inspect documents necessary for enforcement purposes. (Health and Safety)
- Trade unions visit workplaces and they negotiate with the clients and subcontractors.
- Most measures are situated on the level of joint liability concerning health and safety, not wages!

FR

- Both at national and branch level voluntary arrangements seek to improve industrial relations between clients, suppliers and subcontractors.
- Branch or nation-wide charters and guides by corporate structures.
- Corporate social responsibility initiatives.
- Soft law under public supervision: some of these initiatives, although engaging trade unions and employer organisations, have been originally initiated by government authorities in connection with new legislation or other government initiatives.
- No specific information provided on public authorities' measures concerning wages!

IT

- The main sector collective agreements (CCNL) contain clauses aimed at improving the protection of contract workers, often by imposing the client to require the contractor to apply the same CCNL
- If neither the debtor employer nor the guarantor are able to fulfill the obligations of pay, the employee may request the intervention of the Guarantee Fund of INPS. The Fund, which originally guaranteed only the severance pay, takes care of the unpaid remuneration of the last three months, within the maximum limit provided by law, in addition to the unpaid contributions.
- Many national collective agreements also provide for information and consultation obligations towards the union representative at plant level and/or the local trade unions on the undertaking that decides to contract out the activities of the production cycle.
- The main tool provided by law to control wages and social security obligations of contractors and subcontractors is the DURC (Documento Unico di Regolarità Contributiva), issued by social security institutions (INPS and INAIL) and (in the building sector) by construction funds.
- The labour inspectorate is responsible for monitoring all working conditions.

- The labour inspectorate also acts as criminal investigation department and has the power to notify the employer on the violation of law which brings administrative or penal sanctions.
- Inspection activities are generally coordinated at central (regional) level and every year a *modus operandi* is established for interventions in particular sectors on the basis of specific priorities.
- Inspectors from social security institutions verify both the lawfulness of the contract in order to determine the employer bound to pay contribution, and the proper payment thereof. For this reason, like the labour inspectors, they have the power to access the undertaking, to control the documents and to contest violations, even the criminal ones (in more severe cases of contribution evasion)
- In case of no or partial fulfilment of wage obligations by the employer, the inspectors can adopt the “warning assessment act”. The act can be enforced as an executive judicial title.

NL

- The Works Council possesses various powers. The Works Council also has an advisory right with regard to the recruitment or hiring of groups of workers. This means that in case the entrepreneur intends to make use of a (substantial) group of temporary agency workers or posted workers via a TWA or other suppliers of staff (for a substantial period of time), he is obliged to request the advise of the Works Council.
- The enforcement of (extended) CLA provisions substantially belongs to the competence of the social partners, the parties to the CLA, themselves. They are entitled to claim compliance with the provisions of the CLA. They can also claim compensation for their own and their member’s damage (resulting from the non-compliance with the CLA provisions).
- The labour inspectorate is also authorised to impose direct fines on employers who fail to pay statutory minimum wages.
- To combat fraud and illegal practices, the employers association ABU developed (in 2007-2008) a quality label (NEN-norm 4400). The quality label is voluntary, although several generally applicable CLAs oblige employers to hire their temporary agency workers exclusively from NEN-norm certificated TWAs.
- Regularly monitoring the registered agencies on compliance with the applicable law and regulations and on the payment record of the agencies takes place to assure that the agencies stay on the right track.

NO

- The Labour Inspectorate Authority is vested with full power to supervise also the compliance with wage rules.
- The Norwegian Labour Inspection Authority may report violations to the police.
- Access to information may be demanded by trade union representatives who represent the organisation that is party to the collective agreement.
- Monitoring and control measures are carried out through the collective agreement and trade union machinery.
- Local trade unions concerned may have their own inspectors who will actively look up workplaces where there is a suspicion of subpar terms and conditions. If infringements are found, they will alert the labour inspection and as a rule also assist individual workers getting their rights.
- Trade unions and employers’ associations, at the national as well as the local levels, also play an important role.