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***DARK SIDE OF POSTING OF WORKERS IN THE EU:
OPEN PROBLEMS OF SUBCONTRACTING, LEGAL DEBATES AND SOLUTIONS***

PhD thesis

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CHAPTER 1: Research Context, Research Objectives, Theoretical Methodological Framework and the Thesis Structure

1.1. Challenge Specification, Research Context, Hypotheses and Questions

The development of the European Union's (hereinafter: EU) internal market over the last three decades has shown how legal instruments initially introduced as technical tools to facilitate economic activity can gradually evolve into one of the most intricate and sensitive areas of the legal and social environment. The phenomenon of posting of workers is one of the most highlighted examples of such development. What started as the functional mechanism for the cross-border provision of services over time became an area where fundamental principles of the EU meet and collide: market freedoms and the protection of workers' rights. Such a collision is additionally emphasised if the posted workers are involved in subcontracting arrangements.

In that context, this research begins with a clearly formulated but insufficiently researched challenge in legal doctrine: the current EU legal framework cannot ensure the effective, consistent, and enforceable protection of posted workers when they are involved in complex subcontracting chains. Such a challenge is not only normative or practical in nature, but it occurs precisely at the point of their intersection, in the space where formal legal rules meet the dynamic and often non-transparent forms of work organisation in the contemporary economy.

At its core, it is a situation in which the legal system, even though developed and multilayered, does not fully keep pace with labour market transformations. Institutes shaped within the framework of traditional, relatively simple employment relations are more difficult to align with the challenges posed by globalisation, market liberalisation and the broadening of subcontracting business models. In that context, the posting of workers, as the mechanism that allows freedom to provide services in the EU, is more often carried out through complex contractual arrangements involving multiple parties. In such structures, liability fragmentation occurs, during which the formal employer is often not the same subject that controls the working process or holds real economic power (see Chapters 3 and 4).

Therefore, the challenge cannot be based just on the simple question of a lack of legal provisions. On the contrary, EU law on the posting of workers has been developed gradually,

and today it includes several mechanisms aimed at preserving a minimal level of protection (see Chapter 2). However, as further analysis will show, such mechanisms often remain at the level of a formal standard, while their practical efficiency depends on several additional requirements. In other words, the legislation exists, but its operative power in certain situations remains limited.

In that sense, the challenge this research addresses can be more precisely articulated in three mutually interconnected layers.

The first layer refers to the legislative fragmentation. The Directive 1996/71/EC (hereinafter: PWD96)¹, Directive 2018/957/EU (hereinafter: PWD18)², and the Directive 2014/67/EU (hereinafter: Enforcement Directive)³, have set minimum standards (see Chapter 2) but have left Member States with broad discretion in their implementation. Such an approach was considered politically acceptable at the time of its introduction (see Chapter 3), but in practice it led to significant differences across national systems, especially regarding the liability in subcontracting chains (see Chapter 4). The consequence is that the level of protection for posted workers depends on the Member State where the work is performed, which hardly corresponds to the idea of a single market and minimal social standards.

The second layer of the challenge refers to the structural complexity of the subcontracting arrangements. Subcontracting is not only an organisational tool but also a mechanism for distributing risk. As the number of levels in the chain increases, the liability for respecting labour rights is gradually shifted toward the bottom of the chain, where the less financially solvent or more short-term actors are located. In some cases, where subcontracting is used as an abusive business model, structures such as letterbox companies or intermediaries that formally assume the role of employer but lack a real economic or organisational basis are involved (See Chapters 3 and 4). In such circumstances, the liability rules are losing their functional purpose because they are directed towards subjects who are unable to fulfil their obligations.

¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal L 18/1, 16 December 1996 (hereinafter: PWD96).

² Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal L 173, 28 June 2018 (hereinafter: PWD18).

³ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Official Journal L 159/11, 15 May 2014 (hereinafter: Enforcement Directive 2014).

The third layer concerns deficiencies in law enforcement. Even when there is a legislative base for protection, its effectiveness depends on the capability of worker to prove and enforce their rights. In the context of posted workers, this is particularly problematic due to the cross-border nature of work, language barriers, limited access to information, and the uncertainty surrounding their legal and working status (see Chapter 4). Court protection, even when formally available, is often ineffective in practice, while administrative control mechanisms cannot respond in a timely manner to complex and evolving subcontracting structures.

That combination of legislative fragmentation, structural complexity and enforcement weakness is the basis of the specificity of the challenge with which the research is dealing. Therefore, the focus of the research is to overreach the individual legal institutions and open up a broader discussion about the capacity of labour law to adapt to changing market conditions. That is also a reason why, in this research, the challenge is viewed not solely from one side but through the interplay among theoretical background, legislation, business structures, and enforcement mechanisms.

Therefore, it is important to emphasise that this challenge cannot be understood without a broader context of the development of the EU law. Freedom to provide services, as one of the main principles of the internal market, has encouraged labour mobility and business flexibility, but has also created new legal and social uncertainties. As the analysis will show, precisely within the scope of the posting of workers, there is the most significant clash between economic freedoms and social rights (see Chapter 2). Subcontracting arrangements are further strengthening that tension, since they allow organisational models that formally remain within the bounds of legality but, in practice, lead to the erosion of workers' protection. It can be concluded that the challenge the research addresses is not marginal, sector- or Member State-specific. On the contrary, it is a structural challenge for the contemporary European labour market that requires, at the same time, both normative and practical questioning of the existing legal framework. As a result, this research aims to offer not only an analysis of the existing circumstances but also a basis for their systemic improvement.

In that regard, research is based on several working hypotheses. The affirmative hypothesis posits that the existing EU legal framework fails to provide sufficient protection for posted workers in complex subcontracting arrangements. The negative hypothesis posits that the inclusion of obligatory joint and several liability in the construction sector, with the possibility of the due diligence defence, in the Enforcement Directive of 2014, is insufficient to adequately protect posted workers in complex subcontracting arrangements within the EU. The null

hypothesis states that there is no significant difference in the protection of posted workers in the EU when they are included in complex subcontracting arrangements versus when they are not. Additionally, the research variables include the types of liability schemes (joint and several, chain liability), the number of levels in subcontracting chains, the transnational component, the sectoral context, and the availability and effectiveness of enforcement mechanisms.

Furthermore, following the clearly identified focus challenge, insufficient and fragmented protection of posted workers in complex subcontracting chains, this thesis develops a research framework that tries to respond not only to what the law prescribes but also to the question of why such rules in practice often do not accomplish their role. For that reason, research questions are not formulated solely on a normative basis but also address the broader relationship among legal solutions, their enforcement, and concrete market practices.

Therefore, the main research question can be formulated as follows: in what ways does the current EU legal framework, in the context of the posting of workers, ensure the effective protection of posted workers within complex subcontracting chains, and what are its key normative and enforcement weaknesses? From that question, several other interrelated questions structure the analysis throughout the research. Firstly, how is the basic tension between the freedom to provide services and the protection of workers manifesting in the context of the posting of workers and also their inclusion in subcontracting arrangements? Secondly, in which way are the existing mechanisms, such as the liability scheme and the due diligence defence system in subcontracting chains, functioning in the context of posting of workers, and to what extent are they contributing or limiting the enforcement of their rights? Thirdly, which conclusions can be drawn from the analysis of national systems that have developed different models of liability schemes for the protection of posted workers' rights in subcontracting chains? Finally, how can all those conclusions be translated into concrete legislative and policy recommendations at the EU level?

Such a formulation of research questions is directly connected to the above-mentioned working hypothesis, which rests on the presumption that the existing legal framework is not functionally sufficient, not so much due to a lack of provisions, but because of their limited applicability in complex and often non-transparent market structures. In that way, the research is being directed toward the analysis of the relationships between the 'law on paper' and 'law in action' or the understanding of the real limitations of the current legal protection.

1.2. Research Relevance

The importance of this research topic lies not only in its legislative complexity but also in its everyday reality in the functioning of the EU labour market and the direct consequences it has for workers and employers. At the heart of that challenge is a gap between the EU's formally established legal framework, which seeks to secure freedom to provide services and labour mobility, and its capacity, in practice, to protect workers within complex subcontracting chains, especially in cross-border situations.

For the posted workers, this challenge has an especially concrete and often existential dimension. Their legal status is generally marked by multiple forms of precariousness, since they are outside their legal and social environment, often without full information about their rights, and at the same time, they can be included in multilayered subcontracting chains in which identifying the liable subject is difficult or almost impossible (See more in Chapter 2.3.). In such circumstances, violations of basic labour rights, such as non-payment of wages, are not merely individual irregularities but rather symptoms of structural weaknesses in the system. That is why the question of the effectiveness of the legal protection is no longer an abstract doctrinal question, but a necessity.

However, the importance of this challenge lies not only at the level of individual workers' protection. It is broadened on the wider context of the functioning of the EU internal market. Non-harmonised protection levels and the fragmentation of national solutions are creating conditions for regulatory arbitrage, in which business subjects are directed towards the legal systems that offer the least restrictive measures for conducting business. Not only are workers' rights threatened, but also the principle of fair competition, since the competitive advantage is achieved in a way that often circumvents the basic rules of labour law⁴. Consequently, the challenge of protecting posted workers' rights in subcontracting arrangements is also a question of maintaining the integrity of the internal market.

At the level of legal doctrine, the importance of the research is further highlighted by the fact that it is an area where the existing theoretical and normative framework is not fully adapted to modern forms of work organisation. Even though the question of the posting of workers and subcontracting as separate institutions has been sufficiently analysed in the literature, their

⁴ Barnard, 2012.; Barnard, 2007.; Cremers, 2011.; De Wispelaere; De Smedt.; Pacolet, 2022.

mutual interaction has been briefly touched upon and/or researched long ago⁵, or remains completely unexplored. Such a lack of comprehensive, up-to-date research that not only identifies the challenge but also analyses it by interrelating legislative solutions and their enforcement has left a significant space for contribution to the legal doctrine. In such a space, this thesis is trying to make its contribution.

The challenge's importance is also highlighted by its dynamic nature. Political attention to this topic, in both general and specific senses, has been intense and active in the EU for a long time, as will be analysed mainly in Chapters 3 and 5. Namely, the phenomenon of posted workers and PWDs caused discrepancies in national approaches, particularly regarding the latest amendment⁶ and intensive by enforcement mechanisms⁷. As will be seen in Chapters 3 and 4, using the example of the Enforcement Directive and selected enforcement mechanisms, particularly liability schemes and due diligence defence systems, political sensitivity has led to wide discrepancies among Member States that directly affect the levels of protection for posted workers, depending on the host country in which they provide services. The importance and dynamism of this topic were further highlighted by the European Commission's Report on the implementation of the PWD18⁸, which further raised questions about the effectiveness of the current legal framework (See in particular Chapter 3.2.2.3). Additionally, the topic of subcontracting, in general, came to light during the intensive discussions in 2025 and continued in 2026 within the Quality Jobs Roadmap and Act⁹, and, as will be analysed in Chapter 5.3, potentially became relevant to the posted workers' scope as well.

⁵ See, for example: Houwerzijl, Jorens, Peters, Gillis, 2012; Heinen, Müller, Kessler, 2017.; Bogoeski, 2017.; Cremers, Houwerzijl, 2021, p. 32.; Jorens, 2022.

⁶ See, for example: Vinković, Konjević, 2025, pp. 303-327.

⁷ See, for example: Martinsen, 2015, p. 206.

⁸ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. {SWD(2024) 320 final}. COM(2024) 320 final. Brussels, 30th April 2024.; Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2024) 320 final}, 30th April 2024, par. 4.2.

⁹ See: European Commission, 2025, 'Quality Jobs Roadmap highlights key role of social partners and social dialogue in shaping future-proof jobs' [Online] (Accessed: 20 December 2025).; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Quality Jobs Roadmap, COM(2025)944 final, Brussels, 4th of December 2025.; Consultation Document, First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act, C(2025)9944 final, Brussels, 4th of December 2025.; European Trade Union Confederation (2025) 'For an EU Directive on subcontracting and labour intermediation. Resolution adopted at the Executive Committee meeting of 1-2 October 2025' [Online] (Accessed: 15 December 2025).

Finally, the importance of this research stems from its dual function. On the one hand, it contributes to the development of legal doctrine by systematically analysing a topic that has so far been fragmented and insufficiently examined. On the other hand, it has an emphasised pragmatic function, since its recommendations and conclusions refer to the shaping of future potential legislative and political solutions at the EU level. Such an interconnection between the theoretical overview and its potential practical applicability lends this challenge particular weight and makes it relevant not only to legal doctrine but also to the broader social and economic context in which the contemporary EU labour market is being developed.

1.3. State of Research: Literature Analysis

The level of research on posted workers and subcontracting chains at the EU level, at first glance, can give the impression of a well-examined and theoretically stable area. However, already in the more detailed analysis, it is becoming clear that such a 'development' is referred mainly to the partial aspects of the challenge, while its mutual connectivity, that is, the focal point of this dissertation, is staying insufficiently systemically examined and often normatively unclear.

In the literature on the posting of workers, the analysis is predominantly an examination of the basic tension between the freedom to provide services and workers' protection, with special emphasis on the development of secondary EU legislation and the case law of the Court of Justice of the European Union. Authors in that area are examining in detail the structure of the PWD96, its amendment PWD18, and the Enforcement Directive from 2014, analysing the boundaries of permitted national measures and the development of the concept of minimum protection standards¹⁰. Particularly important are the publications that show the gradual shift towards a stronger emphasis on the social dimension of the internal market, especially through the concepts of equal working conditions and wages for posted workers.¹¹ However, even though such literature provides a strong normative basis, it is mostly confined to legal sources

¹⁰ See: Jorens, 2022.; Lasek-Markey, 2023, p. 34; Houwerzijl, Verschueren, 2019, pp. 143–200; Lens, Mussche, Marx, 2021, pp. 45–62; Bottero, 2021; De Wispelaere, De Smedt, Pacolet, 2022; Cremers, 2011.; Verschueren, 2021, pp. 557–567; Houwerzijl, Berntsen, 2020, pp. 33–54; Van Hoek, Houwerzijl, 2012, pp. 417–448; Vinković, 2018, pp. 1–20; Konjević, 2023, pp. 122–125; Rocca, 2015.

¹¹ See: Van Hoek, Houwerzijl, 2012, pp. 411–442.; Houwerzijl, Verschueren, 2019, pp. 163–252.; Van Nuffel, Afanasjeva, 2020, pp. 271–302.; Lasek-Markey, 2023.; Barnard, 2021.; Cremers, 2010, pp. 293–306.; Kyriazi, 2023.; Bottero, 2021.; Jorens, 2022.

and their interpretation, limited to the scope of posting of workers, while the real organisational context, especially subcontracting arrangements, is left out.

In parallel, the literature on subcontracting and employment relationship fragmentation is being developed. In such analysis, subcontracting is identified as both the key instrument of flexibilization and the source of systemic risk and liability transmission at the lower levels of the chain. Particularly highlighted are the phenomena of non-payment of wages, fake employers, and the use of disappearing subcontractors. However, even within this segment of the literature, workers are often viewed as part of the market phenomenon, without further examination of their specific legal position in the context of posting.¹²

When the literature that tries to connect those two areas is analysed, it is clear that it is mostly left to the identification level, without a deeper examination. Authors are recognising that the combination of temporary labour mobility and complex subcontracting structures is creating space for fraudulent practices, but they rarely¹³ develop an integrated analytical framework that includes both the legal and enforcement dimensions of the challenge. That level of identification without systematisation represents one of the key loopholes in the current state of research.

Particularly important contributions to the literature are publications that address liability in subcontracting chains. In that context, the analysis showing that the traditional liability model is connected only to the bottom of the chain is inconsistent with the reality of modern subcontracting chains. Bogoeski, for example, highlights that the formally strong liability models, such as the German one, are effective in practice because they allow for the approach of subjects with real economic power, while the weaker models are often limited by procedural and evidentiary boundaries¹⁴. Similarly, publications by Jorens, Houwerzijl, Heinen and others, show the importance of combining liability with other enforcement mechanisms, emphasising that isolated mechanisms rarely achieve the desired effect¹⁵.

¹² See, for example: Cremers, Houwerzijl, 2021; Houwerzijl, Jorens, Peters, Gillis, 2012; Sinander, 2025; European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025; Marx, Wouters, Beke, 2015, pp. 1–18; Wills, 2008, pp. 441–460.

¹³ One of the rare studies in this regard is, for example: Heinen, Müller, Kessler, 2017; Cremers, Houwerzijl, 2021; Andriescu, Buckingham, Broughton, De Wispelaere, De Smedt, Gascon, Ongono Pomme, Voss, Vitols, 2024; Lillie, 2012, pp. 148–167.

¹⁴ See: Bogoeski, 2017.

¹⁵ See, for example: Houwerzijl, Jorens, Peters, Gillis, 2012; Houwerzijl, Peters, 2008; Heinen, Müller, Kessler, 2017; Bakermans, 2014; Cremers, Houwerzijl, 2021.

Comparative analysis of the national systems additionally confirms that claim. The German chain liability model is often emphasised as an example of a system that enables the effective enforcement of posted workers' rights, mainly because it eliminates the need to prove the guilt of the subject at higher levels of the chain¹⁶. The Austrian system is emphasising the country's preventive role through intervention in financial flows, especially in cross-border cases and those involving letterbox companies¹⁷. The Dutch system of successive liability introduces process logic and predictability¹⁸, while the Belgian system shows how normative complexity can complicate practical application¹⁹. However, most of the literature on such models remains at the level of description and comparison, without a deeper critical analysis of their actual effectiveness in the context of posted workers.

Additionally, a problematic segment of the literature concerns the due diligence defence system. Even though such a concept has been developed through international standards and is broadly accepted as an instrument of responsible business²⁰, its concrete role in the labour law context and in subcontracting chains remains insufficiently developed. Some authors warn that the due diligence defence system risks becoming a formal mechanism for avoiding liability, especially when it is not clearly defined in normative terms²¹. Similar criticisms are found in publications that analyse the implementation of that institute within the framework of the 2014 Enforcement Directive, which highlight that non-harmonised national approaches further increase legal uncertainty²².

¹⁶ See, for example: Bogoeski, 2017; Schlachter, 2010; Bakermans, 2014; Heinen, Müller, Kessler, 2017; Arbeitnehmer-Entsendegesetz (AEntG) (2013) Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen vom 20 April 2009 (BGBl. I S. 799), zuletzt geändert durch Artikel 8 des Gesetzes vom 22 December 2025 (BGBl. 2025 I Nr. 369), § 14.

¹⁷ See, for example: Bundesgesetz, mit dem ein Gesetz zur Bekämpfung von Lohn- und Sozialdumping erlassen wird (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG) StF: BGBl. I Nr. 44/2016 (NR: GP XXV RV 1111 AB 1133 S. 128. BR: AB 9590 S. 854.); Houwerzijl, Peters, 2008.

¹⁸ See, for example: Heinen, Müller, Kessler, 2017; Van Hoek, Houwerzijl, 2011; Kall, Lillie, 2017.

¹⁹ See, for example: Houwerzijl, Peters, 2008.

²⁰ See: United Nations (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. New York, Geneva: Office of the High Commissioner for Human Rights; International Labour Organization (2006) ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; International Labour Organization (2022) ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; OECD (2011) OECD Guidelines for Multinational Enterprises; OECD (2023) OECD Guidelines for Multinational Enterprises on Responsible Business Conduct; Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, Official Journal L, 2024/1760.

²¹ See, for example: Heinen, Müller, Kessler, 2017; Houwerzijl, Peters, 2008, p. 42; Bakermans, 2014, pp. 27–28.

²² See, for example: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on

Institutional literature, especially the European Commission's reports, provides additional insight into the practical challenges of enforcing the existing legal framework. In the 2024 Report, it clearly stated that, despite the existence of formal mechanisms, their effectiveness depends on the level of national enforcement and on the combination of different mechanisms. However, even in those documents it is identified that the current legal framework is not providing sufficient protection of posted workers in subcontracting arrangements, they are just detecting 'good practices', such as broadening liability, while still treating it as optional and not a necessary system element, further confirming the fragmentation of the approach²³.

When everything is analysed together, it becomes clear that the existing literature, though rich and diverse, does not provide a comprehensive response to the challenge this research addresses. In the last decade, research that would, in an integrated way, connect the legal framework for posted workers, subcontracting chains, liability schemes, due diligence defences, and the real challenges of enforcement hasn't been developed. Such fragmentation underscores the real need for a new approach that connects those elements within a single analytical framework. In that sense, this thesis is not trying to replace the existing literature, but systematically connect it and critically upgrade it. Its contribution lies in the shift from partial to integrated analysis, which enables understanding of the challenge not only through legislation but also through its real function within the complex and often non-transparent structures of the contemporary labour market. In that way, space is being created to develop potential solutions that are not only formally harmonised but also effective in practice.

Finally, the structure of the thesis directly reflects such a methodological and research framework. After this introductory chapter, which sets the basic research framework, Chapter 2 analyses the broader context of the posting of workers under internal market law, with particular emphasis on the relationship between the freedom to provide services and the protection of posted workers. Chapter 3 addresses the concrete types of fraudulent practices and challenges that result from subcontracting chains, including phenomena such as letterbox

administrative co-operation through the Internal Market Information System ('the IMI Regulation'), COM/2019/426 final, 25th of September 2019.

²³ See, for example: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. {SWD(2024) 320 final}. COM(2024) 320 final. Brussels, 30th April 2024.; Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2024) 320 final}, 30th April 2024.

companies, work through temporary work agencies, and bogus self-employment. Another focus of this chapter is the analysis of all relevant EU legislation within the scope of posted workers in subcontracting arrangements. Chapter 4 presents a comparative analysis of the national liability schemes and corresponding mechanisms, with the aim of identifying functional solutions and the so-called ‘best practices’. Finally, Chapter 5 synthesises the previous conclusions and develops concrete legislative and policy recommendations, with particular emphasis on the possibility of amending the existing legal framework and the potential development of new horizontal legislation at the EU level. Such a structure allows the gradual development of argumentation, from theoretical and legislative bases, through analysis of practical challenges, to concrete policy recommendations, thereby securing the internal coherence and clarity of the research contribution.

1.4. Methodology, Research Limitations and the Thesis Structure

The methodological scope of this research has been shaped by the nature of the research challenge and an understanding of its complexity. The focus question of the research required, first of all, a comprehensive legislative analysis, but also the capability to overview the law beyond its formal dimension. Consequently, the research is conceived as primarily legal-dogmatic, with the intentional inclusion of comparative and contextual dimensions.

The basis of the research is the detailed analysis of the primary and secondary EU legal framework, including the provisions of the Treaty on the Functioning of the European Union (hereinafter: TFEU)²⁴ that established the freedom to provide services, then the PWD96, its amendment PWD18, and the Enforcement Directive from 2014. Special attention is given to the case law of the Court of Justice of the European Union, which plays a key role in shaping the balance between market freedoms and social rights.

However, even at the early stage of research, it became clear that the legal texts alone cannot explain how subcontracting chains are used in practice. That is why the legal-dogmatic method has been supplemented by a comparative analysis of national systems, with special emphasis on those Member States that have developed specific and/or presumably most

²⁴ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), Official Journal of the EU, C 326, 26 October 2012.

effective liability schemes in subcontracting arrangements. Analysis of the German, Austrian, Dutch and Belgian systems allowed not only the comparison of legislative solutions, but also the identification of concrete mechanisms that, in practice, contribute to or limit the protection of posted workers in subcontracting chains. Therefore, the research is shifting from abstract provisions to their functionality.

Additionally, the research includes an analysis of secondary empirical sources, such as reports and studies from authorities²⁵, as well as available statistical data that provide insight into mobility patterns and potential abusive practices²⁶. Those sources allowed the legislative analysis not to be placed in a vacuum but to be situated in dialogue with real market practices. The thesis does not include individual empirical research in the narrow sense, which would be valuable for further deepening the understanding of posted workers' experiences. However, it would require a methodological and organisational framework that goes beyond the limits of this research. In this sense, it is important to avoid the simplified explanation of the limited accessibility of data on the violations of posted workers' rights. Even though it is true that there are relatively few court proceedings that can be linked to the precarious position of posted workers (see Chapters 2 and 4), their dependence on the employer, or the fear of job loss, such an explanation cannot be the only or sufficient one. The lack of case law does not necessarily

²⁵ See, for example: European Commission (2024) Study supporting the Monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU.; Impact Assessment (SWD (2016) 52 final, SWD (2016) 53 final (summary)) of a Commission proposal for a directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM (2016) 128 final). Briefing. Initial Appraisal of a European Commission Impact Assessment. European Parliament, May 2016.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), {SWD(2019) 337 final}. COM(2019) 426 final, 25th September 2019.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'). {SWD(2019) 337 final}. COM(2019) 426 final. Brussels, 25th September 2019.; Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2024) 320 final}, 30th April 2024.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. {SWD(2024) 320 final}. COM(2024) 320 final. Brussels, 30th April 2024.

²⁶ See, for example: De Wispelaere, De Smedt, Pacolet, 2022; De Smedt, De Wispelaere, 2024; Houwerzijl, 2025; De Wispelaere, De Smedt, Pacolet, 2025.

mean a lack of rights violations, but it often points to structural barriers to accessing justice, including language barriers, short-term residence in the host country, or a lack of knowledge of legal proceedings²⁷. At the same time, relevant information on rights violations extends beyond case law to administrative procedures, inspection controls, and sectoral analysis, but such data are often fragmented, unharmonized, and hardly comparable.

Consequently, the methodological choice of this research can be described as intentionally focused on the legislative scope of the challenge, using accessible empirical sources as contextual support rather than as the primary research material. Such an approach allows for in-depth analysis of legal institutions, but at the same time, it requires acceptance of its limitations. In concrete terms, the legal-dogmatic method cannot fully encompass the everyday experiences of posted workers or the many forms of informal or fraudulent practices that evade legal evidence. However, it can identify structural weaknesses in the legal system that allow such practices or fail to prevent them.

Besides methodological limitations related to data accessibility and nature, it is also important to emphasise the limitations in terms of the scope of the research. The thesis is primarily approached from a labour law perspective on the challenge, while the questions of social security and tax law are incorporated only to the extent necessary for understanding the phenomenon under analysis. Furthermore, the comparative analysis is limited to the selected Member States, which are identified as relevant due to the developed liability models and their intensity in the practice of posting of workers. Such an approach allows a deeper analysis, but necessarily excludes full coverage of all EU national systems. Additionally, it is important to emphasise that the enforcement mechanisms and the political discussions on this area are developing in a dynamic environment. While political priorities and legislative initiatives can change relatively quickly, basic institutional enforcement mechanisms, such as labour inspections, court proceedings and administrative control, are more stable, even though their effectiveness varies across Member States. This thesis, therefore, approaches the analysis with a certain level of methodological reflexivity, aware that the conclusions pertain to a system undergoing continuous transformation. This approach, even though not without limitations, is allowing harmonised and scientifically based analysis that connects the legislative framework

²⁷ See, for example: Theunissen, Zanoni, Van Laer, 2023, p. 937; Arnholtz, Refslund, 2019, pp. 682–699; Berntsen, 2015, pp. 371–389; Danaj, Sippola, 2015, pp. 217–236; Berntsen, Lillie, 2016, pp. 171–187; Wagner, 2015, pp. 201–213.

with its real implications, without the presumption that a single source, especially case law, can provide a comprehensive picture of the phenomena under study.

CHAPTER 2: Posting of Workers in the EU and Its Dark Sides

2.1. Introduction

Over the years, three distinct forms of labour mobility have developed within the EU. The first one refers to the migration in another Member State, including the daily and weekly cross-border commuting, which is made possible by the freedom of movement of workers laid down in Article 45 of the Treaty on the Functioning of the European Union²⁸ (hereinafter: TFEU), and partly by the freedom of establishment regulated by Article 49 of the TFEU²⁹. The final form includes temporary mobility, including, for example, the frontier workers who are employed in a different Member State from their residence country, seasonal workers, and the posted workers,³⁰ as the focus of this research, whose rights are guaranteed by the freedom to provide services as set out in Article 56 TFEU.³¹

EU citizenship, established by the Treaty of Maastricht³², has been directly associated with the right of EU citizens to move and reside freely. As a result, the provisions regarding EU citizenship established a legal basis for separating the exercise of freedom of movement from purely internal market considerations, thus elevating it into a genuine individual right.³³ Nevertheless, the CJEU has consistently maintained that Treaty provisions governing workers, establishment, and services are specific instances of free movement rights. These articles should be prioritised over the broader rights associated with EU citizenship whenever possible.³⁴

²⁸ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), Official Journal of the EU, C 326, 26 October 2012.

²⁹ See more about the freedom of establishment in: Craig, De Búrca, 2008; Barnard, 2007; Chalmers, Hadjiemmanuil, Monti, Tomkins, 2006.

³⁰ Andriescu, Buckingham, Broughton, De Wispelaere, De Smedt, Gascon, Ongono Pomme, Voss, Vitols, 2024, p. 37.

³¹ Barnard, 2012, p. 143; Bottero, 2021, p. 23; De Wispelaere, Pacolet, 2016, p. 9.

³² Treaty on European Union, Official Journal C 191, 29/07/1992.

³³ Hyltén-Cavallius, 2020, p. 13.

³⁴ Nic Shuibhne, 2009, p. 170.

Therefore, while Union citizenship now represents the primary status that defines and shapes the rights of nationals from Member States granted by the EU, the free movement law remains the essential foundation of this ‘fundamental status’.³⁵ It embodies the integration of various populations, collaborative initiatives, and shared experiences among the Member States. This, in turn, cultivates a deep sense of acceptance, belonging, and integration among the citizens of the EU.³⁶

Nevertheless, the European Commission uses diversified terminology for the movements within the EU and between the EU and third countries, mainly due to the political sensitivity of Member States over the mobility of persons.³⁷ According to Ruhs³⁸, the EU policymakers have avoided framing the intra-EU movement as ‘migrations’, but have instead referred to EU citizens as ‘mobile EU citizens’³⁹, especially in the labour context.⁴⁰ That distinction is important, since the ‘migration’ implies permanent movement with restrictions, while the ‘mobility’ suggests (circular) flows between countries, either short-term or long-term, without severe restrictions. Within this framework, the EU labour market has evolved to include different forms of labour mobility, as mentioned above. In particular, temporary mobility⁴¹ through the posting of workers has developed as one of the key forms, based on the freedom to provide services regulated by Article 56 TFEU.⁴²

In its initial form, posting of workers has been a form of mobility, primarily used to send highly skilled and specialised staff abroad. Then, this practice has not caused intensive disputes and debates,⁴³ as the national authorities could still impose taxes and contributions on domestic employers, without taking into consideration the danger of the unfair competition from companies benefiting from a cheaper foreign workforce or from companies’ offshoring’ the production to avoid the obligations. That relatively stable framework has evolved into a demanding and challenging phenomenon with the progress of European integration and the creation of the single market⁴⁴, as it allowed employers to direct the cross-border movement of

³⁵ O’Leary, Iglesias Sánchez, 2021, p. 508.

³⁶ Ramidoff, Teixeira, 2020, p. 100.

³⁷ Guild, 2002, p. 295.

³⁸ Ruhs, p. 166.

³⁹ However, this term, in the thesis, is going to be used specifically for workers covered by the principle of the free movement of workers.

⁴⁰ De Wispelaere, 2025, pp. 19-31.

⁴¹ Therefore, the term ‘temporary mobility’ will often be used in further research, due to its relevance for the scope and outcomes of this research.

⁴² Lens, Mussche, Marx, 2021, pp. 28–29.

⁴³ Arnholtz, Lillie, 2020, p. 5.

⁴⁴ Eichhorst, 1998, p. 8.

labour in ways that separate them from the local workforce and leave them in a particularly precarious position.⁴⁵

Additionally, it is important to note that, from a quantitative standpoint, the posting of workers is not a primary concern for labour lawyers or social actors in Europe, as their numbers are relatively low compared to migrant workers in the EU⁴⁶ as will be mentioned below, and are concentrated in specific sectors, with a focus on labour-intensive ones and several Member States.⁴⁷ However, from a qualitative perspective, the posting of workers presents one of the most intricate and controversial challenges in the EU's social sphere.⁴⁸

One of the reasons for the controversies was particularly the CJEU case-law,⁴⁹ especially after it decided not to apply the free movement of workers to posted workers, which was ultimately followed by the legislation, the Posted Workers Directive from 1996⁵⁰ (hereinafter: PWD96), the Enforcement Directive⁵¹ and the Revised Posted Workers Directive from 2018 (hereinafter: PWD18)^{52,53}. Consequently, the posting of workers has become a specific and individual aspect of the intra-EU labour mobility, but also a highly politicised and widely debated issue, often cited as a key example of unfair competition and social dumping⁵⁴.

In that regard, the following chapter provides a detailed analysis of the personal and legal scope of posting of workers in the EU, including an overview of the background of the determination of posted workers as service providers, essential elements and types of posting, terms for its application, and, finally, the dark sides of that phenomenon. Afterwards, the

⁴⁵ Lillie, Greer, 2007, p. 555.

⁴⁶ Rocca, 2015, p. 23.

⁴⁷ Van Nuffel, Afanasjeva, 2020, pp. 273-274.

⁴⁸ Rocca, 2015, p. 23.

⁴⁹ Rocca, 2015, pp. 17-19.; Houwerzijl, Verschuere, 2024, p. 194.; See: Judgment of the Court of 17 December 1981, Criminal proceedings against Alfred John Webb, Case 279/80, ECLI identifier: ECLI:EU:C:1981:314.; Judgment of the Court of 3 February 1982, Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité, Joined cases 62 and 63/81, ECLI identifier: ECLI:EU:C:1982:34.; Judgment of the Court (Sixth Chamber) of 27 March 1990, Rush Portuguesa Ld^a v Office national d'immigration, Case C-113/89, ECLI identifier: ECLI:EU:C:1990:142.

⁵⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal L 18/1, 16 December 1996.

⁵¹ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Official Journal L 159, 28 May 2014.

⁵² Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal L 173/16, 9TH July 2018.

⁵³ Rocca, 2015, pp. 17-19.

⁵⁴ See more about the concept and scholarly discussion over the social dumping: Bernaciak, 2015, pp. 1-21.; Vinković, 2018, pp. 3-5.

research narrows its scope to the specific challenge of posted workers in the EU. In this regard, this chapter serves as a backbone for understanding the concept of posting workers as the focus of the research, which will be put in the context of subcontracting arrangements.

2.2. The Personal and Legal Scope of Posting of Workers

While the posting of workers is not a new concept, its determination remains complex and unbalanced under EU legislation. Initially, the posting was addressed within the coordination of social security in Europe, rooted in the EU's commitment to free movement and the right to work in another Member State. Coordination rules, established in 1957, revised in 1971, and continuously updated, ensured that individuals working across borders are subject to only one Member State's social security system.⁵⁵ Additionally, CJEU rulings have demonstrated that the practice of transferring workers across EU borders predates both the single market and the European Communities. Early cases like *Van der Vecht*⁵⁶ and *Manpower*⁵⁷, which involved French temporary workers employed in Germany, again addressed social security concerns in such arrangements. These judgements provided a foundation for the modern definition of posted workers,⁵⁸ but also proved the existence of the trend of posting of workers already in the 1960s and 1970s. However, that phenomenon started to be closely connected with the social dumping only after the 1990s, after Portugal⁵⁹ acceded to the EU and the remarkable case of *Rush Portuguesa*⁶⁰, which will be further examined below.⁶¹

⁵⁵ Cremers, 2011, p. 7.

⁵⁶ Judgment of the Court of 5 December 1967. *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht*. Case 19-67. ECLI:EU:C:1967:49. The judgment reinforced the principle that a worker's social security rights are determined by the country of employment, preventing double contributions and ensuring legal clarity.

⁵⁷ Judgment of the Court (Second Chamber) of 11 November 2021. *UAB „Manpower Lit“ v E.S. and Others*. Case C-948/19. ECLI:EU:C:2021:906. Importantly, in this case, the CJEU established that workers temporarily posted abroad would stay covered by the social security system of their employer's home country, provided the posting did not exceed 12 months. Under current rules, as outlined in Article 12 of Regulation 883/2004/EC, this period has eventually been extended for up to 24 months. Despite this, social security issues linked to posting persist. Interestingly, the *Manpower* ruling offered greater protections for workers than those currently available under EU social security law.

⁵⁸ Lasek-Markey, 2023, p. 34.; Houwerzijl, Verschueren, 2019, pp. 45–130.

⁵⁹ Treaty of Accession of Spain and Portugal, Official Journal, L 302, 15 November 1985.

⁶⁰ Judgment of the Court (Sixth Chamber) of 27 March 1990, *Rush Portuguesa Lda v Office national d'immigration*, Case C-113/89, ECLI:EU:C:1990:142, par. 2-7.

⁶¹ Bjelinski, Žeravčić, 2020, pp. 99-100.

In that regard, the scope of labour law also became highly relevant and necessary. Therefore, it is essential to determine the personal scope of the posting of workers separately for social security and labour law. The latter one plays a vital role in understanding, but also in effective implementation and enforcement of the Posted Workers Directive, both in its initial⁶² and revised form⁶³. Also, it is particularly relevant in the context of the Enforcement Directive⁶⁴, which is important for posted workers in subcontracting arrangements. Therefore, this part of the research will focus on the need to clearly define the terms ‘posted worker’ and ‘posting’ to facilitate further analysis. This clarification and the background conceptualisation also contribute to the distinction between the posted workers falling under the freedom to provide services and the workers falling under the freedom of movement of workers^{65,66}.

To define posting, Jorens refers to the Benelux Social Law Dictionary, which is informed by Regulations 1408/71⁶⁷ and 574/72⁶⁸ on social security, as the first Community legal instrument on posting⁶⁹. It shortly describes posting as an employer’s act of sending a worker to do temporary work abroad, such as machine installation. Although this 1977 definition focuses on scenarios that are now less common, it highlights three key aspects of posting: its temporary nature, international scope, and the ongoing relationship between the worker and the employer during the overseas assignment.⁷⁰ These elements also appear in labour law, which is the focal point for further research. Therefore, when it comes to the personal determination of the term ‘posted workers’ from the scope in focus, those are considered employees sent by their employers to perform their work for a temporary period in another EU Member State.⁷¹ As

⁶² Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal L 18/1, 16 December 1996.

⁶³ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal L 173, 28 June 2018 (hereinafter: PWD 18).

⁶⁴ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Official Journal L 159/11, 15 May 2014.

⁶⁵ Ryszka, 2021, p. 138.

⁶⁶ Van Hoek, Houwerzijl, 2012, p. 421.

⁶⁷ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, Official Journal L 149, 5th of July 1971.

⁶⁸ Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, Official Journal L 74, 23rd March 1972, Repealed by: Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, Official Journal L 284/1, 30th October 2009.

⁶⁹ Cremers, 2006, p. 171.

⁷⁰ Jorens, 2022, p. 144.

⁷¹ See: Lens, Mussche, Marx, 2021.

mentioned, the concepts of ‘posted person’ are separately defined in two law areas, reflected in key pieces of EU secondary legislation: PWD96 and PWD18 and the Coordination Regulations (Regulation No. 883/2004 on the coordination of social security systems⁷² and its implementing Regulation (EC) No 987/2009⁷³).⁷⁴ These pieces of legislation exhibit a disparity in their definitions of ‘posted worker’ and ‘posted person’.⁷⁵

The PWD18, in its Article 2(1), defines the ‘posted worker’ *‘as a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works’*.⁷⁶ This definition of a posted worker was first established in Article 2 of PWD96, and despite subsequent revisions to the Directive, it has remained fundamentally unchanged. Therefore, the PWDs require host states to ensure posted workers receive key employment protections under local laws and agreements, regardless of the governing employment law. This applies only if the worker meets the Directive’s criteria; otherwise, the host state has no obligation under the PWD but may enforce its mandatory provisions, provided this aligns with the TFEU.⁷⁷ Typically, posted work is carried out under a contract established by the sending company to provide services in the host Member State, but it can also be conducted as an intra-group posting or through the temporary work agencies.⁷⁸ However, a more detailed analysis of the types of concepts of posting of workers will be conducted below. Moreover, unlike the Regulation, the Directive introduces an additional criterion requiring that the service be provided for a company or individual operating in a Member State other than the one where the posted worker is usually employed. This significantly narrows its scope.⁷⁹

On the other hand, Article 12 of the aforementioned Regulation provides a distinct interpretation of a ‘posted person’ as follows: *‘A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that*

⁷² Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Official Journal L 166, 30/04/2004.

⁷³ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, Official Journal L 284, 30/10/2009.

⁷⁴ Bottero, 2021, p. 36.; De Wispelaere, De Smedt, Pacolet, 2022, p. 9.

⁷⁵ Schwarz, Kiełbasa, 2018, pp. 2, 3-4, 5.

⁷⁶ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal L 173, 9 July 2018, Art. 2(1).; See: De Wispelaere, Pacolet, 2015.

⁷⁷ Van Hoek, Houwerzijl, 2012, p. 422.; Judgment of the Court of 2 July 1996. Commission of the European Communities v Grand Duchy of Luxembourg. Case C-473/93. ECLI:EU:C:1996:263.

⁷⁸ Van Nuffel, Afanasjeva, 2020, pp. 273-274.

⁷⁹ Schwarz, Kiełbasa, 2018, pp. 2, 3-4, 5.

*employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person.*⁸⁰ According to that, for instance, a Dutch professor specialising in social security law delivering a one-day presentation on posting of workers at a conference in Brussels would remain subject to the Dutch social security law for that day, since it would be administratively complex and unreasonable to be under the social security system of Belgium for that short a time. In this regard, the derogation from the main rule of the application of the employment country's legislation is made.⁸¹

Importantly, the Regulation covers posted workers, self-employed individuals, business trips, meetings, and conferences, but does not apply to working simultaneously in multiple Member States. In contrast, the PWD excludes cases without a formal agreement between the service provider and recipient, such as business trips, conferences, and self-employed individuals. However, the PWD does not exclude individuals engaged in activities across multiple Member States.⁸² Additionally, under the Regulation, if a posted worker is in the host Member State for 24 months or less, they remain subject to the social security laws of their home Member State. This provision eases the administrative burden for both employers and national authorities, eliminating the need to repeatedly change the applicable social security system for workers temporarily abroad.⁸³

In this regard, a clear distinction between the two legislations is evident when we compare this Regulation's provision with the PWD18, under which posting can last up to one year, with the possibility of extension for another six months⁸⁴. After this period, the host Member State's labour law provisions are applied.⁸⁵ Therefore, the Regulation defines 'posted worker' more broadly than the Directive, resulting in differences where some workers remain classified as posted under the Directive despite being insured in another Member State, while others holding a PD A1 under the Regulation do not fall under the Directive's definition. This discrepancy leads to uncertainty and public misunderstanding, frequently discussed in media

⁸⁰ Article 12 of the Regulation on Social Security Coordination. While the PWD applies exclusively to workers, excluding the self-employed from its scope, Article 12(2) of Regulation 883/2004 allows self-employed individuals to temporarily post themselves to another Member State. See in: Pennings, 2015, pp. 119-121.

⁸¹ Pennings, 2006, pp. 243-244.

⁸² Bottero, 2021, p. 37.; Jorens, 2022, p. 145.

⁸³ Van Nuffel, Afanasjeva, 2020, pp. 273-274.

⁸⁴ However, the initial idea of the Commission was to provide the duration of posting according to the Posted Workers Directive, also 24 months, just as in the Regulation.

⁸⁵ PWD 18. par. 11.

discussions.⁸⁶ The conditions for posting also differ, leading to inquiries about applicable rules, especially when a situation involves more than two countries, such as subcontracting chains, in which the employer's location, work site, and the individual's residences are spread across multiple Member States.⁸⁷

Therefore, the EU legislator uses the terms 'posted worker' and 'posted person' consistently, but across different contexts.⁸⁸ Generally, the PWDs specify the labour law regulations for posted workers, while the Regulation addresses the applicable social security system⁸⁹. Both legal instruments create a framework for the status of a posted worker during the posting period, considering factors such as the employer's situation, the worker's circumstances, and the experiences of other individuals who have performed similar work at the same location⁹⁰, however, with a different base, leading to legal uncertainty.

To conclude, the definition of a posted person varies among European legal frameworks (labour law and social security law)⁹¹, each with distinct objectives and personal scopes,

⁸⁶ Schwarz, Kielbasa, 2018, pp. 2, 3-4, 5.

⁸⁷ Jorens, 2022, p. 144.

⁸⁸ Bottero, 2021, p. 38.

⁸⁹ To resolve inconsistencies between the Directive and the Regulation, the Commission proposed the broader concept of 'sent person', encompassing posted workers, self-employed individuals, and others covered by the Regulation. EPSCO, in its 2017 approach, adopted this logic, using only 'sent persons' in Article 12(1), as posted workers are a subcategory. While this simplifies the provisions, according to Schwarz and Kielbasa, it leaves the relationship between the terms undefined, which could be clarified in the recitals. However, limiting the Regulation to 'posted workers' alone would exclude many employed and self-employed individuals working in another Member State without providing a service to a business operating there.

⁹⁰ Schwarz, Kielbasa, 2018, p. 2.

⁹¹ It is essential to highlight that the PWD grants the host state the authority to define who qualifies as a worker. See more in: Rocca, 2015, p. 3.

resulting in different rights and obligations. Therefore, not every posted individual is recognised as such across all EU instruments^{92,93}.

Additionally, distinguishing between broad and narrow views of posting is important for the scope of labour law, too. The broad notion of posting encompasses irregular postings and unreported or fraudulent forms of labour mobility, supported by empirical research and media scrutiny. To effectively address the discrepancies between the formal rules and the practical implications for posted workers, especially in low-wage sectors, a harmonised and comprehensive approach that spans different legal areas is needed. The fact that some positive outcomes are visible is encouraging. With the relatively recent revision of the PWD, the European Commission has introduced new regulatory solutions that perceive the posting of workers as the mechanism for sustaining ‘fair labour mobility’.⁹⁴ This broad strategy aims to bridge the gap between the legal framework and the reality of posting, with the ultimate goal of strengthening supervision and compliance. Reliance only on the narrow perception of posting, based primarily on the A1 posting certificates, can be considered insufficient. That approach is limited in several respects, including the non-obligatory nature of the certificate requirement and the differing reporting conditions across Member States. The narrow perspective can create a misleading impression of the scope of the posting, ignore its complexity and the ethical questions related to the practical implications. In contrast, the broader perception

⁹² Nevertheless, if we look at the national legislation, we can find just slight differentiations in personal determination of the posting of workers. For example, the analysis of the national legislation of Croatia, Slovenia, Hungary, Poland and Romania shows a generally unified approach to the concept of posted workers, driven by compliance with EU Directives 96/71/EC, 2014/767/EU and 2018/957/EU. These directives tend to ensure that posted workers receive the same working conditions as domestic workers in the host country. Each country’s laws incorporate the essential principles outlined by the EU directives while operating within their national legal frameworks, balancing EU harmonisation with national legislative autonomy. While the core definition and rights of posted workers remain consistent, the administrative and procedural aspects of implementing these laws can vary. Specific reporting obligations, liability rules, and enforcement mechanisms may differ according to each country’s legal and administrative practices. Finally, the EU’s framework for posted workers establishes a harmonised baseline for worker protection across Member States. However, national laws are crucial in the specific application and enforcement of these protections, highlighting both unity and diversity in the EU’s approach to labour mobility. See more about the above mentioned national legislations’ definitions in: Act on Posting of Workers to the Republic of Croatia and Cross-Border Enforcement of Fines (Zakon o upućivanju radnika u Republiku Hrvatsku i prekograničnoj provedbi odluka o novčanoj kazni), Official Gazette of the Republic of Croatia, No. 128/20, 114/22, Art. 3(2); Transnational Provision of Services Act (Zakon o čezmejnem izvajanju storite), Official Gazette of the Republic of Slovenia, No. 40/23, Art. 3(7), Hungarian Labour Code (2012. évi I. törvény a munka törvénykönyvéről), Official Gazette of the Republic of Hungary, No. 1/12, Act on the Posting of Workers in the Framework of the Provision of Services (Ustawa o delegowaniu pracowników w ramach świadczenia usług), Official Gazette of the Republic of Poland, No. 24/73, Art. 3(6-7); Romanian Labour Code (Codul Muncii), Official Gazette of the Republic of Romania, No.72/03. This research was part of the broader research conducted by the author for the purpose of the LLM thesis in European Public Law, defended in September 2024.

⁹³ Verschueren, 2021, pp. 557-560.

⁹⁴ Houwerzijl, Berntsen, 2020, pp. 162-163.

of posting contributes to a more accurate estimation and encourages more effective policies that reflect the real circumstances of the mobile labour force in the EU.⁹⁵

Consequently, the existence of diverse concepts of posting under EU law has led to fragmented legal systems, with differing conditions and interpretations. This diversity across EU legal instruments complicates the uniformity of understanding and application. As a result, EU legislation approaches the scope of posting of workers differently, resulting in disparate conditions and conceptualisations depending on the specific legal framework.⁹⁶ Besides the mentioned labour law and social security law, and broad and narrow perspectives, there is also the distinction of posted workers, brought by Matyska⁹⁷, between assigned and self-initiated posted workers. Firstly, posted workers that the employer sends to work abroad are employed in their home country and are assigned to projects, which are often perceived as business trips with limited connection to the host country. On the contrary, self-initiated workers find work independently and are more cautious, yet still often do not understand the terms of their contracts due to various pressures. Some of them are preserving the longer-term relationship with the same employer, which can ease the conclusion of future contracts.⁹⁸ However, even though important, the latter classification of posted workers is not usually analysed in the literature.

Importantly and finally, to guide subsequent research, the author will adopt a labour law perspective and apply a broad interpretation of the concept of a posted worker. This approach will not differentiate between assigned and self-initiated posted workers, ensuring a more cohesive and fluid analytical framework.

2.2.1. Evolution of Determination of Posted Workers as Service Providers

For further terminological determination relevant to the scope of the research, it is important to determine the term ‘services’. Namely, in EU law, it has multiple meanings. Firstly, it belongs to the context of the freedom to provide services⁹⁹. Secondly, it refers to a category of economic activity, which can, depending on the nature of the activity, fall under the freedom

⁹⁵ Houwerzijl, Berntsen, 2020, p. 151.

⁹⁶ Jorens, 2022, p. 143.

⁹⁷ See more in: Matyska, 2018, pp. 133–152.

⁹⁸ Matyska, 2020, p. 73.

⁹⁹ Art. 56-57 of the TFEU

to provide services¹⁰⁰, the right of establishment¹⁰¹, or specific treaty provisions regulating service activities in certain sectors, such as transport or banking¹⁰². The focus here is on services as part of the market freedom to provide them, characterised by a cross-border nature, temporality and remuneration.¹⁰³

However, figuring out if some activity qualifies as an economic one under EU law isn't always clear enough. Article 57 of the TFEU clarifies that the free movement of services applies only for those activities that are provided 'normally¹⁰⁴ for remuneration'.¹⁰⁵ The CJEU provided an interpretation of it, stating that a service mostly includes some variation of financial compensation for its provision, which is agreed upon between the person offering the service and the one receiving it.¹⁰⁶ As stated in the *Grogan* case¹⁰⁷, if a service is not provided for financial compensation, but for free or if the clear economic connection between the parties is absent, it generally does not fall within the scope of the Treaty.¹⁰⁸ Services are also treated differently from goods and capital, but the main dividing line tends to be whether the product is tangible. What is more difficult is differentiating between providing services in another Member State and establishing a more permanent presence there. The CJEU uses a case-specific approach, analysing factors such as time spent, visit frequency, and infrastructure.¹⁰⁹ Therefore, understanding what is referred to as 'services' under EU law is complex but important, especially when it comes to transnational situations. Within that framework, one group of service providers stands out for further analysis: posted workers.

As mentioned above, posted workers are not a new phenomenon. However, even today, despite the progress of European integration, posted workers are widely misunderstood, as in public discourse and the media, they are still often conflated with the free movement of workers and the stereotype of the 'Polish plumber', which emerged during the EU enlargement

¹⁰⁰ Art. 56-57 of the TFEU

¹⁰¹ Art. 49 of the TFEU.

¹⁰² Art. 58 of the TFEU.

¹⁰³ Petrić, 2021, p. 158.

¹⁰⁴ Interestingly, the word 'normally' leaves some room for interpretation, for instance, services that are usually sold but are offered free in a promotional context might still count. See: Davies, 2015, p. 564.

¹⁰⁵ Davies, 2015, p. 564.

¹⁰⁶ See the CJEU cases: Judgment of the Court of 27 September 1988. *Belgian State v René Humbel and Marie-Thérèse Edel*. Case 263/86. ECLI:EU:C:1988:451.; Judgment of the Court of 12 July 2001. *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*. Case C-157/99. ECLI:EU:C:2001:404.

¹⁰⁷ Judgment of the Court of 4 October 1991. *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*. Case C-159/90. ECLI:EU:C:1991:378.

¹⁰⁸ O'Leary, Iglesias Sánchez, 2021, p. 535.

¹⁰⁹ Davies, 2015, p. 563.

debates.¹¹⁰ The enlargements in 2004 and 2007 were one of the key turning points that shaped the current landscape of intra-EU posting of workers. These expansions brought a wave of new Member States from Central and Eastern Europe into the EU, and with them, a new trend in labour mobility. The temporary restriction on the movement of workers under the transitional arrangements¹¹¹ but not on services that closed the ‘front door’ to national labour markets, but remained the ‘back door’ open with the freedom to provide services. This legal gap created a pathway for companies to send workers across borders as posted workers, circumventing some of the restrictions that applied to direct employment under the free movement of workers. As a result, a sharp rise in postings from Eastern Europe to Western Europe was observed. However, this arrangement proved financially attractive not only for Eastern European workers and service providers, who saw an opportunity to earn more abroad, but also for Western European companies operating in labour-intensive, price-sensitive sectors such as construction, transport, and cleaning. Nevertheless, it is important to clarify that the posting wasn’t just an East-to-West phenomenon, as data showed that a substantial amount of posting also occurred among Western Member States.¹¹²

In this regard, it is important to note that identifying the primary sending and receiving Member States for posted workers can be done by consulting various sources, including primary data from PD A1 forms, prior declaration systems, EU service trade statistics, and records of professional travel.¹¹³ Based on the PD A1 forms, in 2024, the number of postings in EU-27 and EFTA countries was around 5.6 million, representing a slight increase from the year before and a significant increase from 2022. Of that number, most postings were based on Article 12 of Regulation 883/2004, which refers to classical postings, while a smaller but still significant number were issued under Article 13, which covers situations involving multiple countries. The remaining percentage includes other categories. If the individual number is taken into account, it is estimated that around 3,6 million persons were included in those forms, since many workers were posted multiple times during the year. The main sending countries were Germany, Italy and Poland. The main host countries were Germany, France, Austria, Switzerland, the Netherlands, Spain, Belgium and Italy.¹¹⁴ However, A1 posting data provides only an approximate view of postings, as workers may receive multiple certificates annually, inflating the numbers. Since requesting these certificates is not mandatory and they can be obtained

¹¹⁰ Maslauskaitė, 2014, p. 3-4.

¹¹¹ See more in: Konjević, 2023, pp. 122-125.

¹¹² De Wispelaere, De Smedt, Pacolet, 2022, pp. 31-32.

¹¹³ De Wispelaere, De Smedt, Pacolet, 2022, pp. 31-32.

¹¹⁴ De Wispelaere, De Smedt, Pacolet, 2025, pp. 10, 25.

retroactively, many workers operate without them. Reporting practices also vary across EU countries, with employers often seeking certificates only in regions with strict inspections and penalties for non-compliance.¹¹⁵ Therefore, A1 certificates, even though they are still seen as the most effective way to measure posted workers, can still create a statistical illusion. Consequently, due to the lack of a clear, up-to-date statistical overview of the phenomenon of posting workers, this research will not delve into a deeper analysis of that aspect but will focus on a particular legal challenge related to safeguarding posted workers' rights. To conclude, the complexity surrounding the definition of a 'posted worker' gives rise to both legal and statistical uncertainty¹¹⁶, creating significant challenges in interpretation and analysis.

Nevertheless, to gain a deeper understanding of the reasons for the posted workers' determination as service providers, it is essential to go back to the EU law and the CJEU's case law roots. Since the 1970s, the CJEU has been a cornerstone for understanding and classifying posted workers. Its early judgements, including 1981 *Webb*¹¹⁷ case and the 1982 *Seco*, *Dequenne*, and *Giral* rulings¹¹⁸, provided a foundation for the pillar principles, such as wage levels, legal requirements and minimum conditions as mandated by the host State's regulations.¹¹⁹

Nevertheless, legal scholars often point to the *Rush Portuguesa* case¹²⁰ as a turning point, since it laid the foundation for how posted workers were treated under EU law.¹²¹ The facts of the case are important not only for this context, but also for the context of the posted workers in subcontracting arrangements. Namely, a Portuguese construction company, Rush Portuguesa Lda, entered into a subcontract in France, with the French Office National d'Immigration (ONI), to help build a railway. They brought their own Portuguese workers for the job. However, under French law, only a national agency may authorise the employment of third-country nationals. Since Portugal had then only recently joined the EU, transitional arrangements still applied. The French authorities demanded penalties, arguing the company

¹¹⁵ Houwerzijl, Berntsen, 2020, p. 151.

¹¹⁶ De Wispelaere, De Smedt, Pacolet, 2022, p. 11.

¹¹⁷ Judgment of the Court of 17 December 1981, Criminal proceedings against Alfred John Webb, Case 279/80, ECLI identifier: ECLI:EU:C:1981:314.

¹¹⁸ Judgment of the Court of 3 February 1982, Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité, Joined cases 62 and 63/81, ECLI identifier: ECLI:EU:C:1982:34.

¹¹⁹ Richard, 2014, p. 1.

¹²⁰ Judgment of the Court (Sixth Chamber) of 27 March 1990, Rush Portuguesa Lda v Office national d'immigration, Case C-113/89, ECLI:EU:C:1990:142, par. 2-7.

¹²¹ Rocca, 2015, p. 4.

violated labour and immigration laws.¹²² When the matter reached the CJEU, the Court sided with *Rush Portuguesa*, deciding that France couldn't impose such restrictions on a service provider from another Member State.¹²³ Most significantly, the Court made a conceptual distinction between posted workers and other mobile workers. According to its reasoning, posted workers remain attached to their employer in the sending country without entering the host country's labour market.¹²⁴

If this reasoning is analysed, it is evident that it is overly formalistic. Even temporary postings can influence the labour market, compelling social actors to address the presence of posted workers. Qualitative challenges can appear as reasons, including substandard working conditions, or quantitative ones, such as the large-scale employment of posted workers. For instance, during the construction of a nuclear plant in Finland, about 4000 posted workers were employed. Additionally, the concentration of posted workers in specific regions and sectors such as construction, transport and agriculture,¹²⁵ can distort competition¹²⁶ and undercut minimum working conditions, having a more significant impact than overall EU figures suggest.¹²⁷ Therefore, the approach introduced by the CJEU in the *Rush Portuguesa* case¹²⁸ has sparked extensive debate due to its effect on the social protection of posted workers, its distinction from that of local and mobile workers, and its separation from the protection provided by Article 45 of the TFEU. The result of this decision¹²⁹ was the involvement of posted workers in the scope of the freedom of movement of services covered by Article 56 of the TFEU.¹³⁰

From a labour law perspective, it is challenging to justify separating posted workers from the freedom of movement of workers, especially since they typically perform the same or very similar tasks within the scope of regular employment relations. The CJEU has defended this distinction solely on economic grounds, which, from a labour law perspective, read more

¹²² Judgment of the Court (Sixth Chamber) of 27 March 1990, *Rush Portuguesa Lda v Office national d'immigration*, Case C-113/89, ECLI:EU:C:1990:142, par. 2-7.

¹²³ Judgment of the Court (Sixth Chamber) of 27 March 1990, *Rush Portuguesa Lda v Office national d'immigration*, Case C-113/89, ECLI:EU:C:1990:142, I-1446.

¹²⁴ De Wispelaere, De Smedt, Pacolet, 2022, p. 11.

¹²⁵ Arnholtz, Lillie, 2020, pp. 8-9.

¹²⁶ Lens, Mussche, Marx, 2022, pp. 34-37.

¹²⁷ Rocca, 2015, pp. 175.

¹²⁸ Judgment of the Court (Sixth Chamber) of 27 March 1990, *Rush Portuguesa Lda v Office national d'immigration*, Case C-113/89, ECLI:EU:C:1990:142.

¹²⁹ See more about the implications of this decision and marking it as 'legal fiction' in: Hayes, Novitz, 2013, p. 23.; De Wispelaere, Rocca, 2022, p. 105.

¹³⁰ De Wispelaere, De Smedt, Pacolet, 2022, p. 11.

like excuses than persuasive reasons.¹³¹ Still, the reasoning behind this decision remained only partially explained. After all, posted workers are, in practice, mobile workers, and workers' freedom of movement is one of the foundational pillars of the EU. This classification has continued to raise important questions.¹³² By choosing between these two fundamental freedoms, the CJEU's decision in the *Rush Portuguesa* case and subsequent cases marked a clear departure from traditional labour law principles that underpin the European social model. One could argue that this legal pathway limited the stronger labour protections guaranteed under Article 45 TFEU, particularly the protection against nationality-based discrimination.¹³³ Moreover, this interpretation has led to marking the posted workers as second-class workers¹³⁴, who often find themselves with fewer social protections and intensive exposure to fundamental labour rights violations¹³⁵, compared to local workers or other categories of mobile workers who fall under Article 45, such as seasonal workers, frontier workers, or those relocating for long-term employment. This is additionally emphasised in the context of subcontracting arrangements.¹³⁶

Looking back, it seems that the CJEU's decision to frame posted workers under the freedom to provide services was mainly influenced by the referring national court's formulation of the question, which focused on service provision rather than labour law rights. That framing might have made sense if posted workers always maintained a strong, ongoing link with their employer in the sending country. But in reality, this link is often weak or merely formal, making the chosen legal approach less convincing in practice.¹³⁷ Moreover, in the *Rush Portuguesa* case, the CJEU also took a step that, according to Barnard, was an unreasoned interpretation¹³⁸, since it stated that EU law does not prevent Member States from applying their national laws or collective agreements to all workers operating on their territory, even if those workers are employed temporarily and by companies based in other countries.¹³⁹ In effect, the Court confirmed that national labour standards can apply to posted workers.¹⁴⁰ This was seen as a

¹³¹ Vinković, 2018, p. 15.

¹³² Lasek-Markey, 2023, p. 41.

¹³³ Verschueren, 2008, p. 177.

¹³⁴ Kovács, Vinković, Bankó, 2013, p. 475.

¹³⁵ Vinković, 2018, p. 17.

¹³⁶ De Wispelaere, De Smedt, Pacolet, 2022, p. 11.; See more in: Verschueren, 2021, pp. 639-701.

¹³⁷ Lasek-Markey, 2023, p. 41.

¹³⁸ Barnard, 2012, p. 214.

¹³⁹ Judgment of the Court (Sixth Chamber) of 27 March 1990, *Rush Portuguesa Ld^a v Office national d'immigration*, Case C-113/89, ECLI:EU:C:1990:142, par. 18.

¹⁴⁰ Bjelinski, Žeravčić, 2020, p. 101.

small gesture toward addressing concerns about social dumping, offering a degree of reassurance to host countries worried about being undercut.¹⁴¹

At the same time, by declaring that posted workers do not access the host country's labour market, the Court sidestepped a growing tension between the EU's drive for an open internal market and Member States' desire to retain control over labour immigration. Consequently, the necessity for regulation became evident.¹⁴² In doing so, the CJEU created a legal distinction between two categories of workers: mobile workers, who mainly relocate with the intention of long-term employment and integration, and posted workers, who are sent temporarily and are expected to return to their home country after completing the job, without establishing themselves in the host country's labour market. This distinction became a cornerstone of the PWD96¹⁴³, heavily shaped by the *Rush Portuguesa* decision. The CJEU further reinforced this reasoning in the *Finalarte* case¹⁴⁴, decided after the adoption of the PWD96 but concerning events that took place before it. In that decision, the Court explicitly excluded posted workers from the protection of the free movement of workers under Article 45 TFEU.¹⁴⁵

Ironically, the *Rush Portuguesa* decision ultimately dissatisfied both sides of the political divide: member states with lower labour costs felt constrained in leveraging their competitive advantage, while member states with stronger protections struggled to shield their workers from downward pressure.¹⁴⁶ Nevertheless, this fragile balance helped pave the way for a political compromise, the original PWD. However, this compromise began to unravel. First, EU enlargement brought fears in Western Europe of unfair labour competition. Later, a rise in fraudulent practices related to posting, such as letterbox companies, bogus self-employment and complex subcontracting arrangements, deepened the divide between older and newer Member States. This growing tension eventually led to the 2014 Enforcement Directive¹⁴⁷,

¹⁴¹ Rocca, 2020, p. 175.

¹⁴² Bjelinski, Žeravčić, 2020, p. 101.

¹⁴³ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal L 18, 21 January 1996.

¹⁴⁴ Judgment of the Court (Fifth Chamber) of 25 October 2001.

Finalarte Sociedade de Construção Civil Lda (C-49/98), *Portugaia Construções Lda* (C-70/98) and *Engil Sociedade de Construção Civil SA* (C-71/98) v *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* and *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft v Amilcar Oliveira Rocha* (C-50/98), *Tudor Stone Ltd* (C-52/98), *Tecnamb-Tecnologia do Ambiente Lda* (C-53/98), *Turiprata Construções Civil Lda* (C-54/98), *Duarte dos Santos Sousa* (C-68/98) and *Santos & Kewitz Construções Lda* (C-69/98), Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, ECLI:EU:C:2001:564.

¹⁴⁵ Lasek-Markey, 2023, p. 34-35.

¹⁴⁶ Rocca, 2015, p. 4.

¹⁴⁷ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending

which focused specifically on addressing abuse in posting practices. It culminated in a major political showdown during the revision of the PWD18¹⁴⁸, triggering the ‘yellow card procedure’¹⁴⁹, an unprecedented act of collective resistance by national parliaments against the Commission’s proposal. However, that legal framework, together with its background determination, will be a focus of the analysis in further research.

2.2.2. Essential Elements and Types of Posting Recognised in EU Law

From a legal standpoint, posted workers have dual status. On the one hand, they work in the host country, yet they remain connected to their home country through their employment contract and the social security system. On the other hand, when working abroad, the host country’s labour law applies. Unlike most EU mobile workers, who are permanently relocated to another Member State, posted workers are temporarily present and, according to the CJEU, do not integrate into the host country’s labour market.¹⁵⁰

Importantly, a posted worker is often perceived as an EU citizen relocating from a lower-wage country to a higher-wage one.¹⁵¹ From the workers’ standpoint, individuals often resort to posting to boost their income, driven by limited job opportunities and lower wages in their home countries, where even minimum remuneration in high-wage EU states can surpass average earnings in low-wage states. Also, posting seems like a way for workers to access economic opportunities across the EU without the complexities of permanent relocation, such as language barriers, administrative challenges, securing housing and employment, and

Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Official Journal L 159, 28 May 2014.

¹⁴⁸ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal L 173, 9 July 2018.

¹⁴⁹ ‘Yellow card procedure’ is specified in Protocol No. 2 of the Lisbon Treaty. Throughout that procedure initiated during the proposal discussion on the Posted Workers Directive, the parliaments of all CEE Member States, excluding Slovenia, and including Denmark, were actively engaged. However, the Danish parliament, although expressing concerns about subsidiarity, diverged from the rest, distinguishing itself as the only non-CEE participant. In contrast, six dissenting opinions from France, Italy, Portugal, Spain and the UK were submitted to the Commission, contending that there were no violations of subsidiarity. Despite the procedure, it did not impede the process of reforming of the Posted Workers Directive which procedure was finalised on 28 June 2018. See more about the ‘yellow card procedure’: Protocol (No 2) on the application of the principles of subsidiarity and proportionality of the Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 115, 09/05/2008; Rocca, 2020, p. 167; Fromage, Kreiling, 2017, p. 147.

¹⁵⁰ Lens, Mussche, Marx, 2021, p. 28.

¹⁵¹ Bjelinski, Žeravčić, 2020, pp. 102-103.

concerns over social security portability.¹⁵² In that regard, the posting of workers has been mostly developed through the two distinct types, including the highly qualified workers from the developed Northern and Western countries in the specialised service sectors, and the other one, including the lower to medium-skilled workers from economically less developed South and Central-Eastern EU countries, usually involved in the physical and labour-intensive sectors.¹⁵³ It is important to emphasise that the term also includes individuals from an EEA country or Switzerland who are temporarily working in another EEA state or in Switzerland. PWD applies to those whose regular workplace is within these regions. However, some Member States have gone further, extending national requirements for posted worker notifications to include third-country workers sent temporarily to the EU.¹⁵⁴

De facto, posted workers are defined as persons recruited and sent by their employer to work in another country, whether from the host country or a third country. In that case, the employer usually organises all administrative and logistical aspects of their travel and accommodation. This practical concept reflects the reality of the modern EU labour market, in which the boundary between mobile workers, posted workers, the self-employed, and temporary agency workers is blurred.¹⁵⁵ As an example, a Polish pipefitter employed by a construction company in Poland can be considered a posted worker if he is sent to France for three months to work on the client's water-filtering construction project. It is a case of temporary work in another Member State, organised by the employer, which would qualify as the posting of workers.¹⁵⁶ On the other hand, not every temporary work abroad is considered a posting. For example, if a University professor from Croatia travels to Germany to attend a two-day conference and give a presentation, without financial compensation from the organiser or his employer, that situation wouldn't be considered a posting under the PWDs. To conclude, the posting of workers requires certain conditions, which will be analysed below.¹⁵⁷

Namely, even though the scholars do not provide unified interpretations or lists of elements needed for the conceptualisation of the posting of workers, they all have a basis in the definition in Article 2(1) of the PWD18, as mentioned above. In that regard, one of the most common classifications of the elements of posting is: 1) providing services with a cross-border

¹⁵² Lens, Mussche, Marx, 2021, pp. 2-3.

¹⁵³ De Wispelaere, Pacolet, 2017, p. 9.

¹⁵⁴ Bjelinski, Žeravčić, 2020, pp. 102-103.

¹⁵⁵ Caro, Berntsen, Lillie, Wagner, 2015, p. 1609.

¹⁵⁶ O'Neil, 2019.

¹⁵⁷ Van Hoek, Houwerzijl, 2012, p. 422.

dimension; 2) by an entity in the sending country; 3) while temporarily assigning the worker to another host country.¹⁵⁸

In a broader scope, the elements of posting can be subdivided into several categories: 1) there has to be an employment relationship in the sending country. For self-employed persons, it means the continuation of their business activity. For the workers, it means they have an employment contract with the employer who is posting them. 2) The posting company needs to be legitimately established, regularly perform the business activities in the sending country and have a temporary agreement on the provision of services with the client in the host country. 3) During the posting, workers remain under the authority and direction of the employer who posted them, while performing the tasks that the temporary service agreement between the posting company and the client has specified.¹⁵⁹

To conclude, when it comes specifically to the elements of the concept of the posted worker, then two main aspects should be emphasised: 1) the assignment lasts temporarily; and 2) the worker is sent to another EU Member State, different from the one in which he is employed^{160, 161}.

Moreover, the posting must fit within one of the categories outlined in Article 1(3) of the PWD 18,¹⁶² which clarifies the concept of 'posting' by identifying three types of arrangements between the posting and user undertakings.

The first type involves posting to perform service contracts within the framework of transnational arrangements (e.g., in the construction industry)¹⁶³, meaning that the home undertaking is sending workers to the host state to provide services under its direction, based on a contract with the recipient of the services. Therefore, workers are 'sent' or 'brought' to the host state to work under the authority of their home undertaking within the context of a service provision agreement.¹⁶⁴ For example, a construction company headquartered in Portugal signs a subcontract with a French company to carry out work on a railway project on French territory,

¹⁵⁸ Van Hoek; Houwerzijl, 2011, p. 11.; Davies, 1997, pp. 575-576; Rocca, 2015, p. 2.

¹⁵⁹ Cremers, 2011, p. 12.

¹⁶⁰ The PWD stipulates that posted workers must perform their duties 'within the territory' of the receiving Member State, and the CJEU seems to interpret this requirement as necessitating the worker's physical presence in the host country to qualify as posted. Although the CJEU has not explicitly confirmed this interpretation, it clarified in case C-594/13 Bundesdruckerei that contractors delivering digital services remotely from their home state do not meet the criteria for being considered posted to the host country. See more in: Lasek-Markey, 2023, p. 43.

¹⁶¹ Van Hoek, Houwerzijl, 2012, p. 422.

¹⁶² Article 1(1)(3) of the PWD 18.; Van Hoek, Houwerzijl, 2011, p. 419-420.

¹⁶³ Bjelinski, Žeravčić, 2020, p. 103-104.

¹⁶⁴ Rocca, 2015, p. 3.

bringing its own workers from Portugal.¹⁶⁵ This type of posting, when it involves splitting specialised work to one foreign undertaking, is generally considered less problematic in the workers' protection sphere, since it typically applies to highly skilled, highly paid workers, such as those in financial services.¹⁶⁶ However, the issues with the aforementioned type of postings arise in scenarios of labour-only subcontracting with labour-intensive industries. The problem emerges when the subcontractor of a foreign subsidiary provides only low-cost labour, leading to concerns about employment conditions and the protection of workers' rights.¹⁶⁷

The second type of posting, known as 'intra-group posting', is determined when the workers are sent to work in another company or the establishment within the same corporate group in the host country, while keeping the employment contract with the undertaking in the home country. This arrangement enables internal labour mobility within the group of companies.¹⁶⁸ In this regard, provisions on the posting of workers sometimes overlap with the legal framework for the intra-corporate transfers regulated by the so-called ICT Directive¹⁶⁹.¹⁷⁰ The main difference lies in their scope. Namely, the ICT Directive regulate the entry and residence of third-country nationals, while the PWD apply to EU citizens and third-country nationals who are already legally employed and reside in the EU. Importantly, the ICT Directive ensures that intra-corporate transferees receive 'at least equal treatment' with workers covered by the PWD.¹⁷¹

The third type involves temporary working or placement agencies in the home state, supplying workers to an undertaking located in the host state¹⁷². These agencies provide labour

¹⁶⁵ Commission Staff Working Document Impact Assessment. Revision of the legislative framework on the posting of workers in the context of provision of services Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. SWD(2012) 63 final. Brussels, 21st March 2012, p. 8.

¹⁶⁶ Cremers, 2011, p. 26-27.

¹⁶⁷ Cremers, 2011, p. 26-27.

¹⁶⁸ Rocca, 2015, p. 3.

¹⁶⁹ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. Official Journal L 157/1, 15 May 2014.

¹⁷⁰ Intra-corporate transferees can be described as 'capital handmaidens' by drawing parallels between their legal status and that of posted workers. ICT Directive replicates the 'posted workers anomaly'. Notably, prior to the PWD 18, intra-corporate transferees enjoyed a more favourable position, as they were guaranteed equal treatment with EU nationals concerning remuneration. This disparity is particularly noteworthy, given that posted workers, who are predominantly EU nationals, are ostensibly shielded from nationality-based discrimination under Article 18 TFEU. See more in: Costello, Freedland, 2016, p. 64.; Lasek-Markey, 2023, p. 46.

¹⁷¹ Lasek-Markey, 2023, p. 46.

¹⁷² In *Rush Portuguesa*, the CJEU explicitly ruled that the posting of workers through temporary agencies falls under the free movement of workers rather than the freedom to provide services. By doing so, the CJEU set a clear boundary, recognising that posted workers may, in fact, gain access to or influence the labour market of the host country. As a result, the PWD extended beyond the CJEU's established case law. See more in: Houwerzijl, 2006, p. 186.

to the host state while the employment relationship remains with the agency in the home state.¹⁷³ The temporary agency sector has experienced a consistent increase and evolution over the years. In many countries where agency work was once prohibited, restrictions were lifted in the late 1990s, leading to a notable expansion of the industry. However, since the early 2000s, the sector has struggled with the rise of questionable agencies engaging in illegal employment practices, casting a shadow over its development and the repeated discussions over their negative impact and mechanisms for its improvement.¹⁷⁴ The use of temporary working agencies in a cross-border context is especially problematic in construction due to the sector's temporary and mobile nature. This dynamic interaction between posting and temporary employment requires special attention, due to the sector's emphasis on cost-cutting and labour shortages in recent years. This has resulted in skilled and unskilled construction workers being hired or posted through agencies, which was not common when the initial PWD96 was established.¹⁷⁵

Finally, the posting of workers remains a significant challenge in all its forms, making it a never-ending, politically sensitive topic.¹⁷⁶ One of the main reasons is that the posted workers remain under the social security system of the home country¹⁷⁷, which can be financially more beneficial both for the employer and the worker, especially when the social contributions in the sending country are lower than in the destination country.¹⁷⁸ Also, the increasing trend of fraudulent practices across all forms of posting encouraged diverse approaches among Member States, making the posting of workers one of the most controversial and complex challenges in the EU labour market. To tackle those challenges in subsequent parts of the research, it is important to first clarify the terms and conditions governing the posting of workers in the EU.

2.2.3. Labour Standards Applicable to Posted Workers in the EU and the CJEU's Impact

The idea of regulating the posting of workers in the EU was seriously considered at the beginning of the 1990s, as part of preparations for the creation of a stronger single market through the 'Europe 1992' project. Then, the proposal for a Directive on the posting of workers

¹⁷³ Rocca, 2015, p. 3.; Van Nuffel, Afanasjeva, 2020, pp. 271-302.

¹⁷⁴ Håkansson et. al., 2009, p. 77.

¹⁷⁵ Cremers, 2011, p. 26-27.

¹⁷⁶ Pennings, 2006, p. 245.

¹⁷⁷ Van Nuffel, Afanasjeva, 2020, pp. 273-274.

¹⁷⁸ Pennings, 2006, p. 245.

has also become the subject of intensive debate within EU institutions, especially regarding the scope of application of national labour standards, including their mandatory wage provisions, to foreign service providers.¹⁷⁹ At the centre of those discussions was the need to strike a balance between two objectives: enabling the cross-border provision of services without unjustified market limitations and protecting the rights of posted workers. This compromise led to a comprehensive list of obligatory rights¹⁸⁰ in Article 3(1) of the PWD96.¹⁸¹ The purpose was to protect posted workers and prevent the overburdening of companies providing services abroad through these measures.¹⁸²

Additionally, since the 2018 revision of the PWD, and the changes in that provision, Article 3(1) has been strictly requiring the Member States to ensure, no matter the law governing the employment relationship, that companies guarantee to posted workers, on their territory, based on the equal treatment principle, working conditions that are applicable in the country in which the work is being performed. Within that provision, PWDs have established the mandatory labour standards that have to be applied to posted workers¹⁸³, including: *‘(a) maximum work periods and minimum rest periods; (b) minimum paid annual leave; (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes¹⁸⁴; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination; (h) the conditions of workers’ accommodation where provided by the employer to workers away from their regular*

¹⁷⁹ Van Hoek, Houwerzijl, 2012, p. 419.

¹⁸⁰ This, often called ‘hardcore’, list was the basis of the mandatory labour standards that employers need to provide when posting workers abroad. See: Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final – SYN 346, Brussels, 1 August 1991, par. 25.

¹⁸¹ Article 3(1), widely regarded as the cornerstone of the PWD, has been narrowly interpreted in the rulings of the ‘Laval quartet’. This interpretation has sparked extensive academic debate, thoroughly examining and critiquing the provision. As a result, this chapter will address only the core aspects of that Article just to extent necessary to contextualise the 2018 revision of the PWD.

¹⁸² Van Nuffel, Afanasjeva, 2020, pp. 271-302.

¹⁸³ Houwezijl, Verschueren, 2019, p. 83.

¹⁸⁴ Under the original PWD, posted workers received only the host country's minimum pay unless their home country offered better terms. PWD 18 now ensures they receive all mandatory remuneration, including bonuses and allowances (for instance, overtime rates, allowances for working at night, allowances for working on Sundays or on public holidays, holiday remunerations, end-of-year bonuses and the 13th-month bonuses (EC, 2019)), from day one, with a focus on applying the higher pay level between home and host countries. Travel and lodging costs are excluded, promoting the principle of ‘equal pay for equal work’. See more in: De Wispelaere, De Smedt, Pacolet, 2022, pp. 12-13.

place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons'.¹⁸⁵

The companies posting workers need to comply with those terms and conditions, in accordance with the legislative framework of the home country. It is important to clarify that PWD18 does not include provisions on dismissal or standards regarding workers' rights to representation, as those elements were not considered relevant in the context of temporary work performed by the posted workers abroad.¹⁸⁶

Importantly, Article 3(1) serves as the *lex specialis* to the Rome I Regulation¹⁸⁷, ensuring the application of the host country's specific labour law rules to posted workers. Therefore, it serves as the concretisation of the overriding mandatory provisions in Article 9 of the Rome I Regulation, which apply regardless of the applicable law of the contract. At the same time, Article 23 of the same Regulation strictly confirms that it does not bring into question the application of specific rules of the EU law that regulate collision questions in certain areas, which additionally strengthens the position of the PWD as the *lex specialis* instrument in this context.¹⁸⁸ Therefore, those rules apply regardless of which law governs the employment contract under the Rome I Regulation, meaning that the general conflict-of-laws rules are partially set aside to provide a basic level of protection for workers in transnational situations.¹⁸⁹ However, such deviation is not full or absolute. Rome I Regulation, particularly Article 8, which governs the applicable law for individual employment contracts, remains relevant to all questions not covered by the minimum standards set out in Article 3 of the PWD. In other words, PWD is settling the 'hard core' obligatory rules of the host country, while for all other aspects of the employment relationship, the law determined by the rules of private international law remains applicable.¹⁹⁰

Additionally, the purpose of posting workers is for them to temporarily perform their work outside the country where they are usually employed. For instance, the workers can spend two weeks on training at the parent company abroad, provide services to a client in another country,

¹⁸⁵ Article 3(1) of the PWD 18.

¹⁸⁶ Van Nuffel, Afanasjeva, 2020, pp. 271-302.

¹⁸⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal L 177, 4 July 2008 (hereinafter: Rome I Regulation).

¹⁸⁸ See: Article 9 and 23 of the Rome I Regulation.

¹⁸⁹ Lasek-Markey, 2023, p. 48-49.

¹⁹⁰ See: Article 8 of the Rome I Regulation.; European Trade Union Confederation, 2016, pp. 12-13.

or travel there for a business meeting.¹⁹¹ In this sense, the EU rules are straightforward. If work abroad is conducted only temporarily, the country where the workers usually work is not considered to have changed.¹⁹² This temporality makes the exception from the *lex loci laboris* principle, according to which the law of the country in which the work is performed should be applied. The exception supports the freedom to provide services and reduces the administrative burden for companies. However, it also creates economic imbalances, as differences in social security contributions can give a competitive advantage to service providers in lower-cost countries. Unlike other forms of labour mobility, the posting of workers does not reduce tax revenues in sending countries, since the contributions remain there; the host country receives none of them. Besides, posted workers often miss out on the right to receive social security benefits in the host country, even though equal wage rules can increase their net earnings.¹⁹³

Moreover, in the original PWD96, the rules of the host country that applied to posted workers had to be strictly prescribed by law, regulation, administrative provision, or, in the construction sector, by universally applicable collective agreements or arbitration awards¹⁹⁴. Before the 2018 revision, if the Member State did not have a system for declaring collective agreements generally applicable, it could apply those that were referred to all similar undertakings within a certain sector or region^{195,196}. Nevertheless, the CJEU has strictly interpreted Articles 3(1) and 3(8), thereby limiting the applicability of the Directive on posted workers. In practice, and as confirmed by the CJEU, this meant that if the working conditions under Article 3(1) weren't prescribed clearly in law, regulation, or administrative provision, or covered by universally applicable collective agreements or arbitration awards, they couldn't be applied.¹⁹⁷

Article 3(7) provided the possibility to use more beneficial working conditions¹⁹⁸ than the minimally required ones, but that required a comparison between the labour standards and

¹⁹¹ Kártyás, 2020, p. 72.

¹⁹² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal L 177/6, Article 8(2).; Kártyás, 2020, p. 72.

¹⁹³ See more in: De Wispelaere, De Smedt, Pacolet, 2022, p. 12.

¹⁹⁴ Article 3(1), Article 3(8) and Annex to the PWD 96.

¹⁹⁵ Article 3(8) of the PWD 96.

¹⁹⁶ Lasek-Markey, 2023, p. 48-49.

¹⁹⁷ Barnard, 2021, p. 701.

¹⁹⁸ Determining the most favourable working conditions involves assessing whether individual provisions, subject-specific rules, or overall employment terms should be compared. Each Member State retains the discretion to establish its own approach, but national legislation does not specify a uniform method. Despite the potential for legal uncertainty, in practice, social partners in the construction sector have developed effective solutions to address these challenges. See more in: Houwerzijl, 2006, pp. 190-191.

contract freedoms in the sending and receiving countries.¹⁹⁹ The purpose was to guarantee equal treatment and prevent discrimination by upholding the principle *lex loci laboris*, according to which the workers should benefit from the legislation of the country in which they perform the work. In that regard, the Directive has enabled the application of additional working conditions, considered part of public policy, in a non-discriminatory manner.²⁰⁰

Article 3(10) made it additionally complex by allowing the Member States to broaden the protection of workers based on the public policy provisions or certain collective agreements. This flexibility caused numerous legal disputes over the limits of those extensions.²⁰¹ In this regard, the so-called ‘Laval Quartet’, including *Laval*²⁰², *Viking*²⁰³, *Rüffert*²⁰⁴, and *Commission v. Luxembourg*²⁰⁵ cases, clarified that the Directive does not set just the minimum, but also the maximum limitation for the application of the host country’s legislation.²⁰⁶ Consequently, any additional burden beyond the minimum set out in Article 3(1) could reduce the competitive advantage of foreign service providers in the single market.²⁰⁷

¹⁹⁹ Bjelinski, Žeravčić, 2020, p. 106.

²⁰⁰ Cremers, 2010, p. 299.

²⁰¹ Lasek-Markey, 2023, p. 49.

²⁰² Judgment of the Court (Grand Chamber) of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska*, Case C-341/05, ECLI:EU:C:2007:809. In that case, the CJEU addressed that Directive 96/71/EC allows host countries to enforce minimum employment standards but does not permit imposing additional obligations, such as negotiating wages locally. The Court concluded that the unions’ collective action was disproportionate and unjustified, underscoring the need to balance workers’ rights with the freedom of services in the EU. Following this judgment, European trade union organisations feared that the ruling could enable social dumping and weaken worker protections. The ETUC warned it might hinder unions’ efforts to ensure equal treatment. The decision sparked debate on revising PWD 96, while Sweden considered tightening wage negotiation laws to close loopholes.

²⁰³ Judgment of the Court (Grand Chamber) of 11 December 2007, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, ECLI:EU:C:2007:772. In this case, the CJEU emphasised that the rights of trade unions to collective action, while fundamental, must be balanced against the freedom of establishment. The decision affirmed that private undertakings could invoke Article 43 EC against trade unions, requiring a proportional approach to reconciling economic freedom and workers’ rights.

²⁰⁴ Judgment of the Court (Second Chamber) of 3 April 2008, *Dirk Rüffert v Land Niedersachsen*, Case C-346/06, ECLI:EU:C:2008:189. In this case, the CJEU addressed whether a German law requiring public works contractors to comply with local collective agreements on minimum wages violated EU law. The Court concluded that the law restricted market access for foreign service providers and was not justified by overriding public interest objectives. The decision underscored that Member States may not impose obligations exceeding EU minimum standards on posted workers, ensuring the directive’s effectiveness and balancing market freedoms with worker protection.

²⁰⁵ Judgment of the Court (First Chamber) of 19 June 2008. *Commission of the European Communities v Grand Duchy of Luxembourg*. Case C-319/06. ECLI:EU:C:2008:350. In this case, according to Cremers, the Commission and the Court have deviated from the principle that Member States can declare their mandatory rules of public policy, subject to the condition of non-discrimination or the prevention of the hidden protection of the national market. It raised the question of who is then deciding on it. In that way, Europe is not conceptualised as the ‘unity in diversity’, but as a centralised economic block in which, according to Article 56 of the TFEU, most of the national mandatory rules are considered as an obstacle to the freedom to provide services. See: Cremers, 2010, p. 300.

²⁰⁶ Houwezijl, Verschueren, 2019, p. 83.

²⁰⁷ Carter, 2018, p. 43.

Specifically, in the case *Commission v. Luxembourg*²⁰⁸, the CJEU has strictly interpreted Article 3(1) of the PWD96, which allowed the Member States to, out of public policy reasons, apply the working conditions that override those in the provision. The Court emphasises that public policy may be invoked only exceptionally, when there is a real and genuine threat to the fundamental interests of society, and that it should be narrowly interpreted.²⁰⁹ It confirmed that the PWD96 also set the maximum limitation for the application of the host Member States' law,²¹⁰ meaning that every additional requirement outside of Article 3(1) would be considered contrary to the market freedoms and the aims of the Directive.²¹¹ In that way, although the PWD96 has set the baseline for the protection of the rights of posted workers in the host country, with the intention of balancing interests, the CJEU, through its decisions, has shifted this balance in favour of the freedom to provide services. It interpreted the Directive in a way that restricted the host country's right to extend the scope of its legislation beyond the requirements set out in the PWD96, except in cases necessary to protect public policy.²¹²

These cases opened up a broad discussion on the relationship between fundamental rights and freedoms in the EU, within which three of the four cases in focus concerned the posting of workers, although this was not the central matter of the debate.²¹³ The Court's attempt to achieve a convergence between economic and social objectives has remained under criticism, since the strict diversification between economic freedoms and social rights overlooked the social dimension of the EU's free movement law. In the *Viking* case, Advocate General Maduro emphasised that the use of the internal market's possibilities benefits not only the direct participants but also the overall economic welfare of Member States. This argument was later adopted by the European Commission in its legislative proposals.²¹⁴

In the *Viking* and *Laval* cases²¹⁵, Swedish and English courts brought before the Court the clarification on whether the trade union's actions were justified and if they breached the economic freedoms guaranteed by EU law, including the freedom of establishment and

²⁰⁸ Judgment of the Court of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxembourg*, Case C-473/93, ECLI:EU:C:1996:263.

²⁰⁹ Houwezijl, Verschueren, 2019, p. 83.

²¹⁰ Bjelinski, Žeravčić, 2020, pp. 104-105.

²¹¹ Carter, 2018, p. 43.

²¹² Hoek, Houwezijl, 2016, p. 236.

²¹³ Rocca, 2015, pp. 17-19.

²¹⁴ See more in: Opinion of Advocate General Poiares Maduro delivered on 23 May 2007, Case C-438/05, par. 57.

²¹⁵ See more about the *Viking* and *Laval* cases and their implications in: Lasek-Markey, 2023, pp. 49-51.; Adams, Deakin, 2015, p. 554.; Bjelinski, Žeravčić, 2020, pp. 106-109.; Whittall, 2008 [Online] (Accessed: January 24, 2024).

provision of services.²¹⁶ The CJEU said that the economic objectives connected with those freedoms need to be balanced against the objectives of social policy, such as better living and working conditions, certain social protections, and social dialogue. Nevertheless, in evaluating the relationship between the fundamental right to collective bargaining and the freedom to provide services, the Court took the view that such collective actions could be justified only if used as a defence mechanism and if they passed the strict proportionality test.²¹⁷ The main conclusion from the *Viking* case was that the form or the legal status of the subject is not relevant, but the effect of its activities on the free movement. Each subject, regardless of its nature, is under the Treaty's influence if its activity restricts those freedoms.²¹⁸ Moreover, after the *Laval* case, some legal scholars claimed that the Court had partially brought back the principle of the country of origin, from the initial 'Bolkenstein' proposal for the Service Directive²¹⁹, which was later eliminated during the legislative procedure.²²⁰ Also, that case framed the discussion over the treatment of posted workers from the 'new Member States', including those from the Central and Eastern European states that joined after 2004, in the 'old Member States'.²²¹

Furthermore, the CJEU has decided in the *Laval* case, and then confirmed in the *Rüffert*²²², that the host country cannot impose working and employment conditions that exceed the minimum standards of Article 3(1) of the PWD96. In that way, Article 3(1) has been marked not only as the floor, but also as the ceiling in the scope of the allowed level of regulation.²²³

As a result of the intense debate caused by the 'Laval Quartet', the EU legislator has initiated the reassessment process of the PWD96.²²⁴ After years of discussions and political pressure, especially from the European Parliament's side and the European Trade Union Confederation, the European Commission has on 21st of March 2012 introduced its proposal for the new Directive²²⁵. Its objective was to empower the implementation and interpretation of the

²¹⁶ Vries, 2013, p. 182.

²¹⁷ O'Leary, Sánchez, 2021, p. 510.

²¹⁸ Davies, 2015, p. 582.

²¹⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Official Journal L 376/36, 27th December 2006.

²²⁰ See more in: Barnard, 2008.

²²¹ Thörnqvist, Bernhardsson, 2015, p. 24.

²²² Judgment of the Court (Second Chamber) of 3 April 2008, Dirk Rüffert v Land Niedersachsen, Case C-346/06, ECLI:EU:C:2008:189.

²²³ Barnard, 2021, p. 701.

²²⁴ Lhernould, 2019, p. 254.

²²⁵ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Official Journal L 159, 28 May 2014.

PWD96's provisions.²²⁶ Also, in the same month, the Commission suggested the 'Monti II' Regulation on collective action²²⁷. However, due to the strong opposition, that proposal was withdrawn. On the other hand, the first proposal was accepted in May 2013 and became known as the 'Enforcement Directive'. It aimed to improve the enforcement of the rules on posting of workers, without changing the provisions of the PWD96.²²⁸ Since it specifically addresses the prevention of circumvention of the rules on posting workers, including in subcontracting chains, it will be the subject of further detailed analysis below.

Later on, the enlargement of the EU, the emergence of the new economic conditions, an increasing emphasis on promoting the idea of 'Social Europe'²²⁹ and the transformation of the labour market in the EU from the traditional mobility models to hybrid forms, including the posting of workers, has highlighted the need for the adaptation of the existing legal framework.²³⁰ However, gaining broad support for social initiatives within the EU turned out to be challenging, and one example is the reform of the posted workers legislation initiated by Juncker's Commission in March 2016.²³¹

The revision has faced significant obstacles, mainly due to the criticism from various stakeholders. One of the critics came from the side of the social partners, since they weren't consulted despite the legal obligation from the Commission determined in Protocol No. 2 of the European Treaties²³². The exception from the obligatory consultation would be only in cases of urgency that need to be additionally explained and justified in the Proposal²³³, which wasn't the case here.²³⁴ However, the social partners weren't the only ones criticising the Proposal, since it also caused mixed reactions from the Member States. This phenomenon led to the 'yellow

²²⁶ Bottero, 2021, p. 121.

²²⁷ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012) 130.

²²⁸ Van Nuffel, Afanasjeva, 2018, pp. 1413-1414.

²²⁹ See more: Zeitlin, Vanhercke, 2018, pp. 149-174.; Bekker, Klosse, 2013, pp. 103-120.

²³⁰ Bottero, 2021, pp. 239-240.

²³¹ Kyriazi, 2023, p. 221.

²³² As stated by Bercusson already in 2007, the main principle of the European social model is respecting the complex systems of social policies established in Member States. That framework is based on the sensitive balance between labour law and collective bargaining, which includes the social partners. Since the balance varies from country to country, European social policy must be adaptable enough to accommodate that diversity. When EU legislation overlooks the outcomes of collective bargaining in specific sectors or regions and reduces employment relationships to individual rights, as mandated by EU law, it strengthens the position of employers who already benefit from European integration. However, it does not solve the permanent vulnerability of workers, whose collective bargaining possibilities and actions are mostly limited to national borders. See: Bercusson, 2007.

²³³ See more in: Veneziani, 2012, pp. 123-162.

²³⁴ Lasek-Markey, 2023, p. 72.

card procedure',²³⁵ which intensified the division between the West and East.²³⁶ This increase in intention pointed to the posted workers being considered disproportionate to their quantitative share of the EU labour market, suggesting that the background was political. One of the main factors was that the posting of workers also revealed disparities in the socio-economic statuses of the Member States. Less economically developed countries have sought to increase the competitive advantage of their companies in the EU market by offering lower-cost labour, while more developed countries, in their role as host countries, have sought to limit the competitive advantage of home countries, viewing it as unfair competition for their domestic businesses.²³⁷

After years of discussions, on 28th of June 2018, and exactly ten years after the controversial *Laval* case, the European Parliament and the Commission adopted the Directive (EU) 2018/957.²³⁸ This revision marked a significant change in the approach toward the wages and working conditions for workers legally posted to another Member State. By harmonising those conditions with those of local workers, the legal framework has sought to close legal gaps and reduce the risk of social dumping.²³⁹

It introduced novelties in three areas: employment terms and conditions for posted workers; temporary agency posting; and long-term posting.²⁴⁰ In order to decrease the differentiation in wages between posted and local workers, and the often unfair competition as a result of it, the Commission suggested the change of the expression 'minimum rates of pay' to the broader expression of 'remuneration'. This new concept would include additional elements, such as bonuses, allowances, and a seniority-based increase in salary.²⁴¹

Interestingly, the revised Directive also limited the sources for the terms and conditions for posted workers to the legislation and universally applicable collective agreements, excluding the collective agreements of the companies. Consequently, collective agreements with *erga omnes* effect, including those regulating remuneration, became obligatory in all sectors, compared to PWD96, in which they were applicable only in the construction sector. The only exception is the road transportation sector, which stayed outside of the Directive's scope.²⁴²

²³⁵ See more about the 'yellow card procedure' in: Vinković, Konjević, 2025, pp. 303-327.

²³⁶ See more in: Kyriazi, 2023, pp. 229-230.

²³⁷ Kártyás, 2020, pp. 71-72.

²³⁸ Bottero, 2021, p. 239.

²³⁹ Bernaciak, 2015, p. 230.

²⁴⁰ De Wispelaere, De Smedt, Pacolet, 2022, p. 29.; Furåker, Larsson, 2020, pp. 109-139.

²⁴¹ Bottero, 2021, p. 245.

²⁴² Bottero, 2021, p. 246.

Also, one of the key innovations of the PWD18 remained the rule according to which, if the posting lasts more than 12 months, or exceptionally 18 months, Member States have to ensure that companies, no matter the applicable law, provide to posted workers the same labour law treatment as to the local workers, except for social security²⁴³. That means that, with the previously mentioned conditions, those workers have to gain all the relevant rights from the employment relationships regulated by the laws, regulations, or collective agreements of the host country, including those that are universally applicable or otherwise binding.²⁴⁴

Nevertheless, the minimum duration threshold for posting workers remains unsolved and causes debates, especially regarding the highly mobile workers. The only obligatory exception regarding duration is the initial assembly or installation of goods for up to 8 days. Member States can individually decide on the exclusion from the rules on pay and leave of postings lasting less than a month or those that include minimum work. In all other cases, as confirmed by the European Commission, the PWD18 applies even to shorter postings.²⁴⁵

In this regard, it is important to refer to the concept of temporariness, given its relevance to the phenomenon of posting workers. Namely, even though the PWD18 introduced a time framework for the application of the host country's labour standards, it still did not resolve the fundamental question of the definition of temporality²⁴⁶. In other words, legislators up to now have not normatively defined what the 'temporary' posting of workers means, but they have established a functional threshold after which the legal regime changes. In that way, a certain tension between an open, factually dependent concept of temporality and the normatively determined consequences that appear after a certain time is happening. However, the PWD is not only EU legislation that uses that term, but also does not provide a precise definition. For example, in the introductory provisions of the Rome I Regulation, it is stated that the work is considered temporary if the worker's return to the home country is expected, even if, in the meantime, the worker concludes another contract within the same business structure²⁴⁷. In that way, the concept is being broadened, but it remains unclear because it does not establish a concrete periodic boundary. Nevertheless, similar uncertainty is evident in the CJEU case law. The temporality is tied to the duration of the service, but there is no clear maximum time

²⁴³ The 12-month (or 18-month) threshold is not a maximum duration for posting; it 'only' impacts the applicable labour law and collective agreements.

²⁴⁴ Article 1(a) of the PWD 18.

²⁴⁵ Lasek-Markey, 2023, p. 44.

²⁴⁶ Kullmann, 2024, pp. 10-11.; See also: Bjelinski, Žeravčić, 2020, p. 103.

²⁴⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal L 177/6, Recital 36.

limit²⁴⁸. The CJEU is taking into account other elements, such as the frequency and continuity of work²⁴⁹, and even long-term projects can be covered by the freedom to provide services, whereas permanent activities are more closely connected to freedom of establishment²⁵⁰. That is why the borderline between those two freedoms in practice is often not clear. In this regard, additional complexity arises from the relationship to workers' freedom of movement. Even though the posted workers are distinguished from migrant workers by their temporality, that difference is losing its meaning today. More and more workers are employed on fixed-term or non-standard forms of work, and case law confirms that short-term work can also be protected by EU law. Consequently, it can be concluded that the term of temporariness, even though key to understanding the concept of posting of workers, remains open and fluid, creating legal uncertainty in practice and hindering the application of clear rules.²⁵¹

Finally, after the comprehensive analysis of the labour standards, or the terms and conditions for posting of workers in the EU, and the explanation of the intensive debates caused by the CJEU's decisions, the important question arises: is it even possible to achieve the effective balance between social rights protecting the workers, and the economic freedoms as the pillars of the EU's internal market, or one of them is inevitably taking a precedence? This question is a common focus of the current legal and political discourse in the EU, where the aspiration toward economic liberalisation continues to run up against the need to protect labour rights.

Even though the new directions of the European policies are signalling a more substantial commitment to social rights, there is still an ongoing concern over the challenges of regulatory competition and the risk of a 'race to the bottom'²⁵², in which the protection of workers is eroded

²⁴⁸ See: Judgment of the Court (Sixth Chamber) of 27 March 1990, *Rush Portuguesa Lda v Office national d'immigration*, Case C-113/89, ECLI:EU:C:1990:142, par. 17, 19.; Judgment of the Court (First Chamber) of 26 January 2006. *Commission of the European Communities v Kingdom of Spain*. Case C-514/03. ECLI:EU:C:2006:63, par. 22.

²⁴⁹ Judgment of the Court of 30 November 1995. *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*. Case C-55/94. ECLI:EU:C:1995:411. par. 27.; Judgment of the Court (Sixth Chamber) of 13 February 2003. *Commission of the European Communities v Italian Republic*. Case C-131/01. ECLI:EU:C:2003:96, par. 22.

²⁵⁰ Judgment of the Court (Fifth Chamber) of 11 December 2003. *Bruno Schnitzer*. Case C-215/01. ECLI:EU:C:2003:662, par. 30.; Judgment of the Court (Grand Chamber) of 7 September 2004. *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)*. Case C-456/02. ECLI:EU:C:2004:488.; Judgment of the Court (Sixth Chamber) of 9 November 2000. *Josef Plum v Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln*. Case C-404/98. ECLI:EU:C:2000:607.

²⁵¹ *European Trade Union Confederation*, 2016, pp. 17-18.; See also: Kullmann, 2024, p. 11.

²⁵² 'Race to the bottom' is a situation where companies compete with each other to reduce costs by paying the lowest wages or giving workers worse conditions; 'Race to the bottom' (Cambridge Business English Dictionary, Cambridge University Press) [Online](Accessed 17 November 2024). See more in: Bjelinski, Žeravčić, 2020, p. 109.

for the sake of market flexibility. This discussion highlights the pressing need for a balanced legal framework that ensures both economic integration and robust social protection, without undermining basic labour standards. Finally, in the context of the posted workers included in the subcontracting arrangements, as the research focus, the tension between the economic freedoms and the protection of workers' rights is especially relevant due to its structural complexity and the unclear legal framework. To clarify, the following analysis provides insight into the broader scope of the dark sides of posting, and then the research focuses on relevant definitional determinations, legislative overview, and practical implications.

2.3. The Other Side of the Coin: Dark Sides of Posting

In 'old' Member States, the need for a cheaper workforce has met the offer from the 'new' Member States, encouraged by allowed mechanisms, partly EU law-based ones, such as the fixed-term contracts, (posted) temporary agency work, posting of workers in subcontracting arrangements, and self-employment. Consequently, with a pre-existing national fragmentation of work, the EU added a layer of transnational fragmentation, exacerbating the well-known challenges of the territorial application of labour law and encouraging the development of the posting of workers as a model based on 'regime competition'.²⁵³

Therefore, even though the role of the posting of workers increased significantly within the fundamental principle of the EU, the freedom to provide services^{254, 255} due to its nature and complexity, is often described as a 'Trojan horse'²⁵⁶, and associated with cross-border social fraud, especially in labour-intensive sectors.²⁵⁷ Namely, despite other options for workforce migration and employment, the posting of workers is often an employer's first choice because it leverages differences in national legislation, making it easier to circumvent stricter rules and avoid inspection controls. The reason for it is hiding behind the rules applicable to the posted worker, based in part on the place of work, in part on citizenship and the company, but also on legal options that sometimes do not reflect the real conditions.²⁵⁸ Therefore, due to the

²⁵³ Houwerzijl, 2022, p. 184.

²⁵⁴ Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26 October 2012.

²⁵⁵ Lens, Mussche, Marx, 2021, pp. 27-28.; Scharpf, 2010, p. 222.

²⁵⁶ De Wispelaere, De Smedt, Pacolet, 2022, p. 13.

²⁵⁷ De Wispelaere, De Smedt, Pacolet, 2022, p. 14.

²⁵⁸ Lillie, et. al., 2025, p. 808.

correlation of the posting with the social dumping²⁵⁹ and rights violations²⁶⁰, including substandard working conditions, wage dumping, letterbox companies, bogus subcontracting, overtime work, illegal deductions for transport and lodging and other precarious conditions, it became a controversial phenomenon that highlights a deeper problem within the EU: the imbalance between the strong fundamental freedoms and its weaker social protection.²⁶¹

One case that can be taken as an example of the precarious position of posted workers is the CJEU case *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*²⁶², in which the Polish company Elektrobudowa Spolka Akcyjna posted their workers on the construction site of the nuclear plant in Finland. The Finnish trade union claimed that the posted workers did not receive all mandatory wage elements prescribed by the relevant collective agreement in Finland. Specifically, compensation for travel between the accommodation and the construction site has not been paid to the posted workers, along with the daily allowances; however, the collective agreement considers it part of the minimum wage.²⁶³ Even though the case confirmed the posted workers' right to the required wage, in practice those workers waited for years to be paid and did not receive the full amount mandated by the court due to the employer's bankruptcy.²⁶⁴

Additionally, the wage disparities driving the increase in the posting of workers have also fuelled fraud and rule evasion by companies seeking to profit from underpaid labour. Circumvention ranges from non-compliance with labour and social security laws, often unnoticed due to weak cooperation and information-sharing among national authorities, to the creation of letterbox companies in low-wage Member States, allowing businesses to post workers to high-wage countries while bypassing stricter regulations.²⁶⁵ That specific difficulty arises from the fact that companies can be established easily, almost anywhere in the EU, often as formal legal entities without real business, created to circumvent obligations imposed by specific legislation.²⁶⁶ It is evident that EU legislation is not adequately safeguarding social

²⁵⁹ Bjelinski, Žeravčić, 2020, p. 99.

²⁶⁰ The EU has a strong legal system that generally protects workers from any form of exploitation, but the practical implementation of those norms falls short of what is on paper. Charter of Fundamental Rights of the EU in its Article 5 undoubtedly prohibits slavery and forced labour in all of its forms, while Article 31 gives workers the right to fair and just working conditions. See: European Union Agency for Fundamental Rights, 2015, p. 3.

²⁶¹ Lens, Mussche, Marx, 2021, pp. 27-28.; Scharpf, 2010, p. 222.

²⁶² Judgment of the Court (First Chamber) of 12 February 2015. *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*. Case C-396/13. ECLI:EU:C:2015:86.

²⁶³ Judgment of the Court (First Chamber) of 12 February 2015. *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*. Case C-396/13. ECLI:EU:C:2015:86.

²⁶⁴ Lillie, et. al., 2025, p. 814.

²⁶⁵ Van Nuffel, Afanasjeva, 2020, pp. 283-285.

²⁶⁶ Jorens, 2022, p. 421.

standards and is failing short in tackling the extensive misuse of principles related to freedom of establishment and separate legal entities. This allows companies to establish letterbox companies with the intention of engaging in regime shopping. It harms the public interest by reducing government revenue and contributing to deteriorating working conditions across the EU.²⁶⁷

In this regard, letterbox companies are among the most contentious practices related to the posting of workers. Namely, those companies are established only on paper²⁶⁸ and exist primarily for the purpose of exploiting PWD and circumventing the legal standards and rules of the host countries.²⁶⁹ In practice, according to recent research by Nathan Lillie and others, Polish labour inspectors claimed that certain state policies are restricting the effective supervision and application of the legislation due to political priorities that are not always aligned with enforcement objectives. In that regard, they claimed that the companies that are posting the workers are often complicating the inspection control using legal tricks, such as the ‘virtual offices’, just as letterbox companies, that report the address at which they do not have representatives or genuine activities. In those cases, inspectors have only the mailing address, but since there is no requirement that someone be available at that address, inspectors' inquiries do not reach the responsible persons, allowing the company to ignore them without legal consequences.²⁷⁰ An additional problem arises when the posted worker works under the direct supervision of the service user, which constitutes bogus subcontracting or the illicit provision of workforce. It often happens that those kinds of companies are again not performing any genuine economic activities in the home country, but they are just posting workers in the other country, where they are in reality working almost permanently.²⁷¹ Therefore, it becomes even more complex when letterbox companies post workers through bogus subcontracting chains, thereby circumventing labour law obligations.²⁷² This particular phenomenon will be the subject of the analysis in the next chapter.

Furthermore, an additional challenge arises when the workforce is posted through temporary working agencies (TWA). A relevant example of the prior situation is the international group of TWAs that tried to terminate the contracts of Polish workers in Sweden on the construction site of the company Skanska, in order to reemploy them through the Polish

²⁶⁷ McGauran, 2016, p. 18.

²⁶⁸ Van Hoek, Houwerzijl, 2012, p. 427.

²⁶⁹ Vinković, 2018, p. 16.

²⁷⁰ Lillie, et. al., 2025, p. 815.

²⁷¹ Van Hoek, Houwerzijl, 2012, p. 427.

²⁷² Novitz, Andrijasevic, 2020, pp. 1325-1341.

company, thereby avoiding Swedish labour legislation.²⁷³ Another practical reference to the challenges that the posted workers are facing when employed through the TWAs was shown in the research conducted by Novitz and Andrijasevic, in which they were analysing the working conditions of both EU and non-EU workers from Serbia who were, through the TWAs in Hungary and Slovakia, working in the Slovakian electronics industry. On their contracts, they were described as workers employed by the Hungarian agency but posted to Slovakia. Those workers weren't completely aware of their status; without the social security and health contributions, they were accommodated in poor conditions, isolated from society, without connections with trade unions or legal assistance, while working in shifts longer than 14 hours a day.²⁷⁴ Not only does this case show an increasing trend of TWAs in subcontracting chains, which will be examined afterwards, but it also shows one more example of the latest trend of circumvention of the rules: the posting of third-country nationals²⁷⁵, used due to the weakness of the EU regulation on the cooperation between the countries in those cases.

Namely, employers are hiring third-country nationals in one of the EU Member States, where obtaining a work permit is easiest, and then posting them to other Member States. In that way, they are getting a cheaper, less protected workforce, especially since they do not fall under the EU freedom of movement, while each Member State decides who they are going to let into their labour market. The CJEU explicitly allowed the posting of third-country nationals to the other Member States, which is often called 'a hole in the wall of fortress Europe', in the case *Raymond Vander Elst v Office des Migrations Internationales*,²⁷⁶. In it, according to French legislation, every foreign company which performs services in France and hires third-country nationals is obliged to obtain work permits for the workers²⁷⁷.²⁷⁸ However, it is worth clarifying that due to the specific legal and practical challenges that the third-country posted workers are facing in the EU and its broad scope²⁷⁹, they are considered a separate category of workers²⁸⁰. That's why they will not be the subject of this analysis, but rather of future, individual research. The focus of this research remains on the dark side of intra-EU posting of workers, with a correlation with subcontracting arrangements.

²⁷³ Van Hoek, Houwerzijl, 2012, p. 427.

²⁷⁴ Novitz, Andrijasevic, 2020, pp. 1330-1332.

²⁷⁵ See more in: European Labour Authority, 2025.

²⁷⁶ Judgment of the Court of 9 August 1994. *Raymond Vander Elst v Office des Migrations Internationales*. Case C-43/93. ECLI:EU:C:1994:310.

²⁷⁷ Connor, 2012, p. 716.

²⁷⁸ Lillie, et. al., 2025, p. 807-808.

²⁷⁹ See: Houwerzijl, Van Gardingen, 2025, pp. 1-15.; Verschueren, 2024, pp. 875-890.

²⁸⁰ Lillie, Kärkkäinen, Kayran, 2025, p. 12.

Finally, due to the aforementioned dark sides of the phenomenon of posting workers, its marginalisation affected public perception and led to questions about its enforcement and promotion.²⁸¹ Therefore, despite developments in EU legislation protecting posted workers, some flaws remain in practice, including challenges related to working and living conditions, allowances, trade union representation, letterbox companies, and the particular complexities of including posted workers in complex subcontracting relationships. The latter phenomenon, as one of the most relevant yet under-researched and unclarified aspects, will be a focus of further analysis.

2.4. Concluding Remarks

The analysis in this chapter shows that the institution of posting of workers under EU law cannot be understood without the broader context of the development of the internal market and its fundamental freedoms. Already in the introduction, it has been highlighted that the posting of workers has evolved from a relatively limited and functional form of mobility into a complex mechanism that, especially after the deepening of integration and the EU enlargement, has allowed more intensive use of differences between national systems of labour and social security protection. In that way, the posting of workers took on a twofold dimension, since, on the one hand, it remained the instrument of economic integration, and, on the other, it became the source of heightened legal and social tensions.

Further research into the personal and legal scope of posting workers clearly showed that the institute is conceptually fragmented. Differences between labour law and social security law approaches, and the parallel existence of narrow and broad understandings of the posting of workers, are leading to a situation in which there is no unique and stable definition of the posted worker. Such diversification not only poses a theoretical challenge but also has concrete implications for the level of legal protection and the feasibility of effective rights protection. That inconsistency is creating an opportunity for the misuse of legal loopholes.

The contribution of this chapter is particularly attributable to the CJEU's case law on determining whether posted workers are service providers. CJEU has developed an approach under which posted workers do not enter the host country's national labour market but remain

²⁸¹ De Wispelaere, De Smedt, Pacolet, 2022, p. 13.

tied to the employer from the sending country and function as part of the cross-border provision of services. In that approach, the element of legal fiction can be recognised. Namely, the law here starts from a presumption that is functional for the internal market but only partially corresponds to the realities of the employment relationship. The posted worker is normatively kept in the sending country, even though they are in fact working, residing, and contributing to the host country's work processes. In other words, it is a construction that simplifies the legal regime, but at the same time blurs the real position of posted workers. Such a fiction allows for easier cross-border service provision, but the cost of this approach is a certain weakening of labour law protection. That difference between the legal construction and the real working experience of posted workers is one of the main tensions of this institute.

The consequences of such normative determination include overreaching independent cases and are reflected in the general position of posted workers on the EU labour market. By being accommodated within the freedom to provide services framework rather than the freedom of movement for workers framework, their protection has been, from the beginning, dependent on and limited by the economic logic of the internal market. In that sense, it can be interpreted as a specific and ambivalent position in which posted workers are factually present on the host country's labour market but remain legally outside it. Such a partially integrated position makes them particularly precarious in the face of various forms of flexibilization and rule circumvention.

Furthermore, the analysis of the labour standards and case-law additionally confirmed this tendency. Even though the PWD96 has established a basic level of protection, its interpretation in CJEU case law, especially through the so-called 'Laval quartet', has long limited Member States' ability to broaden that protection beyond the minimally defined legal boundaries. In that way, at least for a certain period, leaning more toward protecting market freedoms than toward strengthening the social dimension. Later amendments, including the PWD18, have undoubtedly sought to address this relationship, but they have not completely eliminated the fundamental tension between economic and social objectives.

The final part of the chapter on the 'dark sides' of posting workers has shown how the aforementioned normative and conceptual weaknesses are reflected in practice. Phenomena such as social dumping, abuse of legal constructs, use of letterbox companies, or intermediary employment models occur inadvertently, but as a consequence of a system that allows the combination of different legal regimes with a relatively limited level of control. In that sense, the border between the legitimate use of the freedom to provide services and its abuse is often

not clearly visible, but is shaped through such practice. Overall, it can be concluded that the position of posted workers in EU law is marked by structural uncertainty, since they are workers whose need for protection is recognised, but whose legal status is shaped to remain compatible with the logic of the internal market. Maybe exactly such internal tension is a reason why the challenges in this scope are constantly repeated, despite legislative interventions.

Such a conclusion has direct implications for further research. If the posted worker is already at the level of the basic legal framework provided as part of the service, rather than as a subject of protection, their vulnerability is further deepened within complex organisational structures. In that sense, the next chapter focuses on the analysis of subcontracting chains, in which the fragmentation of liability, lack of control, and the difference between formal and real relationships are further intensified. In that context, it is becoming increasingly clear how the weaknesses identified in this chapter are shaping the actual position of posted workers in the modern European labour market.

CHAPTER 3: Subcontracting Phenomenon in the Context of Posting of Workers

3.1. Introduction: What are Subcontracting and Subcontracting Chains?

Subcontracting is a phenomenon protected by freedom of contract, given the parties' autonomy and freedom to choose business partners. Under EU law, contractual freedom is traditionally seen as one of the elements of the right to conduct business and as part of the freedom of movement.²⁸² However, it is important to notice that, in the EU legal framework, the concepts of subcontracting and outsourcing are not considered the same, even though they are often used interchangeably²⁸³. The term subcontracting is used in several secondary EU

²⁸² Sinander, 2025, p. 12.

²⁸³ Subcontracting is in EU law considered a delegation of obligations that result from a specific prior contract, which differentiates it from outsourcing, which is not connected to the previous contractual relationship. Even though the Public Procurement Directive does not define the term subcontracting, from its context, it is clear that it is referring to tasks transmitted from a certain contract. Since the posting of workers is also based on a specific contract, the same logic is applicable even in the PWD Enforcement Directive. However, EU law is not consistent. Delegation of the work through the temporary working agencies is functioning like subcontracting, but it is not named as such. Instead, the special Directive defines agencies as subjects that employ their workers and provide them to users. That practice is allowed, but every limitation has to be justified. See: Sinander, 2025, p. 8.

legislations, including the directives on public procurement²⁸⁴, the enforcement of rules on posting of workers²⁸⁵, and the employers' sanctions²⁸⁶. However, only the Employers Sanctions Directive gives a precise terminological determination of 'subcontractor': "*means any natural person or any legal entity, to whom the execution of all or part of the obligations of a prior contract is assigned*"²⁸⁷. Additionally, in legal doctrine, Cremers and Houwerzijl described a subcontract as "*commercial contract (for the provision) of services or a commercial contract (for the provision) of labour, works and materials between a main contractor and a providing or supplying contractor*".²⁸⁸

In other words, subcontracting represents a business model in which the principal contractor, hired by the investor or client, engages additional individuals or companies as subcontractors to execute a project. The main or principal contractor remains responsible for the project and must oversee the hired subcontractors to ensure the work is carried out in accordance with the contract. Hired companies or workers can also be foreign subjects. Therefore, the subcontracting process typically involves three actors: the investor or client, the main or principal contractor, and one or more subcontractors.²⁸⁹

On the other hand, the subcontracting chain arises when the investor hires a principal contractor, or the investor itself, additionally hires one or more subcontractors. Those subcontractors can be involved to provide their workforce or to hire another legal entity, such as a temporary work agency. That kind of chain, at least in theory, can be extended indefinitely and reassembles both a logistical and an economic value chain. Each link in that chain has a contractual obligation to another.²⁹⁰ Another simplified definition of the subcontracting chain says that those 'involve a client, or principal contractor, externalising single specialities or tasks to other companies or self-employed workers'.²⁹¹ The term 'subcontracting chain' has been

²⁸⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Official Journal L 94, 28 March 2014.

²⁸⁵ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), Official Journal L 159, 28 May 2014.

²⁸⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L 168, 30 June 2009.

²⁸⁷ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L 168, 30 June 2009, Article 2(f).

²⁸⁸ Cremers, Houwerzijl, 2021.

²⁸⁹ Heinen, Müller, Kessler, 2017, p. 19.

²⁹⁰ Heinen, Müller, Kessler, 2017, p. 20.

²⁹¹ Andriescu, et. al., 2024, p. 32.

taken from, besides others, the Public Procurement Directive²⁹² and should be distinguished from the expressions of ‘chain of activities’²⁹³, ‘supply chain’, and ‘value chain’²⁹⁴, which are used, for example, in the Corporate Sustainability Due Diligence Directive²⁹⁵.²⁹⁶

The subcontracting chain is at the same time a logistical and an economic value chain that includes the whole process from the idea to the finalisation, often involving small or medium enterprises or self-employed individuals. By then, those chains had become longer and more complex, turning into multi-layered production networks. The work can be performed simultaneously or in several phases, forming a hierarchical network of socio-economic dependencies connected to several contracts and business relationships.²⁹⁷

Generally, subcontracting is considered a valuable and legitimate business model. The main advantages lie in enabling companies to accelerate innovative processes. Additionally, it allows companies to adapt to the market by enabling them to quickly adjust their workload. This effectiveness is especially relevant for small and medium-sized enterprises, which, through subcontracting, can participate in projects that would otherwise be too large for them to undertake individually.²⁹⁸

Despite its economic advantages, subcontracting remains a target of fraudulent practices. In sectors such as transport, logistics, and construction, certain contractors are known to circumvent legal obligations. It includes the avoidance of paying minimum wages or social

²⁹² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, Official Journal L 94, 28 March 2014.

²⁹³ CSDD Directive defines ‘chain of activities’ as: ‘(i) activities of a company’s upstream business partners related to the production of goods or the provision of services by that company, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of products and the development of the product or the service; and (ii) activities of a company’s downstream business partners related to the distribution, transport and storage of a product of that company, where the business partners carry out those activities for the company or on behalf of the company, and excluding the distribution, transport and storage of a product that is subject to export controls under Regulation (EU) 2021/821 or to the export controls relating to weapons, munitions or war materials, once the export of the product is authorized.’

²⁹⁴ The term ‘supply chain’ usually refers to all the phases connected to the production or transport of products. On the other hand, the term ‘value chain’ encompasses a broader set of activities that contribute to the product's value. However, from a legal certainty perspective, both terms are not sufficiently clarified, so the clearly defined liability boundaries of the limitation measures are needed. See: Sinander, 2025, p. 9.

²⁹⁵ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, Official Journal L 2024/1760, 5 July 2024 (hereinafter: CSDD Directive).

²⁹⁶ Sinander, 2025, p. 9.

²⁹⁷ See more in: Sinander, 2025.

²⁹⁸ European Commission, 2025, Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers’ rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 9.

contributions, as well as a systemic ignorance of occupational health and safety standards.²⁹⁹ Subcontracting chains often erode transparency and responsibility and complicate enforcement, since the principal contractor's direct social and legal liability is significantly reduced. The longer the chain gets, the harder it is to determine who is legally responsible for safeguarding labour standards and the protection of workers' rights³⁰⁰. That challenge is particularly relevant in the lower levels of subcontracting chains, where it is sometimes hard even to clarify who the real employer is, and, in addition, how to guarantee workers' rights.³⁰¹

Namely, since labour law rests on the presumption that the employer bears liability for complying with labour standards, contemporary business structures have found ways to avoid that liability. It is often achieved by transferring workers to smaller, outside companies operating in highly competitive sectors, where cost pressure is extremely high. In such conditions, those companies are rarely having real possibility to keep up with higher labour standards, and are very often fighting also with complying with basic legal conditions. In that way, formal liability is kept at the bottom of the chain, while the real impact and economic power are placed elsewhere.³⁰² This makes it almost impossible for workers, even with the NGOs' help, to claim the unpaid wages, since it is not clear from the start who is actually responsible. Larger companies, in whose premises or sites the work is being done, usually deny having anything to do with subcontractors and often refuse to provide any relevant contact details.³⁰³

Therefore, the subcontracting in general can be overviewed through two contrasting models: cooperative and competitive. The cooperative model is interconnected with the organisation of work that appraises professional qualifications, ensures decent wages and working conditions, and relies on specialised skills. A competitive model, on the other hand, prioritises cost reduction by exploiting differences in market power among the included actors. That approach often leads to multiplied subcontracting of the same task, leading to the so-called 'hollowed-out firms', in which responsibility and accountability are faded.³⁰⁴ The imbalance in the power

²⁹⁹ European Commission, 2025, Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 9.

³⁰⁰ European Commission, 2025, Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 9.

³⁰¹ De Smedt, De Wispelaere, 2024, p. 16.; See more in: Houwerzijl, Peters, 2008.; Cremers, Houwerzijl, 2021.; Andriescu, et. al., 2024.; European Labour Authority, 2023.

³⁰² MacDonald, 2014, p. 622.

³⁰³ Čaněk, et. al., 2016, p. 9.

³⁰⁴ Harvey, 2003, pp. 195-197.

of subjects in the chain led to the introduction of liability schemes in Member States to protect workers' rights and ensure compliance with rules, which will be examined in more detail.

Historically, since the late 1980s, subcontracting has become an important business model both globally³⁰⁵ and in the Member States of the European Union, used by companies to outsource tasks to more complex and sometimes even parallel chains of companies. With the strengthening of market integration and the more intensive cross-border movement of capital and labor, those chains began to include companies from multiple Member States.³⁰⁶ Consequently, traditional subcontracting, based on a long-term, coordinated division of tasks within the production process, slowly transformed into a model of outsourcing with the primary objective of cost reduction. Instead of keeping their own workers, companies began using atypical working arrangements. Working tasks were more often let to 'third' parties and performed by 'employers', including specialised subcontractors, labour-only subcontractors, temporary work agencies, and the self-employed.³⁰⁷

However, national and EU policymakers have encouraged this business model for its flexibility and expected benefits for growth and employment³⁰⁸, especially because it supports the free movement of services and promotes fair competition across all Member States while encouraging the participation of small and medium-sized companies³⁰⁹. Also, for employers, subcontracting offers numerous benefits, including access to highly specialised expertise, improved cost management and efficiency, and greater operational flexibility. Besides, such practices are often considered a factor in economic growth and contribute to the creation of new employment opportunities.³¹⁰

Therefore, fundamental freedoms in the EU, significant wage gaps between Member States, and regulatory arbitrage that gives transnational service providers a form of extraterritorial status have further encouraged today's broader possibilities for transnational subcontracting.³¹¹ Regulatory arbitrage is the practice of making strategic choices among different legal or

³⁰⁵ As emphasized by Marx, Wouters and Beke, 'world economy is changing towards a supply-chained world in which firms and workers (...) are connected to one another through supply or value chains'. See: Marx, Wouters, Beke, 2015, p. 2.

³⁰⁶ Jorens, 2022, pp. 420-421.

³⁰⁷ Cremers, Houwerzijl, 2021, p. 7.

³⁰⁸ Houwerzijl, Jorens, Peters, Gillis, 2012.

³⁰⁹ A diverse spectrum of subcontractors operating within various structures, systems and components on the same business site leads to a proliferation of small enterprises, so-called 'dwarfism', and commonly fosters spreading false self-employment and bogus subcontracting. See: Houwerzijl, Jorens, Peters, Gillis, 2012, p. 154.; Jorens, 2022, p. 421.

³¹⁰ Jorens, 2022, pp. 420-421.

³¹¹ Lillie, 2012, p. 150. See more in: Lillie, 2010, pp. 685-706.

regulatory regimes to select the most favourable framework for a particular business activity. It can involve establishing a company abroad to benefit from less restrictive rules or transferring between different regulatory systems within the country.³¹²

Nevertheless, widespread subcontracting also brought numerous challenges for the rights of included workers.³¹³ In those arrangements, workers are often left without adequate protection of their labour rights. Its consequences include the loss of social rights, a limited approach to support and decision-making, and various forms of social marginalisation. The risk burden in such cases is shifted from the main contractor to smaller companies or to workers themselves. On the lowest levels of the system, the unstable cheap labour force offer is made, leading to low wages, insecure and unsafe working conditions, low liability of the employers, serious disturbances on the labour market, and, in extreme cases, practices similar to modern slavery.³¹⁴ These practices have been corroborated by statements from subcontracted workers before the European Parliament in 2025, as transcribed by ETUC. “My colleague Mykailo died on the GHdC construction site in Charleroi on 27/9/21. He was Ukrainian and was working here in Belgium as a worker posted by a Polish company, for which he had not performed any work in Poland. This company subcontracted to a firm registered in the Netherlands that had no employees. The investigation revealed numerous violations of the code. The Polish company no longer exists and did not report the accident to the Polish social security authorities. As a result, four years later, the family is left with nothing. Without compensation, his wife had to find work abroad, his son joined the army, and his daughter is alone in the village.” (Renaud, construction worker, Belgium). “Working in agriculture in Spain means 9, 10 or even 12 hours a day under the sun, in temperatures of over 40 degrees. It is a hard job. But what makes it truly exploitative is the role of gang-like intermediaries. Farmers deal with them to ensure a steady supply of vulnerable workers to exploit. One call, and they have 200 people ready to work. The intermediary charges €0.50 per hour worked by each worker, €6 per day for transport, and up to €180 per month for accommodation, which is always deplorable and overcrowded. They truly act as gangmasters.” (Rachid, agricultural worker, Spain). “Subcontracted workers who work for DHL have to be extremely flexible. They’re often notified at the last minute that their shift is cancelled. The subcontracted drivers never know for sure if they will work or not.” (Chris, driver, Belgium). “Wage theft is a daily reality faced by subcontracted workers in my

³¹² In the case of the posted workers, these strategies are closely related to subcontracting and agency work and represent the form of regime shopping that undermines fair working conditions. See: Lillie, Wagner, 2015, pp. 157-158.

³¹³ Jorens, 2022, pp. 420-421.

³¹⁴ Cremers, Houwerzijl, 2021, p. 8.

company. When a subcontractor goes bankrupt – and it happens a lot – the workers lose everything. Some are even left on the street. The very next day, there is already a new contract in place with another subcontractor. It is workers who pay the price.” (Amazon worker, anonymous). “Across most building sites in Belgium, you see a tiered system. Subcontracted workers are paid less and have no-where to go if they face problems, no matter how serious. They are truly on their own.” (Luis, construction worker, Belgium).³¹⁵

Therefore, at the national level, companies use subcontracting to leverage the advantages of specific business models or, more often, to circumvent applicable legislation or collective agreements, thereby avoiding obligations regarding salaries and benefits. At the EU level, companies operating across borders strategically use subcontracting to exploit the freedom to provide services, thereby avoiding payment obligations and circumventing collective agreements in that country. Eventually, those actions serve a single purpose: to drastically reduce labour costs and avoid legal and financial obligations to workers, thereby undermining labour standards across the EU.³¹⁶ The consequences are direct and measurable: statistics indicate that workers in subcontracting arrangements face greater workplace hazards. For example, twice as many injuries and absences are recorded among workers engaged through subcontracting arrangements in France as among general contractor workers³¹⁷. Research confirms this vulnerability, which often worsens with longer working hours and greater intensity, resulting in an increase in work accidents from 2013 to 2019.³¹⁸ It has been observed that the most significant issues arise in complex subcontracting structures with multiple consecutive subcontractors (subcontracting chains), where determining and implementing liability are significantly more complicated.³¹⁹ Namely, it became a common³²⁰ and effective

³¹⁵ ETUC, 2025, “‘We work in the shadows’: Trade unions call for EU action to end exploitation in subcontracting chains and labour intermediaries”. Press release. 6 October 2025. [Online] (Accessed: 29 November 2025).

³¹⁶ Schömann, 2021, p. 11.

³¹⁷ Eurofound, 2011, 'Impact of subcontracting on working conditions [Online] (Accessed: 30 November 2025), p. 6.

³¹⁸ European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers’ rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 9.

³¹⁹ Sinander, 2025, p. 5.; See also: European Commission (2025), Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers’ rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 9.; European Commission (2023) Study supporting the Monitoring of the Posting of Workers Directive 2018/975/EU and of the Enforcement Directive 2014/67/EU, 2023, pp. 32-33, 89, 137.

³²⁰ It should be noted that it is not always the case that subcontracting is used to decrease the cost and power of the workforce or undermine unions. However, the misuse practices are common and concerning, causing a wide range of research analysis. See more in: Lillie, 2012, p. 149.

employer strategy for reducing labour costs³²¹ and shifting or avoiding responsibility, while increasing organisational flexibility and weakening the position of workers.³²² It is considered the main mechanism for encouraging social dumping and unfair competition between companies' workers across borders.³²³

The challenge of placing workers in subcontracting arrangements has been a topic of discussion for several decades. It began with the Union legislation on occupational health and safety in Directives 89/391/EG³²⁴ and 92/57/EEC³²⁵.³²⁶ Later on, the expansion of subcontracting, especially in the labour-intensive industries, such as construction³²⁷, food processing, agriculture, transport, tourism, cleaning sector,³²⁸ has caused concerns due to the poor protection of the workers' rights on the lower levels of the chains, particularly since the main contractors usually do not have the direct responsibility for, for example, wages, of their subcontractors' employees. Numerous cases of unprincipled contractors and abuses within subcontracting chains, resulting in inhumane working conditions for workers, have increased demand for stronger enforcement mechanisms to prevent social dumping.³²⁹ Also, through transnational subcontracting, the segmentation of the labour market is becoming more intensive, eroding the working conditions of domestic workers by directly competing on costs with workers hired under foreign labour standards and regimes.³³⁰ Cost reductions in subcontracting chains are mainly achieved through breaches of working time and health and safety regulations, wage fraud, and social contributions, as well as the use of dubious business structures, such as letterbox companies, non-compliant subcontracting, and bogus self-employment. However, the main mechanism for enforcing it relies on mobile workers,

³²¹ The threshold between the legal and illegal cost-cutting practices by using the cheaper workforce is often unclear, since the legislation in the scope of transnational mobility of workers or service providers is complicated and the implementation mechanisms on national levels differ. Consequently, not even the labour inspectorates nor the workers do not have enough authority or knowledge to determine the breaches of the law or to effectively enforce the labour law standards. See: Wagner, 2015, p. 1381.; Heidinger, 2016.

³²² Wills, 2008, p. 444.

³²³ Schömann, 2021, p. 9.

³²⁴ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, Official Journal L 183, 29 June 1989.

³²⁵ Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites, Official Journal L 245, 26 August 1992.

³²⁶ Heinen, Müller, Kessler, 2017, p. 17.

³²⁷ Labour-intensive activities, particularly in extensive construction projects, are usually carried out through a subcontractor network made up of smaller companies and independent contractors employing mobile, especially posted workers, from lower-income EU Member States, as well as an increasing number of individuals from third countries. Some companies operate solely for specific projects, while others move between construction sites throughout Europe. See: Houwerzijl; Berntsen, 2020, pp. 153-154.

³²⁸ Houwerzijl, Jorens, Peters, Gillis, 2012.; Heinen, Müller, Kessler, 2017, p. 20.; European Federation of Food, Agriculture, and Tourism Trade Unions, 2025.

³²⁹ Houwerzijl, Jorens, Peters, Gillis, 2012.; Jorens, 2022, pp. 420-421.

³³⁰ Lillie, 2012, p. 148.

including posted workers.³³¹ Therefore, this type of employment has affected working conditions, workers' experiences, and power relations in the labour market.³³² In that regard, subcontracting employment relations are taking shape as a paradigm, significantly changing the nature of employment relationships.³³³

In recent years, the above-mentioned labour law challenges related to subcontracting chains have encouraged several EU Member States to introduce special legislative measures³³⁴, including stricter controls, limits on subcontracting chains, liability systems, more intensive information exchange, and special authorities to determine and prevent rule circumvention. Social partners at the national, sectoral, and EU³³⁵ levels also launched initiatives to improve their systems and collectively persuaded governments to strengthen these activities.³³⁶ Despite the positive results of these initiatives, the persistent challenges to workers' rights in subcontracting arrangements required a broader perspective. *'Without a united European response, it becomes easier for fraudulent and criminal actors to exploit weaknesses of the Single Market.'*³³⁷ Despite the European Commission's long-term interest in this regard³³⁸, there is still no specialised legal framework to regulate subcontracting as a market practice with significant social impact, nor one that clearly defines subcontractors and obliges them to stricter social standards and responsibilities.³³⁹

³³¹ Heidinger, 2016, p. 2.

³³² Wills, 2008, p. 444.

³³³ Wills, 2008, p. 444.

³³⁴ See for example: German Lieferkettensorgfaltspflichtengesetz (entered into force on 1 January 2023) and the French Loi no. 2019-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre. Another example is one of the strictest laws on subcontractor control in the construction sector, motivated by the high accident rates in long subcontracting chains, which was adopted in Spain in 2006. It regulates the minimum rates for permanently employed workers, requires the obligatory registration of all contractors and subcontractors, and limits the number of subcontracting levels. Even though the law is still in effect, there is limited evidence of its effectiveness, mainly due to the economic crisis and the rise in small, harshly controlled companies. While larger companies are mainly complying with the law, at the small- and medium-sized company level and in the informal sector, compliance is weak. Analyses are showing serious public authorities' omissions in performing their own obligations, even though the private sector is usually saying that the system of registration (REA) is useful for the improvement of the control system, quality, and reliability of subcontractors. See: Cremers, Houwerzijl, 2021, pp. 11-12.

³³⁵ See, for example, ETUC project publications: Borelli, et. al., 2021.; Cremers, Houwerzijl, 2021.; Schömann, 2021.

³³⁶ Danielsson, 2025, p. 8.

³³⁷ Danielsson, 2025, p. 8.

³³⁸ See for example: Commission of the European Communities (1989) Development of Subcontracting in the Community. Communication from the Commission and Draft Council Resolution. COM (89) 402 final. Brussels, 7 August 1989.

³³⁹ Cremers, Houwerzijl, 2021, p. 8.

Nevertheless, due to recent stakeholder pressure³⁴⁰, the topic finally became open at the EU level as well. Namely, as will be explained later on, the European Trade Union Confederation (ETUC) and the European sectoral federations European Federation of Building and Woodworkers, European Federation of Food, Agriculture, and Tourism Trade Unions, and the European Transport Workers' Federation, are advocating for the introduction of the EU Directive on subcontracting and labour intermediation, with the aim of preventing existing fraudulent practices and strengthening liability within the EU labour market. This initiative is situated within the broader discussion of the EU Commission's Quality Jobs Roadmap. In that sense, it is emphasised that the existing challenges are overriding national legal frameworks, since the so-far diversified national solutions have not managed to prevent circumvention of rules in cross-border situations. That is why it is highlighted that there is a need for a unique European legal framework that would ensure the effective protection of workers and clear liability for companies, regardless of the country where they work.³⁴¹ However, this will be a subject of a broader analysis later on.

3.2. Subcontracting in the Posting Context

The phenomenon of posting workers has increasingly merged with the broader challenges of the movement of workers and services, as well as the question of compliance with contractual obligations.³⁴² Even though it does not directly result in poor working conditions, it has facilitated the need for new recruitment methods that contribute to the low-skilled European labour market, where the differentiation between mobile workers, posted workers, and self-employed has often become indistinct, just as the borderline between temporary and permanent work.³⁴³ Additionally, various circumventions of rules have been occurring in response to national regulatory frameworks, with the intent to bypass applicable rules and standards.³⁴⁴

³⁴⁰ ETUC (2025) “‘We work in the shadows’: Trade unions call for EU action to end exploitation in subcontracting chains and labour intermediaries”. Press release. 6 October 2025. [Online] (Accessed: 29 November 2025).

³⁴¹ ETUC (2025) “‘We work in the shadows’: Trade unions call for EU action to end exploitation in subcontracting chains and labour intermediaries”. Press release. 6 October 2025. [Online] (Accessed: 29 November 2025).

³⁴² Cremers, 2011, pp. 37-45.

³⁴³ Faist, 2008, pp. 73–98.; Wagner, Shire, 2020, p. 197.

³⁴⁴ Cremers, 2011, pp. 37-45.

Although posting companies are formally required to comply with employment conditions, they still exploit legal loopholes, particularly in complex areas such as subcontracting.³⁴⁵

When subcontracting is combined with the posting of workers, employers can use different legal and labour systems to their advantage and avoid legal responsibility, while at the same time isolating workers from the host country's economic and social standards³⁴⁶. Companies' rules and expectations towards workers of subcontractors often reflect the standards of the workers' home country rather than those of the country receiving them. Consequently, posted work simultaneously shapes and is shaped by the complex interaction between EU legislation, national legal frameworks, and specific practices and organisation of each sector.³⁴⁷ Nevertheless, due to the lack of comprehensive statistical data, it is hard to estimate the real scope of subcontracting in the cross-border provision of services and the posting of workers. However, the accessible data showed the importance of this practice. For example, in 2011, the allocation of work to subcontractors in the construction sector varied significantly across Member States, from less than 15% of total turnover in some countries to more than 30% in others. These data, although outdated and limited, clearly indicate that subcontracting is an important part of the organisation of work in certain sectors, further highlighting the need for understanding and adequate regulation.³⁴⁸

Additionally, although subcontracting does not, *per se*, pose a challenge, it can lead to various issues, especially when the subcontracting chain becomes excessively long. The scholars have shown, for example, that workers engaged through subcontracting chains are often more exposed to occupational health and safety risks. It can be correlated with factors such as long working hours, greater work intensity, economic pressure, and their concentration in the more hazardous parts of the supply chain.³⁴⁹ In the context of the posting of workers, the subcontracting of certain elements of the production process, combined with the absence of effective mechanisms for supervising the implementation of national and European law, has led to the creation of a secondary labour market that often fails to meet the required minimum standards.³⁵⁰ Furthermore, transnational subcontracting became beneficial for the principal

³⁴⁵ Cremers, 2014, p. 2.

³⁴⁶ Lillie, Greer, 2007, p. 552.

³⁴⁷ Lillie, Wagner, 2015, p. 158.

³⁴⁸ EU Commission (2016) Commission Staff Working Document. Impact Assessment. Accompanying the proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. SWD(2016) 53 final, p. 15.

³⁴⁹ James, Walters, Sampson, Wadsworth, 2015, pp. 727-747.; De Smedt, De Wispelaere, 2024, p. 16.

³⁵⁰ Wagner, Hassel, 2016, p. 165.

contractor if the costs, particularly labour or social contributions, which need to be paid in the home country, are lower than in other countries.³⁵¹ The research will demonstrate that serious challenges arise when cross-border subcontracting based solely on labour is presented as a means of providing services³⁵². In such arrangements, as will be explained in more detail below, workers are hired through agencies, letterbox companies, gangmasters, informal networks, etc., thereby making the posting of workers the means of the cross-border exchange of cheap labour. This leads to the concentration of posted workers in the lowest segments of the labour market, posing serious risks, including distorted competition, the weakening of workers' rights, and the circumvention of mandatory regulations.³⁵³ Changes in the labour market and the organisation of work have increased profits for higher levels in the subcontracting chain, but at the expense of labour costs and workers' rights. Consequently, broad groups of posted workers at the end of the chain were forced to accept precarious forms of employment and working conditions, leading to severe rights violations and increased occupational health and safety risks.³⁵⁴

In this regard, the 2016 PWD Impact Assessment highlighted that posted workers, who are included in subcontracting chains, are particularly vulnerable.³⁵⁵ Also, recent research has shown that transnational subcontracting chains frequently connect companies from multiple EU Member States, recruiting posted workers from various countries, including sometimes third countries. That system enables companies to reduce costs while providing greater flexibility and, often, engaging in practices such as undeclared work or social fraud, thereby encouraging social dumping and unfair competition. Those chains also split the workforce into two categories: core employees of the client or main contractor, meaning better payment, protection of social rights, unionisation possibility; and subcontracted workers, who tend to have temporary or casual employment contracts, and whose working conditions are worsened as

³⁵¹ European Trade Union Confederation, 2021, p. 11.

³⁵² The classification issues in the terminological determination are made between ready-made products and on-site services. Buying a previously produced product usually does not entail the same liability as hiring a service provider on-site, as reflected in EU primary legislation, where the free movement of goods and services is regulated by separate rules. In practice, that is visible in the modern construction, in which certain sections of the house are made in another Member State and are entering the market as products. On the other hand, construction work performed directly on the construction site is treated as a service and may trigger the Posted Workers Directive when workers from another Member State are used. This system is, of course, not applicable when the entire work is performed outside the host country, and the final result is delivered solely as a product. See: Sinander, 2025, p. 10.

³⁵³ Cremers, 2014, p. 2.

³⁵⁴ Cillo, 2022, p. 175.

³⁵⁵ See: EU Commission (2016) Commission Staff Working Document. Impact Assessment. Accompanying the proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. SWD(2016) 53 final.

lower in the chain they are, and are often victims of anti-unionisation practices.³⁵⁶ Namely, as trade unions lack influence over subcontracting and rarely reach posted workers in their unions, they have focused more on protecting workers who already hold stable positions in the labour market.³⁵⁷ In this way, the strong ‘insider’ model has emerged, leaving posted workers almost unprotected and widening the gap between protected and unprotected workers.³⁵⁸ As Wagner and Hassel highlighted, trade unions are unable to effectively address the challenges faced by posted workers.³⁵⁹ The reason lies in several factors, as highlighted by Kall and Lillie. Namely, posted workers themselves may be relatively satisfied with their working conditions, as these are often better than those in their home countries, even if they fall below the host country's general standards³⁶⁰.

Also, posted workers are facing social and territorial segregation³⁶¹, often living in isolated groups, without communication with the host countries’ workers, and while having language barriers, approaching relevant information on the rights protection is really hard. The third factor is employers’ dominance and fear of job loss³⁶². Posted workers are afraid to join trade unions or speak with representatives, as there have been reports of workers being fired for doing so (as reported in Sweden³⁶³). Moreover, many posted workers, especially those from Central and Eastern Europe, lack prior positive experience with trade unions, and a short-term stay at a single workplace further complicates the development of lasting trust³⁶⁴.³⁶⁵ Nevertheless, it is worth emphasising that, in certain situations, trade unions were able to overcome those barriers. They established specific strategies for the mobilisation of posted workers, grouped into four approaches: accessibility, proactivity, trust-building, and community outreach³⁶⁶. All of these methods highlight that for the successful organisation of posted workers, it is necessary to overcome their isolation and build trust directly to solve their individual issues and needs.³⁶⁷

Furthermore, in labour-intensive industries, companies often outsource work to foreign subcontractors. Contracts usually determine the price of the service, the deadline, and

³⁵⁶ Cillo, 2022, p. 171.

³⁵⁷ Wagner, Hassel, 2016, p. 165.

³⁵⁸ Wagner, Hassel, 2016, p. 165.

³⁵⁹ Wagner, Hassel, 2016, p. 165.

³⁶⁰ See also: van Hoek, Houwerzijl, 2011.

³⁶¹ See also: Danaj, Sippola, 2015, pp. 217-236.; Wagner, Refslund, 2016, pp. 335-351.

³⁶² Theunissen, Zanoni, Van Laer, 2023, p. 937.; Arnholtz, Refslund, 2019, pp. 682–699.; Berntsen, 2015, pp. 371–389.; Danaj, Sippola, 2015, pp. 217–236.; Berntsen, Lillie, 2016, pp. 171–187.; Wagner, 2015, pp. 201–213.

³⁶³ Van Hoek, Houwerzijl, 2011, p. 146.

³⁶⁴ See: Danaj, Sippola, 2015, pp. 217-236.

³⁶⁵ Kall, Lillie, 2017, pp. 30-31.

³⁶⁶ See: Danaj, Sippola, 2015, pp. 217-236.

³⁶⁷ Kall, Lillie, 2017, pp. 30-31.

responsibility for the equipment and labour force, but do not define wages or working hours. That means the subcontractor independently decides the organisation of the work, while the principal company has no formal authority over working conditions. As a result, the structure of the contracts makes it almost impossible to supervise the enforcement of posted workers' rights and prevent their violation. In the best-case scenario, posting of workers in these cases is a part of a legitimate division of work between contractors and specialised subcontractors in the EU, while in the worst-case scenario, it is just a cover for using precarious, temporary workers without stable, safe employment or real connections to the sending country.³⁶⁸

And even though concrete data on the scope of the inclusion of posted workers in subcontracting arrangements are still unavailable, research and practical experience show that subcontracting is a highly common phenomenon. It is mainly used in construction, transport, shipbuilding, tourism, and other service sectors, where multi-layered contractual relationships further increase the complexity and risk for workers.³⁶⁹ However, studies have shown that the living conditions, health and safety at work, and especially the working conditions of posted workers are particularly precarious in these circumstances. In this regard, especially posted workers' wages, remain highly vulnerable unless properly monitored and enforced.³⁷⁰ Additionally, it is worth emphasising that the health and safety of workers are not influenced only by the physical risks of the job. Subcontracting chains often fragment work, making coordination highly difficult. Posted workers are working in places where safety instructions are not available in their native language, and they are moved from one workplace to another, particularly construction sites, where each has its own risks and safety procedures, leaving little time for adjustment.³⁷¹ Therefore, the safeguarding of the rights of posted workers in subcontracting arrangements is a complex and challenging task.

One of the more interesting cases in this regard was the French construction of the Porcheville power station. EDF, as a client, has hired Alstom as the main contractor, which in turn hired the Polish subcontractor Zrew. Following warnings from the French trade unions, the labour inspectorate has reviewed the salary payments of the posted workers and found that the Polish subcontractor had been paying only the minimum wage, which also illegally included lodging allowances. One of the posted workers, with the support of the Polish trade union, has requested equal treatment and turned to the local trade union. The inspectorate has ordered the

³⁶⁸ Wagner, Shire, 2020, pp. 196-197.

³⁶⁹ Voss, Faioli, Lhernould, Iudicone, 2016, p. 40.

³⁷⁰ Cremers, 2014, p. 2.; See also: Lillie, Wagner, 2015, p. 163.

³⁷¹ Cillo, 2022, p. 173.

back payments under French law, but since they have not been paid, the case has ended up in court, which decided in favour of the posted workers.³⁷² This case is just another proof that the growing reliance on subcontracting has caused further fragmentation of work organisation, leading, for example, in the construction sector, to a trend for large companies to hire site managers primarily tasked with overseeing posting companies to avoid quality problems or delays.³⁷³

Therefore, it is clear that adequate and effective protection of posted workers' rights in subcontracting arrangements is crucial and relevant not only because of the increasing prevalence of subcontracting relationships, but also because of ongoing violations of these workers' rights in such arrangements. Consequently, as will be discussed below, primarily by enhancing liability frameworks, alongside other complementary mechanisms and the enforcement of these rights, it would help prevent the abuse of posted workers' rights in subcontracting chains. To thoroughly examine this phenomenon and ways to improve it, the following section of the research first provides a comprehensive analysis of the relevant legislation and its practical implications.

3.2.1. Subcontracting as an Abusive Business Model

As noted by Felix Hellmann-Theurer, in cases where a direct employment link is 'little', such as in posting scenarios, there are often a larger number of precarious workers, including those working informally, as bogus self-employed, or employed through temporary work agencies and 'disappearing subcontractors', as well as labour-only subcontracting and complex, long, and non-transparent subcontracting chains.³⁷⁴ In the context of the modern labour market, it is important to understand that such fraudulent practices are not isolated. They are often interconnected and combined, creating complex business models that make it harder to protect workers' rights. For example, the so-called 'disappearing subcontractor' can at the same time be an agency without a required licence, established in a country with lower taxes, wages, and

³⁷² Cremers, 2011, p. 41.; Commission Staff Working Document Impact Assessment. Revision of the legislative framework on the posting of workers in the context of provision of services /* SWD/2012/0063 final - APP/2012/0064.

³⁷³ Cillo, 2022, p. 172.

³⁷⁴ Felix Hellmann-Theurer, 2013, p. 162.

contributions by the ‘letterbox company’, and within that formally marking its workers as ‘self-employed’.³⁷⁵

In that way, it is becoming clearer that these are not isolated irregularities but a recurring pattern that requires a systemic approach. Those kinds of models are particularly evident in subcontracting chains and cross-border situations, where formal legal arrangements are used to conceal real employment relationships and avoid liability. In that sense, subcontracting is used not only as a legitimate form of work organisation but also as a tool to shift the burden of reducing costs onto workers. That is why it is important to check how these models function, what their main characteristics are, and how they affect the position of posted workers. Therefore, the following analysis provides an overview of the three often addressed³⁷⁶ abusive business practices in the context of posted workers in subcontracting chains³⁷⁷, including letterbox companies as ‘disappearing subcontractors’, temporary work agencies, and bogus self-employment, in order to provide a brief overview of why they present a specific challenge that requires a strong and effective legislative framework. Nevertheless, as will be explained later, these challenges have only been partially addressed by the legislation currently in force.

3.2.1.1. Letterbox Companies: Disappearing Subcontractors

In the context of subcontracting chains, special attention should be drawn to the phenomenon of so-called ‘letterbox companies’, which are more often connected with liability circumvention and fraudulent practices in the labour market. In practice, it often happens that certain subcontractors are established exclusively as a tool for enforcing subcontracting, sometimes even on the initiative of the main contractor itself. Additionally, sometimes companies do not engage in genuine economic activity but instead serve mostly to reduce labour

³⁷⁵ Heinen, Müller, Kessler, 2017, p. 69.

³⁷⁶ These challenges have been particularly addressed by the European Commission. See, for example: Commission Staff Working Document Impact Assessment. Revision of the legislative framework on the posting of workers in the context of provision of services Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. SWD(2012) 63 final. Brussels, 21st March 2012.; Commission Staff Working Document Impact Assessment. Revision of the legislative framework on the posting of workers in the context of provision of services /* SWD/2012/0063 final - APP/2012/0064.;; Heinen, Müller, Kessler, 2017, p. 41.

³⁷⁷ However, those are not the only abusive models, since the practices such as permanent posting, rotational posting, and payment of minimum wage, while simultaneously charging them high costs for accommodation, clothing, or even work equipment. See more in: Heinen, Müller, Kessler, 2017, p. 69.

costs. Such arrangements allow the main contractor to replace subcontractors as needed and continue using the same business model even after detecting irregularities or labour rights violations. Since such companies can be established easily and disappear just as easily, they are often used as a mechanism to avoid liability, especially in transnational situations, such as the posting of workers, where control is additionally difficult.³⁷⁸ In those cases, such companies are often established in Member States with lower taxes or social contributions, but there, they are not even carrying out the real economic activity. Their main purpose is actually the employment of workers and their posting to other Member States. Also, those are often workers formally presented as self-employed, but in reality, they are in a subordinate relationship and are paid much less than required by the posting of workers legislation. Another challenge is the fact that such companies are sometimes acting through a network of connected companies in multiple Member States, which additionally makes the control and enforcement of rights by the authorities hard. Since they do not have a real economic activity, these companies are easily disappearing from the market, leading to the phenomenon of so-called 'disappearing subcontractors'³⁷⁹. In such cases, companies are quickly established, hire workers, post them abroad, receive payment for the work performed, but then avoid paying wages. When workers try to enforce their rights, the company disappears or goes bankrupt, basically avoiding liability.³⁸⁰

These challenges were emphasised long ago in the context of the legal framework for the posting of workers, starting with PWD96, but insufficiently. According to it, the company could exercise the freedom to provide services only if it is actually connected to the home Member State. However, the term "business establishment" in that context remained ill-defined, and the conditions the company had to comply with were not precisely specified. In comparison, social security legislation required that companies engage in genuine economic activity in their country of registration³⁸¹. That lack of harmonisation of systems opened the door to fraudulent practices. It encouraged the development of a model in which letterbox companies act as formal subcontractors or temporary work agencies, even if they do not have a genuine economy³⁸². In that way, it is further emphasised how important it is to ensure that every employer involved in

³⁷⁸ Schömann, 2021, p. 8.

³⁷⁹ Heinen, Müller, Kessler, 2017, pp. 44-45.

³⁸⁰ Heinen, Müller, Kessler, 2017, pp. 39-40.

³⁸¹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Official Journal L 166, 30 April 2004, Article 13.

³⁸² Heinen, Müller, Kessler, 2017, pp. 39-40.

the posting of workers is actually carrying out genuine activities in the country of destination, and not merely existing in a formal capacity.³⁸³

However, later on, Article 4 of the 2014 Enforcement Directive was introduced to determine genuine postings and prevent fraudulent practices, since the mere introduction of the liability scheme in subcontracting chains was not sufficient to address this challenge. It was clear that additional measures with a broader scope were needed, including letterbox companies. Therefore, Article 4 sought to respond to them by introducing the criterion of “substantial activities” in the country from which the workers are posted, and not only formal administrative or managerial activities. In order to evaluate it, national authorities are obliged to proceed with the comprehensive analysis of all relevant facts, taking into account a longer period and, if needed, the activities in the host country. In such an evaluation, several elements are taken into account, including the place where the company has its registered seat and management, where it uses its business premises, whether it pays taxes and contributions, and whether it has all necessary permissions or registrations. Also, it is analysed where the workers are employed and from where they are posted, which law applies to their contracts and to contracts with clients, where the real business activity is performed, and where the administrative staff is located. Additionally relevant are the number of concluded contracts and the turnover the company achieves in the country of establishment. And even though these criteria are an important tool for identifying fraudulent practices, they serve mainly as indicators rather than strictly defined conditions. It leaves room for different interpretations and unharmonized applications among Member States. In practice, it means the letterbox companies can still function within the system, especially when they act as ‘disappearing subcontractors’, with which the challenge is only partially addressed, but not fully resolved.³⁸⁴

In such situations, an additional problem arises in the case law, as courts are cautious when it is alleged that the corporate personality of the subcontractor is used to conceal the real liability of other subjects in the chain. Courts usually require a high standard of proof before determining that another party, rather than the formal employer, is the real carrier of the employer’s responsibilities. Consequently, in practice, it is difficult to ‘pierce the corporate

³⁸³ Houwerzijl, 2022, p. 185.

³⁸⁴ Heinen, Müller, Kessler, 2017, pp. 44-45.

veil'³⁸⁵ and challenge models in which letterbox companies formally act as employers, even though workers in reality work under the supervision of a user company.³⁸⁶

These kinds of company cases were also a subject of discussion before the CJEU. In several judgments, including *Centros*³⁸⁷ and *Polbud*^{388, 389} the Court took the view that the host country cannot refuse to recognise the legal personality of a company established in another Member State, even if it does not engage in genuine and real activities. That means even such *pro forma* entities, without a real economic activity, can use the same rights on the internal market of the EU as the 'real' companies, including the freedom of establishment, according to Article 49 TFEU, and the freedom to provide services, according to Article 56 TFEU. Consequently, such business models can relatively easily relocate and leverage more favourable legal and tax conditions across different Member States. Additionally, it contributes that today, numerous services actively promote the quick and easy establishment of companies in Member States such as Estonia, Romania, and Slovakia^{390, 391}.

³⁸⁵ The concept of 'corporate veil' refers to the basic rule of company law according to which the owners of companies, or their members or shareholders, usually are not personally liable for the debts of the company. Such an understanding is based on the idea that every company is a separate legal entity, distinct from the people behind it. Even though in the contemporary economy, the complex structures of interconnected companies, in which stakeholders themselves are often other companies, have not significantly changed the main rule of limited liability in practice and the legal theory. However, there are some exceptions. In certain situations, courts can 'pierce the corporate veil', or put aside that formal separation in order to protect the creditor. Such situations are recognised in almost all legal systems, but are applied carefully and mainly in extraordinary situations. The reasons for such liability can be different, ranging from the relationship within the company to liability toward third parties, to the question of contractual or non-contractual liability. When the groups of companies are considered together, the situation becomes even more complex. Even though economically, they often act as a single entity, the law usually treats each company separately. As a result, the liability of one member of the group for the behaviour of another member is rarely accepted to preserve the principle of limited liability. For example, in the USA, piercing the corporate veil is allowed only in certain cases when maintaining the formal separation would clearly lead to unfair results. See: Schunke, Walter, 2023, , pp. 87-88.; See more in: Yiu, 2025, pp. 120–125.; Matheson, 2009, pp. 1091-1156.; Thompson, 1991, pp. 1036-1074.

³⁸⁶ Cremers, Houwerzijl, 2021, p. 9.

³⁸⁷ Judgment of the Court of 9 March 1999. *Centros Ltd v Erhvervs- og Selskabsstyrelsen*. Case C-212/97. ECLI:EU:C:1999:126.

³⁸⁸ Judgment of the Court (Grand Chamber) of 25 October 2017. Proceedings brought by *Polbud - Wykonawstwo sp. z o.o.* Case C-106/16. ECLI:EU:C:2017:804.

³⁸⁹ See also other judgements on the transfer of de facto head offices such as: Judgment of the Court (Second Chamber) of 16 May 2024. *Konzernbetriebsrat der O SE & Co. KG v Vorstand der O Holding SE*. Case C-706/22. ECLI:EU:C:2024:402.; Judgment of the Court of 27 September 1988. *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*. Case 81/87. ECLI:EU:C:1988:456.; Judgment of the Court of 5 November 2002 in Case C-208/00. *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*. Case C-208/00.; Judgment of the Court of 30 September 2003. *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*. Case C-167/01. ECLI:EU:C:2003:512.; Judgment of the Court (Grand Chamber) of 12 September 2006. *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*. Case C-196/04. ECLI:EU:C:2006:544.; Judgment of the Court (Grand Chamber) of 16 December 2008. *Cartesio Oktató és Szolgáltató Bt*. Case C-210/06.; 'European Court of Justice jurisprudence on the transfer of de facto company head offices'. ETUI. [Online] (Accessed: 10 November 2025).

³⁹⁰ See: Rasnača, 2018, p. 150.

³⁹¹ Houwerzijl, 2022, p. 185.

Also, on 18 March 2026, the European Commission presented the proposal for the so-called EU Inc., an optional, digital-by-default EU corporate framework that would make it easier for businesses in the EU to start, operate, and grow. According to the proposal, the establishment of the companies would be much easier and faster, within 48 hours and fully online with minimal costs. Also, registration and interactions with companies would be digital throughout the company's existence.³⁹² Even though such a system would increase competition within the EU and facilitate the growth of innovative companies, the question arises whether it could have unintended consequences, especially in the context of the previously mentioned 'letterbox companies'. Simple, fast establishment of companies at low cost and with minimal conditions could also make it easier to create companies without real economic activity that serve as formal employers in subcontracting chains. In that way, the practice of creating 'disappearing subcontractors' would be encouraged, especially in transnational contexts. For posted workers, such a development could have particularly highlighted consequences. If such companies are easily established and moved between Member States, it becomes even harder to determine the real employer and secure the enforcement of their rights. That can further harden the enforcement of wage payments, access to legal aid, and control over working conditions. In other words, even though EU Inc. can contribute to economic integration and convergence, without sufficient protection mechanisms, there is a risk that it will make it easier for business models that are already creating issues in protecting workers in subcontracting chains. However, since the system is only in the proposal stage, it remains to be seen how, and whether, its development will proceed and in which direction. Nevertheless, if the European Commission creates another legal loophole in this regard and fails to adequately take workers' rights into account, it could put them in an even worse position regarding letterbox companies.

To conclude, the phenomenon of 'letterbox companies' is clearly showing how the existing mechanisms are not sufficient to face the fraudulent practices in subcontracting chains, particularly in transnational situations of posting of workers. Even though some steps have been taken under the Enforcement Directive, in practice, there is still significant scope to avoid liability and circumvent the rules. In such an environment, posted workers are becoming particularly vulnerable, as they are placed at the bottom of complex, often opaque subcontracting arrangements in which it is difficult to identify the real employer and to ensure the effective protection of workers' rights. Consequently, the challenge of 'disappearing

³⁹² European Commission, 2026, 'Press Release. Commission presents proposal for EU Inc. - unlocking the full potential of the Single Market for Europe's entrepreneurs'. 18 March 2026. [Online] (Accessed: 19 March 2026).

subcontractors' cannot be seen as an isolated situation but as a structural challenge that requires a clearer, stricter regulatory response in the EU. Without such an approach, there is a real risk that the existing fraudulent models will not only continue but also evolve, especially in the context of new initiatives that are easing the process of establishing and conducting cross-border business by companies.

3.2.1.2. Misuse of Temporary Working Agencies

In the context of subcontracting chains and the posting of workers, employment through temporary work agencies is emerging as one of the most complex and sensitive forms of work. Compared to the standard employment relationship, the main actors in temporary work agency employment, in its basic form, are: a worker who is formally employed by the agency but is actually working at another company under its control and instructions.³⁹³ Therefore, such an arrangement is based on a trilateral relationship between the agency, the user undertaking, and the worker.³⁹⁴ At the same time, it is an extremely flexible type of work, since such arrangements are often short-term and easily terminated. Due to that flexibility, the role of private employment agencies is steadily rising globally, with the share of agency workers especially high in Europe.³⁹⁵ With this practice, the phenomenon of 'regime shopping' is also closely connected, often observed within the scope of temporary work agencies. In such cases, agencies are asking the Member states with the least strict conditions for establishment and conducting business, especially those with lower levels of social protection. They often act without licences, with which they formally declare workers as self-employed. Bogus self-employment in that context goes hand in hand with the work of temporary work agencies. In practice, it can lead to situations in which the entire workforce is replaced by agency workers, further reducing the level of protection and stability of employment relationships.³⁹⁶

Furthermore, it is worth highlighting that, on the European labour market, there are other forms of work that involve multiple parties and are not always clearly included in the existing legal framework, including the Temporary Agency Workers' Directive³⁹⁷, which further

³⁹³ Zekić, 2024,, p. 69.

³⁹⁴ Heinen, Müller, Kessler, 2017, p. 24.

³⁹⁵ Zekić, 2024, p. 69.

³⁹⁶ Voss, Faioli, Lhernould, Iudicone, 2016, p. 40.; Heinen, Müller, Kessler, 2017, p. 68.

³⁹⁷ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Official Journal L 327/9, 5th December 2008.

complicates regulation and control over such forms of work, especially in complex subcontracting structures.³⁹⁸ Nevertheless, as will be explained below, this Directive did not directly address subcontracting nor use the term. However, in reality, such work is close to subcontracting, since the worker is being ‘borrowed’ by the other company through the intermediary. The directive tried to find a balance between the needs that often go in different directions, on one hand to protect the worker, and on the other to allow employers to continue using flexible types of work. As a result, it does not limit the use of agencies, but it actually confirms their legitimacy as a part of the labour market. Despite that, to prevent fraudulent practices, a rule has been introduced requiring workers employed through agencies to have the same working conditions as workers directly employed by the company where they work.³⁹⁹ In this regard, most Member States have also introduced the rule of equal treatment for posted workers employed through agencies. However, in some countries, such special protection is not directly regulated. In those cases, workers are protected only by the general posting of workers' rules, which, in practice, can lead to differences in working conditions compared to local agency workers. An additional challenge arises when agencies use cross-border arrangements to reduce costs. For example, they can open a branch in a country with lower contributions and, from there, post workers in other Member States, thereby benefiting from more favourable conditions to the detriment of the workers. Such practices are closely correlated with the above-mentioned letterbox companies and the choice of the most beneficial legal framework.⁴⁰⁰ However, when such relationships are embedded in complex subcontracting chains and cross-border contexts, this protection is often insufficient in practice, leaving workers at a disadvantage.

In this regard, it is important to emphasise that such intermediaries in the labour market often act as actors within the subcontracting chain and, as a result, can be incorporated into liability rules. That is why regulating such intermediaries is crucial. Special emphasis is given to national registration, licensing, and certification systems, since such mechanisms can significantly help prevent fraudulent practices, including the use of letterbox companies. The clear rules on who can provide intermediary services and under which conditions can be considered an important tool for strengthening transparency and liability in subcontracting chains. In some Member States, particularly upgraded systems have been established. For example, in the Netherlands, there is a well-developed system that combines legislation, collective bargaining, and a private certification mechanism. Certificate NEN 4400-2 was

³⁹⁸ Zekić, 2024, p. 69.

³⁹⁹ Sinander, 2025, pp. 16-17.

⁴⁰⁰ Heinen, Müller, Kessler, 2017, p. 57.

specifically designed for foreign agencies and serves to verify their compliance with obligations toward their workers. Such a system demonstrates how cooperation between Member States and social partners can help create a more reliable system. Similarly, this is also valid for countries such as Germany and Italy, where stricter liability systems in subcontracting chains that include agencies have been introduced. Germany has, for example, additionally tightened rules to prevent fraudulent practices such as “hidden supply of workers” and “chain leasing”, while at the same time strengthening the rights of agency workers and introducing additional limitations on the use of such forms of work.⁴⁰¹

Finally, the analysis shows that temporary work agencies, even though they represent a legitimate aspect of the labour market, in the context of cross-border subcontracting chains assume a significantly ambivalent role. On the one hand, they allow flexibility and adjustment to market needs. On the other hand, in the absence of clear and effective rules, they can become tools for circumventing labour standards and shifting risk onto workers. Especially problematic are situations in which such forms of work are combined with other fraudulent practices, such as bogus self-employment or the use of letterbox companies, in which the boundaries of liability are further blurred. Therefore, it can be concluded that such arrangements call for a strong and effective legislative framework, with clear integration into liability systems within subcontracting chains. In that way, not only declarative, but also real protection of posted workers can be provided.

3.2.1.3. Bogus Self-Employment

As analysed above, due to their uncertain and dependent position, mobile workers, including posted workers, are particularly exposed to fraudulent practices, such as so-called bogus self-employment. In those cases, workers, without a full understanding of their status, are formally declared as self-employed or ‘micro companies’, even though, in reality, they are subordinated and working under the control of the employer. In that way, the real employment relationship is hidden, allowing employers to avoid obligations they would otherwise have toward workers.⁴⁰² In other words, even though on paper the workers are providing services as independent contractors, in practice their work has all the characteristics of a dependent

⁴⁰¹ Heinen, Müller, Kessler, 2017, pp. 14-15.

⁴⁰² European Federation of Building and Woodworkers, 2024, p. 3.

employment relationship. Such a worker is not carrying out a real business responsibility but is working under the control and instructions of the 'client', who is de facto acting as the employer, determining the place, time, and manner of conducting the work. The main difference between real and bogus self-employment lies in how the work is performed. While a truly self-employed person is individually organising work and bearing business risk, a bogus self-employed person, in reality, functions as a regular worker. The difference is mainly formal, instead of an employment contract, there is a cooperation agreement, and instead of a salary, the worker provides an invoice for their work.⁴⁰³

In this regard, it is important to emphasise that in the discussions on the labour market, often the terms 'economically dependent worker' and bogus self-employed ' are being mixed, even though between them there is an important difference. While economic dependency can occur spontaneously, bogus self-employment usually involves the conscious avoidance of obligations under labour and social law. Nevertheless, both forms share a similar reality. Workers are formally self-employed, but in practice, they work under conditions more similar to employment. That combination of formal independence and real dependency is making them particularly problematic. The International Labour Organization has been emphasising that, in such cases, it is key to consider the actual working conditions, not only the contractual form, and has been calling for the active suppression of bogus self-employment as a form of hidden employment relationship.⁴⁰⁴

This challenge is particularly emphasised in subcontracting chains, where bogus self-employment is used to further reduce costs and shift risks onto workers. In practice, such models often overlap with previously analysed abusive business models, such as letterbox companies or temporary work agencies, that can act as formal intermediaries, even though the real control over work lies elsewhere. As a result, bogus self-employment is one of the main weaknesses of the existing system for protecting workers in cross-border subcontracting arrangements.⁴⁰⁵ Therefore, this challenge was addressed in the PWD Enforcement Directive, which aimed to tackle bogus self-employment in the context of the posting of workers, a phenomenon often used in complex subcontracting chains to conceal real employment

⁴⁰³ Kwiatkiewicz, 2009, pp. 89-108.

⁴⁰⁴ Eurofound, 2017, p. 39.; ILO, 2006, 'Recommendation concerning the employment relationship (No. 198)', paper presented at 95th International Labour Conference, 15 June 2006, Geneva.

⁴⁰⁵ Heinen, Müller, Kessler, 2017, p. 70.; Wixforth, 2020.

relationships and avoid liability.⁴⁰⁶ In that regard, a bogus self-employed worker complies with all the specificities of a worker, but, on the (sub)contractor's side, is formally shown as self-employed and, as such, is posted to another Member State. Therefore, the real nature of the employment relationship is further blurred, raising questions about the enforcement of the preventive rules. In particular, the question is raised whether such workers can even enforce the protection afforded by the relevant EU legislation.⁴⁰⁷ In accordance with the CJEU case law⁴⁰⁸, determining whether it is a real or bogus self-employment shouldn't be based on what is written in the contract, but on what is actually happening in practice. It is key to observe how the work is performed, whether there is subordination, and how the worker is paid.⁴⁰⁹ It is key to observe whether the work is included in the organisation of the business of the company it works for, or whether there is a subordination relationship; what is the most important criterion. If such analysis shows that the person who is formally self-employed is actually acting as a worker, then the workers' protection rules apply, regardless of the title of the contract or the type of cooperation formally agreed.⁴¹⁰

In such situations, the consequences for the workers can be serious. Persons declared as self-employed do not enjoy the protection of labour law or the rules applicable to posted workers. It means they do not have the right to sick leave or paid holidays, and often do not even receive the host country's minimum wage. Besides, the burden of paying social contributions is shifted onto workers, further worsening their position. On the other hand, for the (sub)contractors, such a business model represents a significant financial benefit, since by engaging 'self-employed' persons they can achieve substantial savings compared to classical employment and posting.⁴¹¹ Exactly that imbalance between the benefit to the employer and the risk to the worker explains why it is so often bogus self-employment in subcontracting chains.

⁴⁰⁶ Article 4(5) of the Enforcement Directive: 'Member States should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties.'

⁴⁰⁷ Heinen, Müller, Kessler, 2017, p. 31.

⁴⁰⁸ See, for example: Judgment of the Court (Fifth Chamber) of 27 June 1996. *P. H. Asscher v Staatssecretaris van Financiën*. Case C-107/94. ECLI:EU:C:1996:251.; Judgment of the Court of 20 November 2001. *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*. Case C-268/99. ECLI:EU:C:2001:616.; Judgment of the Court (First Chamber) of 15 December 2005. *Criminal proceedings against Claude Nadin, Nadin-Lux SA (C-151/04) and Jean-Pascal Durré (C-152/04)*. Joined cases C-151/04 and C-152/04. ECLI:EU:C:2005:775.

⁴⁰⁹ Heinen, Müller, Kessler, 2017, p. 46.

⁴¹⁰ Heinen, Müller, Kessler, 2017, p. 31.

⁴¹¹ Heinen, Müller, Kessler, 2017, p. 69.

Finally, bogus self-employment in subcontracting chains represents not only a legal challenge but a concrete everyday reality for numerous posted workers. It clearly shows how easy formal types can hide real working relationships and how the protection system is still insufficiently adopted to such practices. In such cross-border situations, where the liability is additionally blurred, such models are particularly emphasised and leave workers without real protection. That is why the question of bogus self-employment cannot be solved in isolation, but it needs to be seen as part of the broader challenge of how subcontracting chains function. Without clear rules and effective enforcement, there is a serious risk that such practices will continue to harm the workers who are already in the most precarious positions.

3.2.1.4. Practical Challenges: Example of the Construction Sector

Diverse research, from Letta's report to the European Labour Authority's analysis in the construction sector, and especially the Commission's Report on the implementation of the PWD18, consistently shows that subcontracting increases the risk of fraudulent practices and rights violations. Particular emphasis is on the precarious position of the construction sector workers. In practice, layered and long subcontracting chains are used to conceal genuine employment relationships, evade tax and social security obligations, and evade liability and labour inspection controls. Often, those subjects vanish, leaving the workers without earned but unpaid salaries after extended work periods.⁴¹² Therefore, as discussed above, the effective regulation of subcontracting arrangements is crucial to protecting posted workers from abuse; when labour standards are not supervised, they gradually erode, encouraging social dumping and undermining fair competition. It also contributes to increased circumvention of basic occupational health and safety rules. And even though that issue is particularly significant in the construction sector, where subcontracting accounts for almost 40% of all work,⁴¹³ that sector is not the only one affected. The shipbuilding⁴¹⁴ and food industry⁴¹⁵ also have a long tradition of focusing on the posted workers in subcontracting arrangements. For example, until the PWD

⁴¹² European Federation of Building and Woodworkers, 2024.

⁴¹³ Letta, 2024, p. 46.

⁴¹⁴ Lillie, Wagner, 2015, p. 158.

⁴¹⁵ See more about the implications on the food industry, particularly the meat industry in: Wagner, 2015, pp. 201–213.; Wagner, Hassel, 2016, pp. 163-178.

amendments, the German meat industry was a particular user⁴¹⁶, as most of the workforce consisted of posted workers⁴¹⁷, and these gradually pressured other Western European countries to lower the cost of labour by using posting practices⁴¹⁸.

CJEU case-law, such as the cases of Hungarian workers in Austrian slaughterhouses, in which *‘the remuneration for the services provided by Martin Meat depended on the quantity of meat processed. The amount of that remuneration was reduced if the meat was of poor quality.’*⁴¹⁹, additionally emphasising the challenging working conditions in this sector. Therefore, slaughterhouses are traditionally dependent on subcontracting, as workforce fluctuations indicate that demand is driven not only by a lack of workers but also by the need for cost reduction.⁴²⁰

However, as discussed above, the Enforcement Directive has introduced mandatory rules on liability for the inclusion of posted workers in subcontracting chains, which apply only to the construction sector, which the EU legislator has recognised as the most relevant in this context. Even from the Commission Staff Working Document on the Enforcement Directive, it is evident that the construction sector was considered the most pertinent within this scope, primarily due to its then-statistically prevalent posting trends compared with other sectors.⁴²¹ Nevertheless, the more detailed reasoning behind excluding other sectors from the scope of protection mechanisms in subcontracting arrangements has not been provided, leaving a legal gap that causes discrepancies in the treatment of workers or service providers in the same

⁴¹⁶ Wagner has also conducted interesting research published in 2015, including interviews in the German meat industry, in which the author reflects on the specific challenges connected to that sector. See: Wagner, 2015, pp. 201-213.

⁴¹⁷ In the German meat industry, the position of mobile workers is generally insecure. Germany has faced accusations from Belgium, France, and Austria for unfair competition, as they employ posted workers with extremely low, ‘dumping’ wages. Besides, French workers took a step further by protesting on the streets due to the social dumping in the German meat industry, since it was negatively affecting workplaces in France. See: Wagner, 2015, p. 203.

⁴¹⁸ Theunissen, Zanoni, Van Laer, 2023, p. 939.

⁴¹⁹ Judgment of the Court (Fourth Chamber) of 18 June 2015. *Martin Meat kft v Géza Simonfay and Ulrich Salburg*. Case C-586/13. ECLI:EU:C:2015:405, par. 15. In this case, the Hungarian company Martin Meat has send its workers to the Austrian slaughterhouse Alpenrind. The question on the diversification between ‘hiring-out’ and posting of workers occurred. The CJEU took a more restrictive approach, providing broad criteria to differentiate between the two phenomena, but ultimately left the final decision to the national court’s discretion. However, Advocate General Sharpston in the 2015 Opinion took a more worker- and companies-protection approach, considering it a case of posting workers rather than hiring out. See: Opinion of Advocate General Sharpston delivered on 15 January 2015. *Martin Meat kft v Géza Simonfay and Ulrich Salburg*. Case C-586/13. ECLI:EU:C:2015:15.

⁴²⁰ Robin-Olivier, 2022, pp. 683-684.

⁴²¹ Commission Staff Working Document Impact Assessment. Revision of the legislative framework on the posting of workers in the context of provision of services Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. SWD(2012) 63 final. Brussels, 21st March 2012, p. 19.

category who contribute to other sectors of the economy. Therefore, the other sectors were left out of the scope of the mandatory legal framework and remained at the discretion of the Member States regarding inclusion. Consequently, the further analysis will focus on the construction sector, as it is the one in which the practical impact of the Enforcement Directive, as well as the impact of PWDs in subcontracting arrangements, can be most clearly determined. The question remains if the limited mandatory framework, including the joint and several liability with the possibility of a non-clearly defined due diligence defence, has ensured the practical and comprehensive protection of posted workers in subcontracting construction arrangements. This discussion is especially important since the other sectors are not covered by the mandatory rules, meaning that if the Enforcement Directive did not manage to provide a decent level of protection, not even in the only included construction sector, the serious question remains on the real scope of the protection in other sectors that the Member States did not include in the national legislative regimes. Therefore, the analysis serves as the basis for critical questioning of whether the Enforcement Directive effectively fulfilled its protective role in the construction sector or, due to its application limitation, left significant gaps in the protection of the rights of posted workers on the EU labour market.

Historically, the construction sector has been one of the main drivers of the economy in most of the EU countries.⁴²² Over the last 25 years, it has undergone significant growth, resulting in increased employment in many Member States. Companies of all sizes benefited from it, and workers gained more choices, including self-employment, which today accounts for approximately one quarter of the workforce in the sector.⁴²³ The interrelation between EU labour mobility rules, transnational service provision, and national labour market rules characterises the construction industry.⁴²⁴ Nevertheless, the rapid growth also led to the expansion of subcontracting practices, especially in the last decade⁴²⁵, often including long chains of interconnected companies.⁴²⁶

The construction industry provides a clear example of how subcontracting reflects the interrelation between global and local markets. Those restructurings have created deeply layered subcontracting chains. On top of them are often multinational companies that manage the project, provide technical support, and handle finances, while at the lower level are

⁴²² See: Contreras, Carrascosa, 2015.

⁴²³ Houwerzijl, Peters, 2008, p. 1.

⁴²⁴ European Labour Authority, 2023, p. 41.

⁴²⁵ Andriescu, et. al., 2024.; Buckley, et. al., 2016.; De Smedt, De Wispelaere, 2024, p. 7.

⁴²⁶ Houwerzijl, Peters, 2008, p. 1.

numerous smaller companies more closely related to the local market. At the same time, subcontracting is also closely connected to the growing labour migration and the informal employment, in stark contrast to the site-specific character of the sector.⁴²⁷ Long chains in the construction sector occur when the principal contractor hires other companies to complete specific tasks, whether to their own workers or further passing the job down the chain. That system provides the main contractors with flexibility, cost control, specialised expertise, know-how, efficiency, and the avoidance of labour shortages⁴²⁸. However, the more levels included in the chain, the more challenges arise,⁴²⁹ especially in that sector, as due to its structure, the trend of significantly long and complex chains is becoming particularly relevant. The industry comprises several larger companies, as well as numerous medium, small, and micro enterprises, including a high number of self-employed workers, which is naturally encouraging the extension of already long subcontracting arrangements.⁴³⁰ Therefore, construction workers are traditionally placed in complex and precarious situations, often victims of fierce competition among construction companies.⁴³¹ Research by Voss and others, as well as the example of Romanian posted workers in the construction sector, further clarified that unfair competition practices have negatively impacted the sector.⁴³² That competition is mostly seen in the constant pressure on the decrease in prices. As a consequence, the bankruptcies in the sector are often, and the fraudulent practices are becoming more usual. Altogether, this makes the construction sector particularly sensitive to social dumping and unfair competition, reflecting its specificities regarding the workers included.⁴³³ Also, the mobile workers in the construction sector often face unstable social protection, interruptions in payment of social contributions and difficult access to benefits, making them particularly vulnerable. Furthermore, bogus self-employment is on the rise⁴³⁴, and the forms of ‘light entrepreneurship’⁴³⁵ are increasingly used to shift the costs of social security to workers.⁴³⁶

Additionally, Houwerzijl cites research by EU-OSHA on the specific characteristics and psychosocial risks in the construction sector. The emphasised ones include: consistent exposure

⁴²⁷ Davies, et. al., 2011, p. 126.

⁴²⁸ Andriescu, et. al., 2024.; European Labour Authority, 2023.; Buckley, et. al., 2016.; De Smedt, De Wispelaere, 2024, p. 7.; De Wispelaere, 2025.

⁴²⁹ De Smedt, De Wispelaere, 2024, p. 7.

⁴³⁰ Houwerzijl, Peters, 2008, p. 4.

⁴³¹ Cremers, 2006, p. 172.

⁴³² Voss, Faioli, Lhernould, Iudicone, 2016, p. 18.

⁴³³ Cremers, 2006, p. 172.

⁴³⁴ See: De Wispelaere, De Smedt, Pacolet, 2022, pp. 31, 33-34.

⁴³⁵ See: Lillie, Ndomo, Kärkkäinen, 2023, p. 6.

⁴³⁶ Gellé, Gyulavári, 2025, p. 6.

to dust, dirt, noise, and vibrations; a higher likelihood of non-fatal injuries at the workplace than in other industries; the widespread use of complex subcontracting arrangements; temporary and often changing sites; and regular exposure to the outdoors, including demanding weather conditions. Additionally, construction work frequently involves more travel and project-based assignments. Those psychosocial risks are more likely to occur as company size decreases, and occupational health and safety criteria are often poorly enforced during projects.⁴³⁷ Also, in this regard, the 2023 European Labour Authority study on the construction sector has highlighted the most common violations and abuses, including failure to comply with labour standards and occupational health and safety rules, undeclared work⁴³⁸, bogus self-employment, misuse of the PD A1 forms, the use of letterbox companies, and fraudulent postings.⁴³⁹

Furthermore, over the last few decades, the sector has faced the negative aspects of the introduction of the free movement of workers and services principle, as it has been implemented without a clear and consistent social framework to protect service providers.⁴⁴⁰ In this regard, the migrant and posted workers are traditionally⁴⁴¹ overrepresented in the sector, facing additional risks.⁴⁴² Specifically, the construction sector is undoubtedly the largest consumer of posted workers in Europe, accounting for almost all the increase in postings over the years. They can be found in all branches of the construction sector, but primarily on residential building sites or in specialised trades, including plastering, electrical work, roofing, heating and ventilation system installation and painting. Those workers are primarily engaged through layers of subcontracting and work for companies of varying sizes, ranging from larger contractors to small local companies.⁴⁴³ The larger construction companies, as the main contractors, rarely post the workers themselves. Instead, they serve as construction site managers on major projects. However, they play a vital role in shaping the subcontracting chains, engaging companies from lower-wage countries that then post workers to perform

⁴³⁷ Houwerzijl, 2025.

⁴³⁸ According to the research based on the 2007 Eurobarometer on undeclared work, around 16% of all undeclared jobs in the EU-27 were in the construction sector, while in the Nordic countries, such as Denmark, Finland and Sweden, that scope was going up to 27%. In practice, it meant that even the posted workers who were already poorly paid and working in bad working conditions, were additionally competing with the companies offering even lower wages and worse conditions, since their undeclared work stayed outside of the powers of authorities. See: Thörnqvist, Bernhardsson, 2015, p. 25.; Williams, Nadin, Winderbank, 2011, pp. 856-857.

⁴³⁹ See: European Labour Authority, 2023.; Houwerzijl, 2025.

⁴⁴⁰ Cremers, 2006, p. 168.

⁴⁴¹ For example, the German construction trade union, together with the European Federation of Building and Woodworkers, were already in the 1990s taking initiatives in the protection of numerous posted workers in the sector. See: Kahmann, 2006, p. 188.

⁴⁴² Houwerzijl, 2025.

⁴⁴³ Cillo, 2022, p. 168.

specific construction tasks. Therefore, according to the national systems analyses conducted by Lillie and Wagner, larger companies are usually main contractors or construction services providers, while small and medium companies take over the role of subcontractors and supply the majority of the workforce, including posted workers.⁴⁴⁴ It is worth emphasising that small and medium-sized companies are usually short-lived and are mostly concentrated at the end of long subcontracting chains,⁴⁴⁵ which is considered one of the main causes of challenges to protecting posted workers' rights. These companies, when they come under control, often disappear to avoid responsibility. In these occasions, the opening of a new company, often under a different name but with the same workforce, is relatively easy. A similar phenomenon has also been observed among temporary work agencies in the construction sector. Again, these companies on larger construction sites are at the very end of the subcontracting chains, making the supervision of their work even more difficult, and causing challenges not only from the perspective of construction workers, but also from the perspectives of both posted workers and temporary agency workers.⁴⁴⁶

Furthermore, when it comes specifically to EU trends, it is worth clarifying that the primary final consumers of posted workers included in construction subcontracting arrangements are situated in Western Europe, with an emphasis on the Netherlands, Belgium, Germany, Denmark, France, and Sweden.⁴⁴⁷ In the Belgian construction sector example, it is clear that the increase in the posting of workers is closely related to the development of subcontracting practices. On the one hand, the creation of the transnational labour market, shaped by neoliberal globalisation and labour market liberalisation in the EU, has also strengthened the international division of labour in Europe. On the other side, the changes in the organisation of work, inspired by the principles of 'just in time', have encouraged the construction sector to have a higher dependency on subcontracting. That system enables flexible hiring of the posted workers, almost on demand, adapting the workforce to the current needs of the construction site.⁴⁴⁸ However, the chains altered employment relations, and at the same time, further distanced the main contractors from the responsibility for their workers. Such processes raised essential questions about posted workers, including working conditions, protection of workers' rights, the danger of social dumping, and the potential circumvention of tax obligations in the sector.⁴⁴⁹

⁴⁴⁴ Lillie, Wagner, 2015, pp. 165-166.

⁴⁴⁵ Bagnardi, Sacchetto, Vianello, 2024, p. 1710.

⁴⁴⁶ Ødegård, Berge, Alsos, 2012, pp. 464-465.

⁴⁴⁷ Voss, Faioli, Lhernould, Iudicone, 2016, p. 20.

⁴⁴⁸ Cillo, 2022, p. 174.

⁴⁴⁹ Houwerzijl, Peters, 2008, p. 1.

In this regard, the Enforcement Directive aimed to enhance the protection of posted workers and prevent such abuses in subcontracting chains. It included joint and several liability for the construction sector, meaning that if the direct subcontractor didn't pay the workers' remuneration, they could claim it from one more subject of the chain.

On paper, the solution given by the Enforcement Directive appeared to be a robust protection mechanism, but in practice, its implications were limited even in the only sector included. One of the main challenges was the long and complex chains in the construction, meaning that workers would remain unprotected if the abuses were concentrated lower in the chain. And even though the trade unions, as discussed above, were advocating for the inclusion of a stricter approach in the Enforcement Directive⁴⁵⁰, the final text, in its Article 12, has limited itself only to the direct, or first, subcontractors in the chain⁴⁵¹. However, some national systems went further away from this minimum protection level and introduced more functional mechanisms. For example, in the German construction sector, the liability can be extended to all subcontractors within the chain. That system enables workers to claim unpaid wages and social contributions, even when the company goes bankrupt or ceases to operate in the market. At the same time, it imposes the obligation on main contractors to ensure the reputation of their subcontractors and include mechanisms for supervision.⁴⁵² Therefore, the German approach, which will be further analysed in the latter parts of the research, clearly demonstrates that the system can be functional if liability is extended to the entire chain. Unfortunately, the Directive did not follow that path, but it even retained the space for the 'due diligence defence', which provides the opportunity to escape liability, even though it does not genuinely protect workers.

On this point, examples from practice and research conducted after the Enforcement Directive came into force, and after the deadline for Member States to comply with it⁴⁵³, demonstrated the ineffectiveness of the system aimed at preventing the abuses of posted workers' rights in construction subcontracting arrangements. For example, in 2021, Portuguese companies came into the media's focus due to a 20 million-euro fraud, which affected more than 600 Portuguese posted workers on several construction sites in Belgium. Only a week later,

⁴⁵⁰ For example, the European Federation of Building and Woodworkers was one of the social partners advocating for stricter liability mechanisms. See: Wagner, 2015) Labour citizenship and enforcement gaps in a Pan-European labour market. Project: Testing EU citizenship as "labour citizenship" from cases of labour rights violations to a strengthened labour-rights regime. [Online] (Accessed: 10 August 2025).

⁴⁵¹ Lillie, Wagner, 2015, p. 162.

⁴⁵² Lillie, Wagner, 2015, p. 162.

⁴⁵³ As of Article 23(1) of the Enforcement Directive: 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 June 2016.'

there was another focus on the construction sector when scaffolding and part of a school building under construction collapsed, causing the deaths of five workers and nine injuries. All of them were foreigners, employed as posted workers by one of the subcontractors that won the public procurement. These two tragic cases once again opened public discourse on the working conditions of posted workers, the social dumping effect, and the liability of construction companies that profit from incoming postings through subcontracting but rarely face prosecution.⁴⁵⁴

Specifically, the discussions included the issue of housing, since many posted workers live in overcrowded and impoverished living environments⁴⁵⁵, and often the costs of living are deducted from their already insufficient wages. Additionally, they are often unaware of their rights and are compelled to work in hazardous conditions without sufficient protection. Long working hours and exhausting working flow, such as in the case of a Polish worker who has worked seven days a week, 12 hours a day for two months and experienced a work accident, showed how much the living and working conditions affect the physical and mental health of the workers. That situation also reflected the ongoing social dumping in the sector, in which workers, economically dependent on their employers, are forced to accept challenging working conditions to preserve their jobs, making it even harder to prevent violations of their rights.⁴⁵⁶

These challenges, among others, were also confirmed from the labour inspectorates' perspectives, as explained in a 2023 study published by the European Labour Authority. In the questionnaire sent to the labour inspectorates, the representatives were asked to describe the abuses that posted workers most often face in the construction sector. Their responses have clarified several recurring challenges: the inclusion of letterbox companies, breaching basic working conditions, bogus self-employment, misuse of PD A1 forms, and the illegal employment of third-country nationals.⁴⁵⁷ The 2024 research by Bagnardi *et al.* focused on interviews with posted workers in the Italian construction sector, clarifying their still-existing precarious position within this scope. They highlighted the disposability of posted workers, who

⁴⁵⁴ Cillo, 2022, p. 166.

⁴⁵⁵ Indeed, according to the empirical research conducted by Theunissen *et al.* on the posted workers included in subcontracting arrangements in the meat production industry, it was clarified by one of the interviewed subjects that the subcontractors are finding difficulties in providing any accommodation, especially the better accommodation, for posted workers, since landlords prefer long-term renting contracts, and they avoid renting apartments to subcontractors. See: ⁴⁵⁵ Theunissen, Zanoni, Van Laer, 2023, p. 945.

⁴⁵⁶ Cillo, R. (2022) 'The Impact of Postings on the Belgian Construction Sector', in: Cillo, R.; Perocco, F. (eds.) *Posted workers La condizione dei lavoratori in distacco transnazionale in Europa*. Venice: Edizioni Ca' Foscari - Venice University Press, p. 173.

⁴⁵⁷ European Labour Authority, 2023, p. 41.

are treated as a replaceable resource, and the normalisation of circumventing rules in the construction sector, where a culture of their abuse has become an everyday practice. Additionally, the research highlighted the ignorance and lack of power among posted workers in that sector, stemming from fear of job instability or retaliation, as well as the insufficient inspections that often result in only formal responses without long-term practical repercussions.⁴⁵⁸

Finally, as previously mentioned, the construction sector is indeed the largest user of posted workers, but at the same time, it is also the sector with the most complex subcontracting arrangements. When labour conditions are not supervised in these instances, working conditions are eroded, and social dumping and unfair competition intensify. And even though the Enforcement Directive aimed to enhance the preventive system by, among other mechanisms, introducing obligatory joint and several liability schemes for construction, with the possibility of extension dependent on national discretion, it was revealed by the practical implications that posted workers, even in the only covered sector, remained in precarious and unsafe conditions. Consequently, it can be concluded that the Directive did not fulfil its protective role, as its narrow sectoral scope and application to subcontracting arrangements left numerous gaps in the protection of posted workers' rights. The fact that abusive practices and trend-governing rules remained significant in the construction sector demonstrates the ineffectiveness of the existing framework. Additionally, by focusing solely on one sector and excluding others from the mandatory framework, the Directive left posted workers in other labour-intensive industries in even more precarious positions within subcontracting arrangements, as evidenced by the aforementioned studies on the meat industry and shipbuilding. Finally, as illustrated by practical examples from the construction sector, some of the long-standing and most emphasised abusive mechanisms revealed in this scope include substandard working conditions, letterbox companies, pseudo and bogus self-employment, regime shopping, and the misuse of temporary work agencies, as analysed above.

3.2.2. Applicable EU Legal Framework

Posted workers are service providers under the freedom to provide services. That phenomenon, initiated by the CJEU's widely discussed case law, has been part of the research

⁴⁵⁸ See: Bagnardi, Sacchetto, Vianello, 2024, pp. 1703-1724.

presented above. Therefore, the applicable primary EU legal framework in the context of posted workers, based on Article 56 of the TFEU⁴⁵⁹, is not going to be a focus of this section, since this subchapter will provide a detailed analysis of the most relevant EU secondary legislation in the scope of protection of posted workers' rights in complex subcontracting arrangements. Namely, the EU has long been trying to improve the rights of temporary cross-border workers through EU secondary legislation. Key instruments in that regard are the PWD from 1996 and its revision from 2018⁴⁶⁰, together with the highly relevant Enforcement Directive from 2014⁴⁶¹. Their common objective was to ensure decent working conditions for posted workers and fair competition between companies in the EU. PWDs guaranteed that workers posted to another Member State receive a core set of labour rights comparable to those of local workers. That includes fair wages with all the obligatory additions, limited working time, minimum rest periods and health and safety protection in the workplace. Also, the PWDs tried to prevent social dumping, as the practice of misusing the differences in the cost of labour for the reduction of local standards. On the other hand, the Enforcement Directive complemented this framework with concrete measures for the effective enforcement of rules, from more precise administrative requirements and easier access to information, to strengthening cooperation between Member States for the prevention of circumvention of rules and ensuring respect of posted workers' rights.⁴⁶²

Therefore, the author will provide an overview of the legislation crucially related to posted workers participating in complex subcontracting relationships, as well as other pertinent legal frameworks. Importantly, the main objective of all legislative attempts related to subcontracting was to ensure that parties beyond the direct employer could be held accountable for guaranteeing some or all of the labour and social rights of included workers⁴⁶³. The examination

⁴⁵⁹ Article 56 of the TFEU: 'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.'

⁴⁶⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal L 18/1, 16 December 1996; Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal L 173, 28 June 2018.

⁴⁶¹ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Official Journal L 159, 28 May 2014.

⁴⁶² Andriescu, et. al., 2024, p. 4.

⁴⁶³ See more in: Kun, 2018, pp. 149-174.

will start with a general overview of PWDs and the Enforcement Directive, given their relevance to the scope of posted workers, followed by an analysis of their specific relevance to the research matter. Although the PWDs did not directly address subcontracting arrangements, understanding their historical background and implementation is essential for protecting posted workers in these situations, as is an analysis of the missed opportunity presented by PWD18 to improve the existing system. Special attention is given to the Enforcement Directive, as the most relevant and crucial in this context.

3.2.2.1. Posted Workers Directive 1996

The history of regulating the conditions for the posting of workers in Europe started in 1955 and intensified in 1967 with the establishment of an expert group by the European Commission.⁴⁶⁴ In the 1970s, the European Commission attempted to regulate the status of posted workers by proposing measures to address conflicts of law in employment relationships. These efforts, separate from the legislative process leading to the 1980 Rome Convention⁴⁶⁵, suggested that posted workers remain governed by their home country's laws, except for certain mandatory provisions of the host country. Provisions from the 1976 draft⁴⁶⁶ closely resemble Article 3(1) of the 1996 Posting of Workers Directive (PWD)⁴⁶⁷, highlighting their influence on its development. Unlike the PWD, which is based on the principle of free movement of services, the earlier proposals relied on the free movement of workers.⁴⁶⁸

However, after the 1970s proposals, further negotiations on the PWD began after the first draft was presented on 30 August 1991⁴⁶⁹. The Economic and Social Committee brought its criticisms in November 1991, proposing to determine the relevant legislation according to the duration of the posting of workers.⁴⁷⁰ The discussions particularly concentrated on how much Member States should be permitted, or obligated, to enforce their mandatory wage laws or other labour conditions for workers assigned to their region. Another topic of concern was

⁴⁶⁴ Comte, 2019, pp. 2-3.

⁴⁶⁵ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, 80/934/EEC, Official Journal L 266, 9 October 1980.

⁴⁶⁶ Commission of the European Communities (1976) Amended proposal for a Regulation of the Council on the provisions of conflict of laws on employment relationships within the Community, COM(75) 653 final Brussels, 28 April 1976.

⁴⁶⁷ See more about the Article 3(1) PWD above. It has been mainly unchanged since 1996.

⁴⁶⁸ Lasek-Markey, 2023, pp. 35-36.; See more in: Evju, 2010, pp. 151-182.

⁴⁶⁹ Rocca, 2020, p. 175.

⁴⁷⁰ Comte, 2019, pp. 3-4, 7.

the legal foundation of the directive, which was derived from the Treaty clauses that establish the freedom to provide services, as analysed above.⁴⁷¹ A compromise was achieved in 1993, and in 1995, the Committee was actively encouraging differentiation between the short-term and the long-term postings, which culminated in the adoption of Directive 96/71 on 16 December 1996 after two revisions.⁴⁷² The final compromise was reached despite opposition from the UK and Portugal's abstention, largely due to the mediation of the Italian presidency. France and Germany strongly supported the Directive, fearing that the increasing practice of posting of workers, driven by the completion of the single market, would lead to social dumping.⁴⁷³ The resulting Directive has been adopted to address all protectionist preferences of the more economically developed host countries.⁴⁷⁴

Therefore, there were two opposing sides, driven by a conflict of interest between the net importers of posted workers, who presumably want the protection of internal labour standards and the abolition of social dumping through posting, and the net exporters, who want to water down the labour regulations in the host country.⁴⁷⁵ The Commission's 1991 proposal sought to balance free competition in the internal market, including wage differences, with Member States' right to enforce minimum pay standards to protect workers' living conditions.⁴⁷⁶ It was part of the EC Action Programme linked to the Community Charter of Fundamental Rights of Workers, which aimed to set a legal framework for posted workers, ensuring minimum protection, fair competition, and compliance with host country rules. It established core labour standards applied non-discriminatorily through mandatory laws or collective agreements.⁴⁷⁷ The new legal framework has caused various difficulties, especially in the upper segment of posting, which is of particular interest to the more developed European countries. The companies needed to change the contracts for postings, indirectly causing their decrease, which was completely in contrast to the objectives of the Common Market, repeated in the Preamble of the Directive.⁴⁷⁸ However, it was visible that *Rush Portuguesa* influenced PWD negotiations by framing posting within free service provisions, shaping its legal basis to

⁴⁷¹ Houwerzijl, Verschueren, 2024, p. 196.

⁴⁷² Comte, 2019, pp. 3-4, 7.

⁴⁷³ Evju, 2010, pp. 151-182.

⁴⁷⁴ Comte, 2019, p. 7.

⁴⁷⁵ Rocca, 2015, pp. 17-19.

⁴⁷⁶ Van Nuffel, Afanasjeva, 2020, pp. 276-278.

⁴⁷⁷ Cremers, 2010, p. 5.

⁴⁷⁸ Comte, 2019, p. 7.

prioritise market access over worker protection. Additionally, allowing Member States to apply their labour law to posted workers reduced opposition from worker-exporting countries.⁴⁷⁹

Therefore, the Directive sought to balance companies' right to provide cross-border services under Article 56 TFEU (formerly Article 49 EC) with the need to uphold fair competition and protect workers' rights⁴⁸⁰.⁴⁸¹ It was based on Articles 57(2) and 66 EEC (now Articles 53(1) and 62 TFEU), which facilitate self-employment and service mobility. However, since the Directive does not cover self-employed workers, the EESC questioned the suitability of Article 57(2) as its legal basis.⁴⁸² Some scholars sought the legal basis of the PWD as a strategic choice, as free movement of services required only a qualified majority in the Council, unlike social policy measures. Despite later reforms, Article 53(1) and 62 TFEU remain its legal foundation, including for the later 2018 revision.⁴⁸³

Finally, the phenomenon of temporary posting within the framework of freedom to provide services, although initially considered a common form of flexible workforce engagement, has gradually become a mechanism for undermining the principle of territoriality in national labour law systems. Under the banner of encouraging free competition and efficiency in the single market, the original assumptions of the Treaty of Rome have been largely reversed.⁴⁸⁴ Overall, PWD96 provided the minimum working conditions and basic rights for posted workers, as mentioned in Chapter 2.2.3.

Tackling the previously described dark sides of posting, including the subcontracting relationships that have been in practice for several decades, has proven far from easy, especially due to the limited mechanisms given by PWD96.⁴⁸⁵ Namely, the PWD96 did not contain provisions specifically related to subcontracting relations, leaving Member States at discretion as to how to apply the rules in the case of subcontracting (chains) and leaving a significant gap in the regulation of liability for contractors. Effective enforcement required extensive cooperation and the information exchange between the inspection services. As more actors were incorporated in subcontracting relationships, the more problems occurred, and the oversight

⁴⁷⁹ Rocca, 2020, , p. 175.

⁴⁸⁰ The PWD ensures posted workers receive minimum protection by requiring compliance with key host state labour rules. It makes certain employment provisions mandatory under EU law, strengthening worker protection, particularly for vulnerable posted workers facing legal and linguistic barriers abroad. See more in: Van Hoek, Houwerzijl, 2012, p. 419.

⁴⁸¹ Van Hoek, Houwerzijl, 2012, p. 419.

⁴⁸² Lasek-Markey, 2023, p. 39.

⁴⁸³ Davies, 1997, p. 572.

⁴⁸⁴ Giubboni, 2006, pp. 86-87.

⁴⁸⁵ Jorens, 2022, p. 421.

was more complicated. Even with the determination of the breach, the enforcement of the sanctions was challenging, especially against the employers who in the host country do not have real activities or stable presence, and commonly, in the case of inspections, just shut down operations and vanish. In many cases, sanctions weren't enforced since the company fell outside the jurisdiction.⁴⁸⁶ Absence of the solutions for these challenges in PWD96 did not prevent the increase of fraudulent practices in the scope of subcontracting, which continued during the EU enlargements. Even though the liability schemes were considered soon⁴⁸⁷, it took more than a decade for the preparations and negotiations over the Enforcement Directive to take their place. However, it finally brought some changes and the peak into the improvement of the system, which will be analysed further.

3.2.2.2. Enforcement Directive 2014

The debate on PWD's implementation gained prominence with the 2004 'Bolkenstein Directive' proposal⁴⁸⁸ and the EU's 2004 and 2007 enlargements, which exposed its limited impact. As previously mentioned, key CJEU rulings in the 'Laval quartet' intensified legal and public discussions, prompting calls for clarification. The European Parliament addressed these concerns through resolutions, notably on 22 October 2008, emphasising proper enforcement. In response, the European Commission initiated a pilot project, 'Working and Living Conditions of Posted Workers'.⁴⁸⁹ In approximately 2011, several studies emerged, clearly demonstrating that there is, in reality, a significant deficiency in control, oversight, and coordination among Member States, leading to ineffective enforcement of essential terms and

⁴⁸⁶ Jorens, 2022, p. 421.

⁴⁸⁷ European Parliament Resolution of 26 March 2009 on the Social Responsibility of Subcontracting Undertakings in Production Chains (2008/2249(INI) (2010) Official Journal L117.; Jorens, 2022, p. 421.

⁴⁸⁸ The Bolkenstein Directive refers to the 2004 Proposal for the Directive on Services in the Internal Market (COM(2004) 2 final). The proposal sought to facilitate the free movement of service providers by permitting them to operate temporarily under their home country's regulations, following the *Lex Loci Domicilii* principle. This sparked protests against EU-driven economic liberalisation, particularly in France, where fears of 'Polish plumbers' working under Polish labour laws influenced the rejection of the EU Constitutional Treaty in the May 29, 2005 referendum. Therefore, the proposal to deregulate service controls faced resistance in France and the Netherlands, seen as a threat to their social models. France tightened posting rules, while the Netherlands maintained work permits for CEE workers, though the Commission opposed these restrictions. Despite concerns, the EU pushed for service liberalisation, but backlash, symbolised by the mentioned 'Polish plumber', delayed broader reforms. See more in: Kyriazi, 2023, pp. 227-228.; Lalanne, 2011, pp. 221-222.; Böröcz, Sarkar, 2017, p. 309.

⁴⁸⁹ Van Hoek, Houwerzijl, 2012, p. 420.

conditions of employment for posted workers, including wages, working hours, and expenses related to housing and transportation.⁴⁹⁰

To enhance the enforcement of PWD96 and address legal developments on the right to take collective action⁴⁹¹, the European Commission launched two proposals in March 2012. These included the Monti II Regulation on the right to collective action⁴⁹² and a Directive on enforcing the PWD without reopening its original provisions.⁴⁹³ In the meantime, in 2013, the Belgian Ministers for Finance and Labour announced plans to file a complaint with the European Commission, citing exploitative practices in Germany that resulted in social dumping and negatively affected Belgian industries⁴⁹⁴. They underscored significant abuses, with a focus on the meat-processing industry, in which a high number of posted workers, mostly from Eastern Europe, were reportedly receiving only 3 euros/hour while working 60 hours a week without any social security benefits. Instead of directly addressing the misuse of the PWD96 in Germany and the sending countries, the Commission responded by introducing the Enforcement Directive.⁴⁹⁵

Due to strong opposition from trade unions and national parliaments, the first proposal was withdrawn. In contrast, the second proposal was adopted in May 2014 as Directive 2014/67/EU⁴⁹⁶ (hereinafter: Enforcement Directive)⁴⁹⁷. Namely, the Enforcement Directive⁴⁹⁸ from 2014 should have brought new and stronger mechanisms for preventing circumvention of the legislation and fraudulent practices in the context of the posting of workers.⁴⁹⁹

⁴⁹⁰ Houwerzijl, Verschueren, 2024, p. 199.

⁴⁹¹ See more in Viking and Laval cases explained above.

⁴⁹² Procedure 2012/0064/APP, COM (2012) 130: Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.

⁴⁹³ Kyriazi, 2023, pp. 227-228.

⁴⁹⁴ European Parliament (2013) Complaint of social dumping filed against Germany by Belgian Ministers. Official Journal C 20 E. [Online] (Accessed on: 20/04/2025).

⁴⁹⁵ McGauran, 2016, p. 19.

⁴⁹⁶ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Official Journal L 159/11.

⁴⁹⁷ Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2012/0131 final - 2012/0061 (COD).

⁴⁹⁸ The title of the Directive reflects that the PWD96 failed to provide real safeguards against abusive and exploitative practices. See: Houwerzijl, Verschueren, 2024, p. 200.

⁴⁹⁹ Kyriazi, 2023, pp. 227-228.

It introduced the criteria for identifying legitimate postings to reduce misuse and prevent the evasion of regulations. Also, it has detailed requirements regarding access to information⁵⁰⁰, administrative collaboration, an overview of adherence, and the specific enforcement mechanism.⁵⁰¹ It aimed to prevent abuse of posting rules by requiring national authorities to verify whether posted workers have a genuine employment relationship with the sending company, which must also conduct substantial business activities in its home country. Additionally, host states became obliged to clearly and freely provide information on posted workers' terms and conditions via an official national website. The Directive strengthened mutual assistance, cooperation, monitoring, and the cross-border enforcement of administrative penalties. Notably, it also introduced rules on subcontracting to enhance oversight and accountability.⁵⁰² Additionally, it focused on the challenges related to letterbox companies, especially relevant in the context of subcontracting, which have been established explicitly to avoid the application of national labour and social security legislation, without genuine economic activity in the home country. Member States have greater powers to inspect working conditions and to apply the relevant legislation, including qualitative criteria that help determine the existence of a genuine economic correlation between the employer and the Member State in which the company has been established. Those criteria are applied to clarify whether the worker can be considered the posted one. Additionally, the Directive improved the administrative cooperation between the national bodies responsible for controlling the posting. Therefore, the Enforcement Directive did not cover all of the questions related to the phenomenon of the posting of workers, but is focused only on the enforcement mechanisms for the prevention of the circumvention of the rules in the context of the posting of workers and filled up the legal gaps that have not been regulated by the PWD96, making them are considered complementary.⁵⁰³

Nevertheless, even though the Enforcement Directive brought certain improvements, particularly in the administrative and cooperation scope, it still left a wide range of unanswered questions. Namely, it did not clarify the CJEU case-law on minimum rates of pay, nor did it

⁵⁰⁰ The Enforcement Directive connected the inspectorates' information exchange through the Internal Market Information System. One of the first and most advanced notification system is the Belgian LIMOSA system. See: Houwerzijl, Verschueren, 2024, p. 215.

⁵⁰¹ Verschueren, 2021, pp. 557-558.

⁵⁰² Van Nuffel, Afanasjeva, 2020, pp. 283-285.

⁵⁰³ European Commission (2016) Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final, 2016/0070(COD), Context og the Proposal.

address the strict interpretation of the PWD96 that limited the ability of Member States and social partners to improve the system of protection for workers. The only exception in this regard was the previously mentioned *Sähköalojen ammattiliitto* case⁵⁰⁴. Even though the Enforcement Directive sought to define ‘genuine posting’ to prevent misuse of the system, such as letterbox companies or long-term posting, it did not provide a clear definition of the temporary nature of posting and left the inspection measures undetermined. It also did not solve the conceptual inconsistency between the PWD96 and the social security coordination rules, nor did it address issues such as regime shopping and bogus self-employment. It did not address the crucial question of the imbalance between economic freedoms and social rights and therefore did not sufficiently contribute to preventing social dumping.⁵⁰⁵

However, it is important to note that before it was finally accepted, the Enforcement Directive underwent extensive debate, particularly regarding the list of national control measures and, specifically relevant to the protection of posted workers’ rights in subcontracting relationships, the liability mechanisms. Looking through the prism of the conflict between more or less integration, the introduction of an exhaustive list of national control measures⁵⁰⁶, and the obligatory principle of joint and several liability would lead to broader European integration, meaning narrower national discretion.⁵⁰⁷ Namely, the European Commission, despite expectations that it would present the proposal in December 2011, has repeatedly delayed it. In the initial phase, the Commission has considered the concept of the liability between contractors and subcontractors, an idea that has been stagnant since the Social Action Program in 1991. The proposal drafted at the beginning of 2012, but never formally published, has predicted the principle of joint and several liability applicable to all sectors. Nevertheless, it did not include the principle of chain liability, which the Commission had previously considered in 1991. This broad application of liability has been met with resistance, especially from Business Europe. Consequently, the initial draft has been revised to limit the principle's scope to the construction

⁵⁰⁴ Judgment of the Court (First Chamber) of 12 February 2015. *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*. Case C-396/13. ECLI:EU:C:2015:86.

⁵⁰⁵ Voss, Faioli, Lhernould, Iudicone, 2016, pp. 44-45.

⁵⁰⁶ Final version of the Enforcement Directive, in its Article 9(1), regulates that Member States are allowed to implement administrative requirements and control measures only if they are essential for effective oversight of adherence to the duties specified both in this Directive and the PWD96. Those kinds of measures must also be justifiable and proportionate under EU law. To achieve this, Member States may impose the measures detailed in Article 9. See more in: Article 9 of the Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Official Journal L 159/11, 28/05/2014.

⁵⁰⁷ Martinsen, 2015, p. 206.

sector. After this change, the Commission was finally ready to introduce the revised proposal on the 21st of March 2012^{508, 509}.

Later on, in the report given by the appointee from Poland in 2013, it was suggested to eliminate Article 12 regulating the liability mechanisms, due to its high disproportionality. This approach was widely criticised. Later on, due to the consistent pressure, the rapporteur shifted to a more realistic stance.⁵¹⁰ On the other hand, in the opinion given by the Committee on the Internal Market and Consumer Protection for the Committee on Employment and Social Affairs in March 2013, it was emphasised that the misuse of the subcontracting chains is not limited only to the construction sector, so the principle of joint and several liability should have been expanded across all sectors. Also, they claimed that Member States should implement the necessary measures, in accordance with their experiences and procedures, to ensure the application of the joint and several liability. It should additionally be allowed to introduce more stringent rules on the national level. They were calling for the reconsideration of Article 12 and the implementation of the necessary revisions.⁵¹¹ On the 20th of June 2013, the Committee on Employment and Social Affairs of the European Parliament passed sixty-one amendments to the Commission's proposal, including Amendment No. 54 on liability. Namely, the Committee took an approach that the principle of joint and several liability should be modified to chain liability, encompassing all sectors and extending to all of the potential subcontractors. According to the provision of that Amendment, Member States would be obliged to implement non-discriminatory measures, ensuring that any company directing another, directly or indirectly, to perform services on its behalf can be held liable, together or instead of a subcontractor, for the rightful entitlements of the worker and/or social security contributions owed to relevant funds or social partner institutions. This liability, however, would be restricted to rights accrued during the contractual period between the main contractor and its subcontractors. Also, this provision would not prevent national legislations from imposing more stringent liability rules.⁵¹²

⁵⁰⁸ Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2012) 131 final, 2012/0061 (COD), Brussels, 21.3.2012.

⁵⁰⁹ Martinsen, 2015, p. 205.

⁵¹⁰ Martinsen, 2015, pp. 209-210.

⁵¹¹ Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Employment and Social Affairs on the proposal for a directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2012)0131 – C7-0086/2012 – 2012/0061(COD), Rapporteur: Malcolm Harbour, 12 March 2013, p. 3.

⁵¹² Report on the proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services,

However, when it comes to the position of the member states in that regard, there was a substantial division⁵¹³ between the Eastern European countries, led by Poland, and the UK on one side, and the rest on the other. The first group was in favour of defending the internal market and opposed joint and several liability in any sector, while the other group of Member States were those that already had a principle of liability integrated into their national systems and could not agree to exclude that system from the Directive.⁵¹⁴ By confirming that a system of joint and several liability is, in principle, in accordance with European Community law, the CJEU, with its case *Wolff & Müller (C-60/03)*⁵¹⁵, gave additional weight to initiatives advocating the implementation of such mechanisms on the European level.⁵¹⁶ However, that discussion was further flamed with the inclusion of the CJEU's *Commission vs. Belgium (C-433/04)*⁵¹⁷ case law in the debate, with its diversified approach⁵¹⁸.

Firstly, in the case *Wolff & Müller (C-60/03)*, the CJEU was considering the dispute between the German construction company *Wolff & Müller GmbH & Co. KG* and the Portuguese worker *José Filipea Pereira Félix*, employed by the Portuguese subcontractor on the construction site in Germany. The worker has asked for the unpaid wage in the amount of 4.019,23 DEM and has sued both his employer and the company *Wolff & Müller*, basing it on the Article 1(a) of the German AEntG Act on Posting of Workers, which provides the joint and several liability of an undertaking which appoints another undertaking to provide building services for the subcontractors' obligations with the payment of the host states' minimal wage. *Wolff & Müller* were claiming that it does not correspond to the German constitutional right nor to the freedom to provide services guaranteed by Article 49 EC. The German Labour Court asked for the preliminary ruling from the CJEU on the compliance of this provision with the EU freedom to provide services. The CJEU has analysed it through the lenses of the PWD96, especially Article 3(1)(c), which imposes the obligation for the Member States to ensure the payment of the host states' minimum wage to posted workers, and Article 5, which imposes the obligation for the establishment of the effective enforcement mechanisms for its realisation. The CJEU did

COM(2012)0131 – C7-0086/2012 – 2012/0061(COD), 04/07/2013, Committee on Employment and Social Affairs, Rapporteur: Danuta Jazłowiecka, Amendment no. 54.; Martinsen, 2015, p. 210.

⁵¹³ Another parallel discussion was also over the national control measures. See more in: Martinsen, 2015, p. 213.

⁵¹⁴ Martinsen, 2015, p. 213.

⁵¹⁵ Judgment of the Court (Second Chamber) of 12 October 2004. *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix*. Case C-60/03. ECLI:EU:C:2004:610.

⁵¹⁶ Jorens, 2022, p. 422.

⁵¹⁷ Judgment of the Court (First Chamber) of 9 November 2006. *Commission of the European Communities v Kingdom of Belgium*. Case C-433/04. ECLI:EU:C:2006:702.

⁵¹⁸ Due to the importance of aforementioned case law and specific relevance for further research, a more detailed analysis is provided.

emphasise that the Member States have a wide discretion in the choice of the enforcement mechanisms, as long as they comply with the fundamental freedoms of the EU. Despite the potential administrative and financial burden for the undertakings which appoint another undertaking to provide services, or the principal contractor, those mechanisms enable higher protection for the posted workers since they provide an additional and more solvent debtor for their wages. Even though the protection of the posted worker was maybe not an initial intention of the German legislator, that mechanism did provide a concrete benefit for the posted workers' rights. In that regard, the CJEU decided that Article 5 of the PWD96, interpreted in the scope of the freedom to provide services, does not preclude the Member States, such as the German legislator, from imposing the joint and several liability on the undertaking which appoints another undertaking to provide services for the host states' minimum wage payment obligations of subcontractors. If national measures are based on conditions of public interest, including the protection of workers, they can be justified. Also, if the purpose of the national measure is to prevent unfair competition, that provision can be justified as a restriction on the freedom to provide services, provided it is based on the public interest. That objective can be achieved together with the protection of workers, and not necessarily instead of it^{519, 520}.

Consequently, the CJEU has undoubtedly agreed that liability systems provide an additional safeguard for protecting workers' rights in transnational subcontracting. The CJEU did not take into consideration potential practical difficulties or economic inefficiency in enforcing such claims, but this system has been considered as a valid justification for limiting the freedom to provide services.⁵²¹ This judgement was an important step forward for the protection of posted workers' rights in subcontracting chains, since it confirmed that liability mechanisms are effective for improving their rights, especially as an additional guarantee of the payment of their wages and social contributions. However, in the case *Commission vs Belgium (C-433/04)*, the CJEU took an interesting but divisive approach, which sparked fear and debate mainly in Western European countries.

Namely, the Commission has initiated proceedings against the Kingdom of Belgium for breaching the freedom to provide services on the EU market. Belgian legislation has asked the principals and contractors who engaged foreign contracting partners not registered in Belgium to withhold 15% of the amount received for the performance of the work and transfer it to the

⁵¹⁹ Heinen, Müller, Kessler, 2017, pp. 35-36.

⁵²⁰ Judgment of the Court (Second Chamber) of 12 October 2004. *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix*. Case C-60/03. ECLI:EU:C:2004:610.

⁵²¹ Jorens, 2022, pp. 422-423.

Belgian tax authorities. Besides, they were jointly and severally liable for all tax obligations of those contracting partners, and up to 35% of the value of work, encompassing the debts from the earlier periods not connected to the relevant contract. The Commission considered those measures to be a disincentive to the provision of services on the EU market and an overreach of the necessary mechanisms for preventing tax fraud. Belgium claimed that the measures are justified as part of the system for combating tax fraud in the construction sector. However, the CJEU considered such measures to be restrictions on the freedom to provide services, since they deterred foreign service providers and principals from entering the Belgian market. Also, the Court considered them disproportionate because they were applied automatically without adjustments to individual cases, and said that less restrictive measures, including information exchange or procedures for proving contractors' tax compliance, would achieve the same objective. Therefore, the CJEU held Belgium liable for failing to fulfil its obligations under EU law.⁵²² In the context of joint and several liability, a less restrictive approach would enable service providers to prove the proper fulfilment of tax obligations or to request compliance with special formalities designed to confirm their appropriate tax status.⁵²³

Looking at both cases, the CJEU clarified that not all of the systems of liability in the context of subcontracting can be in accordance with EU law. In the *Wolff & Müller* case, the CJEU considered the German system of joint and several liability justified on the basis of the protection of posted workers as the final objective. However, in the *Commission vs. Belgium* case, the CJEU did not consider it justified, since it restricted the freedom to provide services and its objective wasn't the protection of workers or the avoidance of unfair competition in the sphere of public interest, but the tax collection. Therefore, the CJEU demonstrated that the system of liability in subcontracting chains can be justified under EU law and can serve as a functional mechanism for the protection of posted workers, provided its objective is indeed their protection and not disproportionate restrictions on the EU's fundamental freedoms.

Furthermore, these cases also contributed to the argumentation during the Enforcement Directive negotiations, especially for Member States that already had liability schemes in their systems. Namely, their concern has arisen from the CJEU's previous abolition of the Belgian liability system due to its disproportionate effect on the freedom to provide services and the approval of the German system, focused on the protection of workers. Therefore, the existing

⁵²² Judgment of the Court (First Chamber) of 9 November 2006. *Commission of the European Communities v Kingdom of Belgium*. Case C-433/04. ECLI:EU:C:2006:702.

⁵²³ Heinen, Müller, Kessler, 2017, pp. 35-36.

liability systems in certain countries could be easily disrupted and abolished by the CJEU, without any guarantee from the Enforcement Directive. Consequently, by inclusion of at least a voluntary reference to joint and several liability in the Directive, these Member States hoped to create a safeguard clause against future CJEU rulings, making it clear that such systems, if proportionate and workers' rights-oriented, are not in contrast with EU law.⁵²⁴ During the further negotiations in the Council, Article 12 got some mandatory elements. On this basis, the difficult discussions with the European Parliament started in January 2014. Due to France's leadership in the Council and the pragmatic approach of the European Parliament, the final agreement was reached by February 2014, primarily reflecting the Council's last compromise.⁵²⁵

On 13 May 2014, the Council held their final voting⁵²⁶, with only Hungary and Latvia opposing it and Estonia abstaining from voting.⁵²⁷ Finally, the Directive got its final shape, with the widely discussed and highly research-relevant Article 12 establishing the mandatory joint and several liability⁵²⁸ for the construction sector, and the possibility to introduce the broader liability, chain liability, and apply it to more or all other sectors. Also, the due diligence defence system introduced the possibility for a contractor that presents due diligence according to national law to be excluded from liability.⁵²⁹ By these novelties, posted workers benefited by gaining the right, at least in the construction sector, to claim unpaid minimum wages directly from the contractor, rather than only from their direct employer. Member States and companies, especially the small and medium companies from the host and sending Member States, benefited from the more vigorous enforcement of the Directive, fairer market competition and more equal business conditions. This approach is based on the preventative measures, encouraging the careful selection of subcontractors. Companies are expected to examine⁵³⁰ the potential circumvention of the payment obligations in the host country. However, this provision

⁵²⁴ Martinsen, 2015, p. 213.

⁵²⁵ Martinsen, 2015, pp. 215-217.

⁵²⁶ See: European Commission (2014) Commission welcomes Council adoption of Posting of Workers Enforcement Directive. Press Release. [Online] (Accessed: 12 March 2025).

⁵²⁷ Martinsen, 2015, pp. 215-217.

⁵²⁸ It is important to clarify that the Enforcement Directive is not the initial European legal framework to define liability within subcontracting chains. Directive 2009/52/EC, dated 18 June 2009, which sets minimum standards for sanctions and measures against employers of illegally residing third-country nationals, includes provisions related to subcontracting liability in Article 8. See: Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L 168/24, 30th June 2009.; Heinen, Müller, Kessler, 2017, p. 52.

⁵²⁹ See: Article 12 of the Enforcement Directive.

⁵³⁰ This approach was also in accordance with the OECD Guidelines for Multinational Enterprises, encouraging risk-based due diligence when choosing subcontractors.

of the Enforcement Directive also brought additional costs, mostly related to the scope of the Directive's implementation and changes in the behaviour of companies in countries that previously didn't have a liability scheme in this regard. Nevertheless, the costs should not have been considered the borderline of enforcement, since, for example, the review of the application of the wage rules at the subcontractor is expected to take 15 minutes per posted worker at the standard hourly rate for ancillary business activities. Given the narrow quantitative range of posting, the expenses are expected to stay relatively low.⁵³¹

Despite these efforts, ETUC continued to criticise the Directive, contending that it did not improve legal clarity, as essential definitions of posting remained ambiguous and open to abusive practices. An additional highlighted criticism was the Directive's emphasis on administrative enforcement rather than on improving the role of trade unions or civil society. These improvements, if properly incorporated, could have been a significant step forward for the Enforcement Directive and strengthened the posting procedures as shaped by PWD96. Nevertheless, even if the Directive had resolved all enforcement issues, concerns over fair competition would have remained, as posting companies could still benefit from lower social contributions in their home countries. While stricter regulations might have reduced this advantage, legitimate firms and their workers would have continued contributing to their national welfare systems. A broader issue was the gap between the minimum standards set by PWD 96 and the actual working conditions in host countries. More vigorous enforcement would have ensured basic protection for posted workers, but not equal treatment with local workers, allowing posting firms to maintain a cost advantage within the legal framework.⁵³² However, even after adopting the Enforcement Directive, which, as discussed, left some legal gaps and unresolved challenges, PWD96 continued to face criticism. The main ones included only a guarantee of the host country's minimum pay level and the absence of a duration threshold for the posting.⁵³³

Finally, it is worth noting that despite the EU's introduction of joint and several liability mechanisms, which seemed like the Commission's move to the liberalisation and the protection of social rights of posted workers and the well-needed step forward embracing the challenges of inclusion of posted workers in complex subcontracting arrangements, it avoided their wider

⁵³¹ Commission Staff Working Document Impact Assessment. Revision of the legislative framework on the posting of workers in the context of provision of services /* SWD/2012/0063 final - APP/2012/0064, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52012SC0063>, Annex 6.

⁵³² Maslauskaitė, 2014, pp. 16-17.

⁵³³ Verschueren, 2021, pp. 557-558.

protection with the introduction of an obligatory (full) chain liability for all sectors, leaving a question mark in its approach. That missed opportunity only partially resolved the issue, primarily because the system of chain liability could potentially act as a stronger preventative mechanism, since it would diminish the appeal of working with unreliable or ill-intentioned contractors, and it would give the inspection and enforcement bodies an effective instrument to ensure compliance⁵³⁴.

The finally adopted version mostly just formalised the existing national legislation, rather than introducing new measures. In some instances, it even left room for the CJEU to potentially limit national implementation. For example, the Enforcement Directive has repeatedly emphasised that enforcement measures must be justified and proportionate. It clearly expresses the concern that national labour law enforcement shouldn't impede the free movement of companies, implying that Member States could bear responsibility if their enforcement is deemed disproportionate, even though it remains unclear exactly what it entails.⁵³⁵ Consequently, this choice of the protection mechanism and the need to revise it to enhance the protection of posted workers in subcontracting chains will be examined in Chapter 5, with a special emphasis on analysing the necessity of improving current liability mechanisms through the national reports and the search for the best (national) practices.

3.2.2.3. Posted Workers Amendment Directive 2018 and the 2024 Report on Its Application and Implementation

Gathering widespread support for the social initiatives in the EU has always been challenging, and the reform of PWD96 clearly illustrated this. Launched in March 2016 by the Junkers' Commission and finalised in 2018, the reform highlighted the difficulties of the process due to the complexity and political sensitivity of the topic. This case has shown the broader context of decision-making within the multi-level structure of the EU governance system and has identified the political strategies used by Member States to implement reforms in controversial areas.⁵³⁶ Namely, the proposal for the revision of the PWD96 has caused

⁵³⁴ Jorens, 2022, p. 424.

⁵³⁵ Lillie, Wagner, 2015, p. 162.

⁵³⁶ Kyriazi, 2023, p. 221.

divided reactions between the advisory bodies of the EU and stakeholders⁵³⁷ and significant disagreements between the Member States, culminating in the ‘yellow card procedure’, a formal mechanism with which national parliaments can challenge the proposed EU legislation. This case has crystallised the deep tensions between Eastern and Western European countries caused by the economic differences, the approaches toward workforce mobility, and social protection.⁵³⁸

The final version of the PWD18 included the updated list of the basic rules, including the exchange of ‘minimum rates of pay’ with the ‘remuneration’, adding rules for postings longer than 12 months or 18 months⁵³⁹, and the changed rules for the posting of workers through the temporary work agencies.⁵⁴⁰ Specifically, the revised PWD has extended the list of the ‘hard core’ labour standards that the host country has to apply to the posted workers. Those standards now include the rules on working time, rest periods, holidays, pay, health and safety, hygiene, the conditions under which workers can be hired, and equal treatment between men and women. Significantly, the employers are obliged to apply all the required elements of remuneration that apply in the host country, whether those result from the law, the universally binding collective agreements or are negotiated by the most representative organisations. That includes, for example, 13th salary, travel and accommodation expenses, or additional payment for night shift and public holidays. Also, proper housing conditions and reimbursement for travel, meals, and lodging must be respected.⁵⁴¹

The objective of this revision was to resolve the problems in the application and enforcement of PWD96, which did not prevent loopholes, abuses and non-compliance at the EU and national level.⁵⁴² However, even though the revised PWD from 2018 did improve the position of posted workers in the EU, the unresolved challenges remained. For example, labour law and collective agreements of the host country are applied to them only in the scope allowed by the Directive and the TFEU. Specifically, posted workers do not enjoy the protection rules of the host country that refer to the termination of the employment relationship (Art. 1(a) of the

⁵³⁷ ETUC, BUSINESSEUROPE, UEAMPE and CEEP, 2016,) ‘Revision of the Posting of Workers Directive: Joint Letter to President Juncker’ [Online] (Accessed 5 August 2025).; Lasek-Markey, 2025, p. 7.

⁵³⁸ See: Vinković, Konjević, 2025.

⁵³⁹ However, according to Kullmann, the PWD18 did not provide the differentiation between the short-term and long-term postings, since after 12, or in certain cases 18 months, posted workers are entitled to additional terms and conditions of employment, but without an influence on the duration of posting itself. See: Kullmann, 2024, p. 11.

⁵⁴⁰ Andriescu, et. al., 2024, p. 31.; Wispelaere, Smedt, Pacolet, 2022, p. 29.; Furåker, Larsson, 2020, pp. 109-139.

⁵⁴¹ Houwerzijl, 2024, p. 56.

⁵⁴² Andriescu, 2024, p. 31.; Wispelaere, Smedt, Pacolet, 2022, p. 29.; Furåker, Larsson, 2020, pp. 109-139.

PWD96, revised by the PWD18), which can make it harder for them to enforce their rights. The issue of enforcement continues to pose a significant challenge to the effective safeguarding of posted workers' rights, a subject often discussed among labour scholars.⁵⁴³ One of the remaining challenges is indeed including the enforcement of the rights of posted workers in subcontracting arrangements.

Namely, as mentioned before, Article 12 of the Enforcement Directive 2014 was considered a step forward in strengthening the protection of posted workers in subcontracting chains, particularly in the construction sector. According to that Directive, Member States should secure that posted workers in construction can claim unpaid wages not only from their employer but also from the contractor that hired that employer as the subcontractor. National legislation could go even further in three ways: by extending the liability outside the construction sector, applying it to the other actors in the chain, or enabling workers to claim more than just a minimum amount of wage in the host country. Also, the system is additionally weakened by the due diligence defence, providing the opportunity for companies to avoid liability. However, studies have shown that any mechanism that weakens this system reduces the chance of posted workers receiving remuneration or rights enforcement, while only a wide and strict system can provide them protection.⁵⁴⁴ Therefore, the system from the Enforcement Directive was not considered sufficient and was in desperate need of change. The perfect chance for it was the PWD18.

Namely, the Impact Assessment for the proposal of the PWD18 from 2016 highlighted that one of the key challenges in the protection of posted workers is that the legislation did not provide specific rules for the situations of posting of workers through subcontracting arrangements, leaving a legal gap. That is why the posted workers in these cases often didn't have clearly determined wages. This uncertainty has given employers the chance to decrease labour costs, which could drive wages down and even push local workers out of the labour market.⁵⁴⁵ Therefore, the proposal for a Directive amending PWD96 included the provision strictly related to the phenomenon of subcontracting. According to it, Member States could ask the companies to cooperate only with the subcontractors, who guarantee their workers certain conditions for payment that are also applicable to the principal contractor. Those conditions

⁵⁴³ European Trade Union Confederation, 2021, p. 11.

⁵⁴⁴ Lasek-Markey, 2023, pp. 146-147.

⁵⁴⁵ Impact Assessment (SWD (2016) 52 final, SWD (2016) 53 final (summary)) of a Commission proposal for a directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM (2016) 128 final). Briefing. Initial Appraisal of a European Commission Impact Assessment. European Parliament, May 2016, p. 2.

could also include ones from collective agreements that are not mandatory. Each of those measures would have to be applied in a proportionate and non-discriminatory manner, meaning that the same rules have to be used for all domestic subcontractors.⁵⁴⁶ Additionally, the Proposal claimed that Member States may, through their laws, regulations, administrative measures or collective agreements, ensure that, by subcontracting, the application of rules on remuneration cannot be circumvented. Suppose those kinds of rules existed on the national level, Member States could also apply them to the companies that post workers on their territory, under conditions that they are used in a non-discriminatory way and not to limit transnational provision of services disproportionately.⁵⁴⁷

Nevertheless, that proposal to introduce stricter rules for subcontracting chains, which would enable Member States to proceed with subcontracting only with companies guaranteeing a certain minimum level of pay, was not included in the final text of Directive 2018/957.⁵⁴⁸ This new provision was closely related to the then recent CJEU case-law, especially the case *RegioPost*, which confirmed that Member States can require from the contractor and its subcontractors to comply with the applicable wage rates in the public procurement procedures.⁵⁴⁹ This outcome has disappointed numerous interested parties, including trade unions and the Committee of the Regions, which have been warning that the liability rules in Article 12 of the Enforcement Directive are not sufficient and have asked for stricter protection of posted workers. However, that topic has not been completely abandoned, but it has been postponed since Article 2 of PWD18 predicted the Commission's report on subcontracting, along with potential proposals for amendments, until July 2023. In the meantime, Member States should have effectively enforced the Directive to prevent fraudulent practices in subcontracting relations and to protect the rights of posted workers. However, such

⁵⁴⁶ Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM/2016/0128 final - 2016/070 (COD), par. 2(b).

⁵⁴⁷ Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM/2016/0128 final - 2016/070 (COD), par. (14).

⁵⁴⁸ Lasek-Markey, 2023, p. 79.

⁵⁴⁹ Voss, Faioli, Lhernould, Iudicone, 2016, p. 46.; Cremers, Houwerzijl, 2021, p. 10.

postponement left the workers' rights in a state of legal uncertainty, which not even the CJEU addressed in the *Dobersberger* case^{550, 551}.

Later on, several Member States, as will be analysed in Chapter 5, have claimed that the rules on liability from the Enforcement Directive have contributed to the improvement of the protection of posted workers in subcontracting chains^{552, 553}. Also, the trade unions have highlighted that in the Member States that have included or kept the full subcontracting liability, and where the chain was limited, rights of posted workers were significantly improved.⁵⁵⁴ Nevertheless, in July 2021, the European Commission initiated a procedure against several Member States for breaching specific provisions of the Enforcement Directive⁵⁵⁵, and in January 2023, the Commission issued reasoned opinions to 17 Member States for failing to harmonise with that Directive.⁵⁵⁶ Therefore, the system was only partially functioning and required revision.

⁵⁵⁰ In that case, the CJEU has examined whether the workers serving food and cleaning on the international trains should be considered as posted workers according to the EU law. Workers were employed in Hungary, where they performed most of their work, but the part of the services were performed in Austria. CJEU concluded that they are not posted workers since their work is too closely related to Hungary, and too little to Austria. Importantly, those services were organised through the subcontracting chain; a Hungarian company was hired by the Austrian company that served the railways. A lot of stakeholders hoped that these kinds of cases would be under the legislation in the scope of the posting of workers. Even though the CJEU did not ignore the subcontracting relationships, it has just, in the first step, determined that the workers in this case are not posted workers, so there was no need to examine their rights in detail. However, the CJEU took a narrow approach that left the similar situations of the workers' rights in subcontracting chains insufficiently protected. See: Judgment of the Court (Grand Chamber) of 19 December 2019. *Michael Dobersberger v Magistrat der Stadt Wien*. Case C-16/18. ECLI:EU:C:2019:1110.

⁵⁵¹ Lasek-Markey, 2023, p. 79.

⁵⁵² Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), {SWD(2019) 337 final}. COM(2019) 426 final, 25th September 2019.

⁵⁵³ Andriescu, 2024, pp. 31-32.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'). {SWD(2019) 337 final}. COM(2019) 426 final. Brussels, 25th September 2019, p. 16.

⁵⁵⁴ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'). {SWD(2019) 337 final}. COM(2019) 426 final. Brussels, 25th September 2019, p. 16.

⁵⁵⁵ European Commission (2021) July infringements package: key decisions. Brussels, 15 July 2021. Available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_3440 (Accessed on: 12 January 2025).

⁵⁵⁶ Andriescu, 2024, pp. 31-32.

Also, in April 2024, the European Commission published the Report on the application and implementation of PWD18, in which, according to Article 2(2) of PWD18, the Commission was also obliged to reconsider the inclusion of additional measures in the scope of subcontracting for the protection of posted workers and ensuring fair market competition conditions. The provision in focus was the previously analysed Article 12 of the Enforcement Directive, which introduced obligatory joint and several liability for unpaid wages only in the construction sector, with the possibility for Member States to broaden its scope, since the PWD18 did not include subcontracting. As will be analysed in detail afterwards, most of the Member States have limited the application to the minimum liability scheme required by the Directive, only 10 Member States applied the full chain liability, and only four countries introduced additional measures⁵⁵⁷. Therefore, the Enforcement Directive set only the minimum framework for subcontracting, while Member States can introduce stricter and broader rules, provided they are fair and proportionate.

Furthermore, the Commission clarified and acknowledged the main challenges for posted workers' rights related to the subcontracting chains. Firstly, companies at the top of the long and complex chains have limited control over the lower levels, and they usually transfer business risks to the smaller enterprises. Rules on liability are mainly applied only to the direct contractor, while the other subjects in the chain remain outside of it. Secondly, the lack of transparency is complicating the determination of who is liable. It weakens the enforcement of the provisions and prevents workers from recovering unpaid wages. Thirdly, the letterbox companies often appear in subcontracting chains. They exist only for labour cost and tax reduction, and are posting workers abroad without having any genuine economic activity in the home country. Since they are established to be hidden, their identification is particularly difficult. Finally, due to intense competition within the chain, occupational health and safety are often ignored, leaving workers insufficiently informed about their workplace protection rights.⁵⁵⁸

⁵⁵⁷ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), COM/2019/426 final, 25th of September 2019.

⁵⁵⁸ Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2024) 320 final}, 30th April 2024, par. 4.2.

However, despite all the challenges mentioned, the Commission did not see the need to amend the Directive regarding subcontracting arrangements. It only proposed the exchange of good practices and, with the European Labour Authority's support, the mapping of Member States' liability systems.⁵⁵⁹ In this regard, the European Labour Authority, in cooperation with the European Commission, is currently evaluating the national systems governing liabilities in subcontracting chains. Additionally, it focuses on the complex challenges that arise in the cross-border provision of services, which will be a crucial part of the Fair Labour Mobility Package, expected to be introduced in 2026. In other words, ELA and Commission are seeking to understand how Member States address liability in the subcontracting process to address challenges related to labour mobility in the EU.⁵⁶⁰

As the Commission stated, the good practices would potentially include: *'limiting the number of levels in subcontracting chains and/or extending the subcontracting liability to the full chain, as currently applied in 10 Member States, on a proportionate and non-discriminatory basis; imposing "social clauses" in public procurement contracts published by Member States; allowing workers to take a specific claim directly to the top of the subcontracting chain, without the need to go through each level of the chain; enhancing cooperation between Member States in order to facilitate inspections and tackle the abusive practices of letterbox companies, including on a cross-border basis, and by exchanging information; enhancing the possibility for trade unions to access workplaces at national level with the aim of protecting workers and providing information on their rights; designating a coordinator with an overview of all the different entities in a subcontracting chain (following the example of the project supervisor under Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites); including provisions in collective agreements stating that before works start, companies are obliged to communicate to the national competent authorities the complete list of companies involved in contracts and subcontracts (including cross-border service providers).'*⁵⁶¹ In this regard, scholars, including

⁵⁵⁹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. {SWD(2024) 320 final}. COM(2024) 320 final. Brussels, 30th April 2024.

⁵⁶⁰ European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 10.

⁵⁶¹ Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2024) 320 final}, 30th April 2024, par. 4.3.

Houwerzijl, from all the mentioned ‘good practices’, emphasise limiting the number of levels in subcontracting chains and extending liability to the whole chain as the most relevant ones⁵⁶², however, the detail analyses on those enforcement mechanisms will be given below.

Finally, this Report did not support the legal rationale that the institutions, in the cases of systematic deficiencies in the protection of rights, should not restrict their activity only to recommendations and soft-law measures. The Commission emphasised that there is a formal possibility for the Member States to introduce stricter liability mechanisms, but the reality clearly showed that given discretion is not enough to provide adequate protection of posted workers' rights, since most of the Member States stuck to the given minimum. Additionally, due to the widening of the practical applicability of the subcontracting chains in a broad range of sectors, limiting the Directives’ obligatory scope only to the construction sector seems uncoordinated with the realities of the labour market conditions. Also, the Commission called for the encouragement of ‘good practices’, including the broadening of liability schemes to the whole chain and/or to the broader scope of sectors, but without giving any concrete obligatory measures. In the parliamentary questions to the European Parliament from the 10th of October 2024, a Swedish representative asked for an explanation from the Commission on the ways that they are trying to implement the ‘good practices’ recommendation⁵⁶³. In response, the European Commission reiterated its recommendations on good practices⁵⁶⁴, this time emphasising that they are explicitly applicable to situations within the scope of the PWDs⁵⁶⁵.⁵⁶⁶ That contradictory approach is, on the one hand, directly acknowledging the existence of structural issues that could be improved, but on the other hand, it does not provide any legislative solution. Therefore, the Commission should have considered leaving the soft law approach in this regard and offering the mandatory legislative amendments of the Enforcement Directive that would

⁵⁶² Houwerzijl, 2025.

⁵⁶³ The exact questions were the following: How is the Commission planning to increase national uptake of the good practice of limiting the number of levels in subcontracting chains, particularly in high-risk sectors? What immediate action can the Commission take to reduce legal uncertainty for those Member States that have not yet introduced a limit on long subcontracting chains in high-risk sectors? See: European Parliament (2024) ‘National attempts to limit long subcontracting chains and the Commission implementation report on the Posting of Workers Directive’. Parliamentary question E-002021/2024. [Online] (Accessed: 10 September 2025).

⁵⁶⁴ ‘The uptake of these good practices will be increased with the support of the European Labour Authority by organising Peer Learning Dialogues between Member States to allow for mutual learning.’ See: European Parliament (2024) ‘Answer given by Mr Schmit on behalf of the European Commission’. Parliamentary question E-002021/2024(ASW). [Online] (Accessed: 10 September 2025).

⁵⁶⁵ European Parliament (2024) ‘Answer given by Mr Schmit on behalf of the European Commission’. Parliamentary question E-002021/2024(ASW). [Online] (Accessed: 10 September 2025).

⁵⁶⁶ Sinander, 2025, p. 6.; Question for written answer E-002021/2024: ‘National attempts to limit long subcontracting chains and the Commission implementation report on the Posting of Workers Directive’, 10 October 2024.

correspond to the existing challenges following the posting of workers in complex subcontracting relationships. This missed opportunity, which could've provided a much-needed stronger protection of the rights of posted workers in complex subcontracting arrangements, left the system untouched and in need of reconsideration. In this regard, in Chapter 5, the author will analyse the possibly strongest solutions for improving the existing system and will give recommendations for its change.

3.2.2.4. Other Relevant EU Legislation

The previously mentioned PWD96, the Enforcement Directive from 2014, and the updated PWD from 2018 form the foundational legal structure aimed at safeguarding the rights of posted workers in relation to functional subcontracting practices and are the cornerstone of this research. Nevertheless, these are not the only relevant regulations addressing this matter; therefore, the author will present a concise overview of other EU legislation that is primarily significant for the integration of posted workers within subcontracting agreements.

Firstly, the relevant legislation in the scope of the posting of workers is the Directive on temporary agency work⁵⁶⁷ from 2008⁵⁶⁸. It aims to secure the fair treatment of the workers employed through the temporary work agencies⁵⁶⁹ (hereinafter: TWA), especially when they perform the same job as permanent employees at the user company. It guarantees equal pay and working conditions and recognises the agencies as the employers. The objective is to protect the agencies' workers, improve the quality of such arrangements and encourage fair and flexible employment. Just like the PWDs and the other spheres of the EU labour law, this Directive sets out the common minimum standards to safeguard core rights of workers across the EU. The broader aim is to prevent unfair competition between the Member States and prevent the 'race

⁵⁶⁷ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Official Journal L 327, 5th of December 2008 (hereinafter: TAW Directive).

⁵⁶⁸ This Directive, adopted after the launch of the flexicurity agenda in 2006, has reflected the new policy approach aimed at balancing flexibility and security in the labour market. Nevertheless, in practice, it became increasingly distant from traditional mechanisms for job protection and labour market security. Compared to earlier EU measures on part-time and fixed-term work from the 90s, this Directive contributed more to deregulation and increased precarious employment. See: Countouris, Horton, 2009, p. 337.

⁵⁶⁹ According to the TAW Directive, Article 3(1)(b), the temporary-work agency means 'any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction'.

to the bottom' in workers' rights and conditions.⁵⁷⁰ Namely, the scenario of applicability of the Directive in the scope of the posting of workers would be the worker employed by the TWA in one Member State but being posted to another host Member State. In this type of arrangement, the TWA uses the right to provide services in the EU under Article 56 of the TFEU. PWD18 explicitly mentions the cross-border temporary agency work in Article 1(3)(c), meaning its applicability in this situation, as long as all the necessary conditions for posting are met. However, there is also a similar arrangement to the previously mentioned that includes an additional transnational dimension. As before, the worker is being employed by the TWA in the sending country and is being posted to the undertaking in the host country. Later on, that undertaking is posting the same worker to the third Member State, so not the home or the host country. That way, the undertaking is also entitled to provide services in the EU. Therefore, the workers employed by the TWA are maintaining their employment relationship with their employer from the host Member State, even if they are being posted to another Member State(s). From a legal standpoint, on their employment contract, only the law of their home country is applicable, and not the law of the country where they are performing their duties. This arrangement leads to a complicated legal situation, because of which the posted workers are simultaneously subject to multiple national legal systems.⁵⁷¹ Supervision and detection of TWAs is additionally difficult when the employment relationships are complex and non-transparent, especially in triangular arrangements and long subcontracting chains that spread across several countries. The situation becomes even more complicated when letterbox companies, unregistered⁵⁷² or unlicensed agencies and 'phoenix' companies⁵⁷³ are included in the chain. Those kinds of agencies are often at the end of the long and unclear subcontracting chains, which makes the enforcement even more challenging.⁵⁷⁴ Those were some of the reasons why, traditionally, TWAs were not allowed in construction and some other sectors. According to Article 4 of the TWA Directive, prohibitions or restrictions on the usage of TWAs

⁵⁷⁰ Heinen, Müller, Kessler, 2017, p. 54, 56.

⁵⁷¹ Houwerzijl, 2024., p. 53.

⁵⁷² In the Manpower case, the CJEU decided that the rules on the posting of workers can also apply to workers employed exclusively to be sent abroad, under the condition that there is an organic link between the worker and the employer and that the employer really performs its activities in the sending country. If those conditions are met, TWAs can use the system to post workers. Also, in the Fitzwilliam case, the Court claimed that the TWA has to perform substantial activities in the country from which it is posting workers, to use the rules on posting of workers in the EU. It is not enough that the agency is just formally registered in that country, but it has to, in reality, perform its business there. See: Judgment of the Court of 17 December 1970. S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg. Case 35-70. ECLI:EU:C:1970:120.; Judgment of the Court of 10 February 2000. Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekering. Case C-202/97. ECLI:EU:C:2000:75.; Pennings, 2006, pp. 245-246.

⁵⁷³ Companies that shut down and then reopened under a different name.

⁵⁷⁴ Houwerzijl, 2024, p. 61.

are permitted only if justified by legitimate general-interest reasons, including workers' protection, health and safety at work, functioning of the labour market and abuse prevention.⁵⁷⁵ For example, Germany had a general ban for a long time. However, recently, certain limitations have been introduced: since 2021, TWAs are allowed in the German meat-production sector, and since 2023 in Norwegian construction, but only in the broader Oslo area and under the proportionality condition.⁵⁷⁶ Additionally, there have been various reported cases of undeclared work involving TWAs, both nationally and transnationally, especially in sectors such as agriculture, construction, care, etc. This challenge is closely related to the complex and often non-transparent subcontracting chains in which TWAs are operating. As mentioned above, those structures are obstructing the determination of liability and the enforcement of labour standards.⁵⁷⁷ In this regard, the relationship between the PWD and the Temporary Agency Work Directive and the (negative) influence of the TWAs in the already complex situation of posted workers in subcontracting arrangements will be one of the subjects of the analysis in the next Chapter.

Furthermore, besides the Directive on temporary agency work, other relevant legislation also includes the coordination legislation mentioned above, which is essential for the social security rights of posted workers. According to the rules on the coordination of the social security system from Regulation 883/2004⁵⁷⁸ and the implementation of Regulation 987/2009⁵⁷⁹, social security contributions for posted workers are paid in the country in which the employer regularly operates, so in the sending country of the posted worker.⁵⁸⁰ Therefore, for the mobile worker who is posted abroad within the stable and long-term employment relationship with the employer, the situation is clear: they are keeping the employment contract with the employer in the home country, while the worker and the employer are continuing to pay the social contributions in relevant funds of the home country, just as if the worker has never left the country.⁵⁸¹ That means posted workers, whether sent directly or through a subcontracting chain, remain entitled to claim social security benefits in that country. Even though the purpose of these rules is the protection of workers, subcontracting chains regularly

⁵⁷⁵ Article 4 of the TWA Directive.

⁵⁷⁶ Houwerzijl, 2025.

⁵⁷⁷ Pavlovaite, 2020, p. 1.

⁵⁷⁸ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Official Journal L 166, 30/04/2004.

⁵⁷⁹ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, Official Journal L 284, 30/10/2009.

⁵⁸⁰ Voss, Faioli, Lhernould, Iudicone, 2016, p. 26.

⁵⁸¹ Lillie, Kärkkäinen, Kayran, 2025, pp. 4-5.

undermine the ability to supervise the payment of social contributions, especially when employers fail to comply or are difficult to trace. Also, it is essential to clarify that posted workers in subcontracting chains in the EU also enjoy the protection of national legislation and the collective agreements. In most Member States, the rights of posted workers under those arrangements are guaranteed equally to local workers in similar conditions. However, equality can vary depending on how collective agreements are applied. For example, in some Member States, posted workers benefit only from generally binding collective agreements, and sometimes only if they are posted for more than 12 or 18 months. Regional agreements can be applied just after this threshold expires.⁵⁸²

3.3. Concluding Remarks

The analysis conducted in this chapter showed that subcontracting, especially in relation to the posting of workers, is one of the most complex challenges in the modern European labour market. Even though it is formally based on the legitimate principles of freedom of contract and freedom to provide services, its practical application has revealed numerous structural weaknesses that the existing legal framework cannot accommodate.

Already, from the analysis of the terminology and the functioning of the subcontracting chains, it is evident that these are systems that are gradually fragmenting liability and hardening control possibilities. The more subjects are involved in such subcontracting arrangements, the more transparency decreases, and the risk to the workers at the bottom of the chain increases. In such circumstances, formal contractual relationships are less likely to reflect how work is organised in practice. When the element of posting workers is added, the complexity is additionally highlighted. A combination of multiple legal systems and varying levels of regulation is creating situations in which liability is spread, and workers fall between multiple legal regimes without effective protection. In that sense, it is not overdone to say that certain segments of the system are functioning at a level of legal construction that calls for clarity and control, even though, in practice, the opposite is often the case. In such a disbalance between the current legislative framework and the reality of the labour market, serious challenges arose.

⁵⁸² See more about the application of national legal frameworks (and collective agreements) on posted workers in subcontracting chains in: Andriescu, et. al., 2024, pp. 54-55.

In that context, this chapter has focused on analysing the current EU legal framework relevant to posted workers in subcontracting arrangements. PWD96, its 2018 amendment, and the Enforcement Directive from 2014 have undoubtedly laid the foundation for the protection of posted workers. However, their analysis clearly showed that such a framework is not suited to the complexity of subcontracting chains in practice and their challenges.

Firstly, the lack of clear and comprehensive regulation of subcontracting as such is leaving a significant space for different interpretations and rule circumvention. Even though the Enforcement Directive introduced certain mechanisms, especially in the liability context of the construction sector, this approach remains limited and partial. Limitations of the obligatory liability scheme to a single sector, with the delegation of broader regulation to Member States, are leading to a fragmented system of protection that does not align with the nature of subcontracting chains that are affecting a much broader scope of sectors. Additionally, the analysis showed that the existing mechanisms, such as liability of the subjects at the bottom of the chain, are not reaching the level at which the challenges begin and could be resolved. Also, the possibility of the due diligence defence is additionally weakening those mechanisms in practice. Furthermore, the legislative framework is not sufficiently responsive to the resulting and related phenomena, such as letterbox companies, misuse of temporary work agencies, and bogus self-employment. Even though those challenges are recognised, the solutions are only partial and often dependent on national approaches that are not harmonised. In that way, the space for regulatory arbitrage is open and for further deepening the differences in the approaches of Member States.

Finally, it can be concluded that the existing legal framework recognises the key challenges but does not address them in a way that adequately responds to their complexity and importance. EU legislation, in this case, acts reactively and is fragmented, while business models based on subcontracting have become systemic and sophisticated. That is why there is a clear impression that the current legislative solutions are lagging behind the development of practice. Therefore, a need for legislative changes on the EU level is being imposed. Such changes should be directed toward strengthening enforcement mechanisms, especially regarding the liability scheme. Without such an approach, there is a real danger that existing fraudulent subcontracting models will continue to operate within formally allowed frameworks, to the detriment of posted workers.

Consequently, further analysis is necessarily directed towards the question of enforcement and efficiency of existing mechanisms. Therefore, the next chapter will focus on the analysis of

selected enforcement mechanisms, with particular emphasis on identifying ‘best practices’ for the liability scheme to address the legislative and practical challenges identified in this chapter.

CHAPTER 4: Selected Enforcement Mechanisms for Preventing Posted Workers' Rights Violations in Subcontracting Arrangements

4.1. Introduction

As analysed above, the increasing use of subcontracting arrangements has raised numerous legal concerns, particularly regarding their effects on employer-employee relationships, the protection of posted workers' rights⁵⁸³, the risk of social dumping, and compliance with tax and social security obligations.⁵⁸⁴ Despite existing EU legislation, complex subcontracting chains and work intermediaries continue to be used to reduce costs and avoid responsibility. In such structures, workers often lack clear legal protection because it is difficult to determine who is legally liable to them. Fraudulent practices, such as analysed letterbox companies, bogus self-employment, or misuse of temporary work agencies, often occur within such subcontracting structures, while the main contractors distance themselves from the consequences. In those instances, workers shoulder the greatest burden, work in unsafe conditions, are left without pay or social contributions, and face pressure to oppose unionisation. Since the abusive practices are often performed cross-border, and the control and sanctioning are weak, this business model is still spreading, causing damage to the workers, but also to the *bona fidei* employers.⁵⁸⁵

As seen in Letta's report, the need for the normative determination of subcontracting arrangements is highlighted to prevent violations and abuses associated with such practices. It is emphasised once again that unregulated and complex subcontracting arrangements can undermine workers' protection, encourage social dumping, and destabilise the conditions for

⁵⁸³ On 3rd of December 2025, Deleu, in the regular meeting of the Committee on Employment and Social Affairs, highlighted that posted workers are a particularly precarious group in the EU labour market and should be recognised as an individual and specific challenge, especially in the context of the subcontracting chains. See: European Parliament (2025) Committee on Employment and Social Affairs Ordinary meeting. 3 December 2025. 20251203-0900-COMMITTEE-EMPL. [Online] (Accessed: 3 December 2025).

⁵⁸⁴ Amon, 2010, p. 232.

⁵⁸⁵ European Trade Union Confederation, 2025, 'For an EU Directive on subcontracting and labour intermediation'. Resolution adopted at the Executive Committee meeting of 1-2 October 2025. [Online] (Accessed: 30 November 2025).

fair market competition⁵⁸⁶. Additionally, such arrangements can lead to regulatory noncompliance⁵⁸⁷, particularly in the construction sector, where subcontracting accounts for a significant share of overall business activity, as shown above.⁵⁸⁸

As Cremers and Houwerzijl emphasised, international instruments that broadly regulate cooperative behaviour often ignore the dimensions of labour and social rights, while normative priority is given to environmental questions or to generally formulated obligations within the scope of human rights.⁵⁸⁹ Such practice is also evident in the latest EU legislative novelties.⁵⁹⁰ Nevertheless, coherent enforcement requires coordination of economic, social, and environmental policies, without mutual cancellation of obligations.⁵⁹¹ Although some improvements have been observed, labour standards are still not recognised as ‘business as usual’. Instead of integrating social obligations into business activities, corporations often limit themselves to formal and symbolic measures with minimal financial impact, aiming to demonstrate harmonisation. In that context, evaluations of business practices are predominantly based on economic criteria, such as cost-benefit analysis, risk, and incentives, while broader

⁵⁸⁶ As stated by the European Commission, the protection of workers’ rights is key to a fair and competitive market and is part of the basic EU legal framework. However, its enforcement across Member States’ practices remains variable. To improve that system, it is vital to ensure the effective implementation of EU legislation in national law, to resolve workers’ claims promptly and effectively, and to maintain continuous cooperation with national authorities and social partners. Finally, vigorous law enforcement is not only a legal obligation but also the basis for fair and stable work relationships. See: European Commission (2025) Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions. Quality Jobs Roadmap. COM(2025) 944 final. Brussels, 4 December 2025, p. 12.

⁵⁸⁷ Subcontracting has long-term consequences that go beyond the scope of the labour law and directly affect the health and safety of workers. Workers in subcontracting structures are often in particularly precarious positions, working without proper training, safety equipment, or knowledge of who is responsible for their safety, and the organisation of the work is fragmented across several companies. A tragic example of such systemic failure occurred in the port of Antwerp in June 2021, when the construction site collapsed, and five workers lost their lives, while twenty remained heavily injured. In the project, more than 280 subcontractors were engaged, indicating that liability and control were diluted to the extent that even identifying the victims was challenging. While the legal proceedings are ongoing, the injured workers and their families are still awaiting justice and compensation. See: Theodori, 2025.

⁵⁸⁸ Letta, 2024, p. 46.

⁵⁸⁹ Cremers, Houwerzijl, 2021. p. 32.

⁵⁹⁰ See, for example: Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, Official Journal L 1760, 5 July 2024.

⁵⁹¹ Cremers, Houwerzijl, 2021, p. 30.

social interests and objectives are systematically set aside⁵⁹².⁵⁹³ One related challenge is that most provisions and standards are grounded in principles that support multiple frames of harmonisation, yet complicate enforcement because they lack legally binding mechanisms and effective control along the value chain. The consequence is a significant gap between businesses' formal obligations and actual practice, and practitioners, such as trade union officers and workers' representatives, often encounter these differences. The imbalance between the 'law in the book' and 'law in the action' results from the mutually intertwined and inconsistently regulated legal areas. The challenge is further exacerbated by the subordination of social and labour rights to economic freedoms and the prioritisation of the everyday promotion of the business environment, which often leads to the neglect of growing inequality and the weakening of workers' protection.⁵⁹⁴

Therefore, as shown in the previous analysis, effective enforcement and harmonisation with the rules remain key challenges in cross-border subcontracting arrangements. The issues are reflected in several areas: first, the previously analysed EU legal framework does not provide effective preventive sanctions at the transnational level, thereby complicating the regulatory arbitrage landscape, while affected workers rely solely on national courts. Secondly, the corporate veil doctrine and the absence of explicit liability provisions in subcontracting chains exempt main contractors from subcontractors' obligations, even when they retain complete control. Thirdly, in many countries, the due diligence obligations of main contractors toward subcontractors are unclear or non-existent, further complicating liability systems. Fourthly, workers' legal interests are insufficiently protected; complaint mechanisms are weak; and

⁵⁹² This practice was evident even in the EU's Omnibus package. In February 2025, the European Commission introduced a package proposing revisions to several key elements of the EU framework for sustainable corporate management, particularly the rules on reporting and due diligence obligations. The initiative was a response to pressure from business actors to simplify regulations, with claims that existing ESG rules are unduly burdensome. However, the proposed changes raise important questions about the actual effects of such simplification, particularly with respect to the protection of labour and human rights, which should have remained a focus during the discussions. See: Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM(2025) 81 final, 2025/0045 (COD), Brussels, 26/02/2025.; Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, COM(2025) 80 final, 2025/0044 (COD), Brussels, 26/02/2025.; Commission Staff Working Document Accompanying the Documents: Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements and Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, SWD(2025) 80 final, Brussels, 26/02/2025.; Rühmkorf, 2018. See more on the critical evaluation of the Omnibus package in: Konjević, 2025, pp. 19-21.

⁵⁹³ Cremers, Houwerzijl, 2021, p. 32.

⁵⁹⁴ Cremers, Houwerzijl, 2021, p. 30.

financial risks are high, creating significant obstacles to enforcing their rights, while the application of criminal law to non-authentic or fraudulent business practices is often absent⁵⁹⁵.⁵⁹⁶ To address these challenges in subcontracting, the Commission has long developed an enforcement approach based on a combination of instruments, with particular emphasis on the complementary use of informative measures, state control through inspections and sanctions, and private-law forms of liability. Within that scope, adequate protection does not arise solely from the dominance of any single mechanism, but from the balance among them. Any weakening of the enforcement system's elements would necessitate adopting and strengthening additional instruments to preserve the overall level of effectiveness.⁵⁹⁷ This will be additionally highlighted in the further part of the research.

Therefore, the EU's activities in this area highlighted in 2025, with a focus on the sectors that prevalent with fraudulent practices, involved initiatives in the straightening of the enforcement of relevant legal framework of the EU, increasing the transparency of the national systems, such as prequalification systems, national registers or certified mechanisms, without pushing the unnecessary additional obligations, and considering how the social dialogue could contribute to the respecting of the existing rights and responsibilities. It also analysed whether sectors with a higher rate of incidents and fraudulent practices (such as construction, transport and logistics, agriculture, and the food industry) could align liability schemes or other corresponding mechanisms, while avoiding additional requests, litigation, and unnecessary administrative burdens.⁵⁹⁸ Additionally, in labour law studies on subcontracting over the past several years, several measures have been identified.⁵⁹⁹ In some cases, broadening liability schemes across the entire chain and limiting the number of levels in the chain have been proposed as possible solutions to labour law challenges, alongside other relevant mechanisms. Additionally, from its Report from the 30th of April 2024 on the implementation of the PWD18⁶⁰⁰, the European Commission recognised the national measures focused on limiting

⁵⁹⁵ See more in: Cremers, 2019.

⁵⁹⁶ Cremers, Houwerzijl, 2021, p. 30.

⁵⁹⁷ European Commission 'Proposal for a Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' COM (2012) 131 final, p. 20.

⁵⁹⁸ European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 12.; European Commission (2025) Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions. Quality Jobs Roadmap. COM(2025) 944 final. Brussels, 4 December 2025, p. 10.

⁵⁹⁹ See, for example: Cremers, Houwerzijl, 2021.; Heinen, Müller, Kessler, 2017.

⁶⁰⁰ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of

subcontracting levels and broadening liability schemes across the entire chain as ‘good practices’ for addressing the challenge of long chains of subcontracting⁶⁰¹, as will be critically analysed in detail below.

Following the previously mentioned challenges and identified flaws in the existing EU legislation, further analysis will focus on the mechanisms designed to protect the rights of posted workers in subcontracting arrangements. The focal point of the analysis is liability schemes, which, in scientific research and policy discussions, are often cited as mechanisms for detecting fraudulent practices and protecting posted workers' rights in complex subcontracting arrangements. In this regard, the research will focus on the analysis of the national solutions that are often recognised as the ‘best practices’, with the aim of detecting in which scope such liability models contribute to: 1) the effective enforcement of the posted workers' rights, especially wages⁶⁰², 2) serve as a deterrent instrument for the prevention of the fraudulent practices, and 3) are a mechanisms for a real practical contribution to rights protection. Finally, the research will also address other complementary mechanisms, such as due diligence and chain-level limitations.

4.2. Liability as Enforcement, Deterrent, and Practical Mechanism

Subcontracting liability encompasses the shared responsibility of multiple actors within subcontracting arrangements (chains), rather than solely the direct employer. It includes the main contractor, other contractors, and, in some instances, the client or user undertaking, which may be jointly responsible for protecting and enforcing workers' labour and social rights.⁶⁰³ The European Parliament has long emphasised that the introduction of liability schemes is crucial, as it enables an effective response to violations and circumvention of rules associated with

the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, Brussels, 30 April 2024.

⁶⁰¹ Sinander, 2025, p. 5.

⁶⁰² One of the important reasons for it is the fact that the liability rules for the social security contributions or taxes are usually not applicable to foreign subcontractors that are temporarily providing services in the other Member State. The collision rules state that foreign subcontractors are generally exempt from the material application of the host country's social security contributions and taxes. In the cross-border context, this means that national systems of liability for wage payment are often left as the only potentially effective protection mechanism, since the PWD obliges foreign employers to respect certain minimum working conditions in the host country. However, the liability for wages is not only a politically sensitive question but also raises several practical challenges, especially regarding the cross-border collection of unpaid amounts. See: Houwerzijl, Peters, 2008, p. 45.

⁶⁰³ Bogoeski, 2017, p. 5.; See also: Houwerzijl, Jorens, Peters, Gillis, 2012.

cross-border work under subcontracting and outsourcing arrangements. According to the Parliament, that mechanism would facilitate the creation of an open and fair internal market in which all businesses would operate under the same conditions.⁶⁰⁴ Also, in certain fields of labour law, liability mechanisms are already usual or directly regulated by the EU legislation. For example, this relates to the protection of health and safety at work, such as the hiring of illegal nationals from third countries, and, finally, to what will be analysed in detail: the payment of wages to posted workers.⁶⁰⁵

In a broader comparative context, previous research has shown that liability rules for subcontracting arrangements in most European countries were established in the 1960s and 1970s, including Italy, the Netherlands, Belgium, Finland, and France. By contrast, other countries introduced such rules much later. The common goal of these legislative interventions was to strengthen the protection of workers' rights, including, for example, measures against undeclared work and unfair competition practices.⁶⁰⁶ Nevertheless, several liability-circumvention strategies persisted afterwards, such as reclassifying posted workers as self-employed (bogus self-employment) and complicating control procedures through the use of temporary work agencies. Also, the practice showed that numerous posted workers have been exposed to rights violations, left without any part of their wages. Certain workers could not enforce their rights because the employer did not exist or had disappeared, as in cases involving letterbox companies.⁶⁰⁷ Therefore, these negative repercussions and the actual effectiveness of liability mechanisms, as noted in one study⁶⁰⁸, largely depend on how easily they can be circumvented in practice.

In this regard, the presumption of the effectiveness of the liability mechanisms is mainly based on the previous (empirical) research⁶⁰⁹ and its normative recognition in the EU law, as mentioned above. However, because certain prior relevant research relies on interview participants' subjective perceptions, this study is further limited to the main factors influencing the effectiveness of liability schemes in practice, focusing on the enforcement, preventive, and

⁶⁰⁴ European Parliament, 'Resolution on the social responsibility of subcontracting undertakings in production chains' 2008/2249(INI); Bakermans, 2014, p. 8.

⁶⁰⁵ European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 11.

⁶⁰⁶ Houwerzijl, Peters, 2008, p. 1.

⁶⁰⁷ Heinen, Müller, Kessler, 2017, pp. 22-23.

⁶⁰⁸ Houwerzijl, Jorens, Peters, Gillis, 2012, p. 159.

⁶⁰⁹ See, for example: Houwerzijl, Peters, 2008.; Houwerzijl, Jorens, Peters, Gillis, 2012.; Bakermans, 2014, p. 9.; Bogoeski, 2017.; Cremers, Houwerzijl, 2021.

practical effects of these mechanisms. This resulted from recognising the liability in subcontracting arrangements as an essential mechanism for protecting workers, as it encourages contractors to increase due diligence when selecting business partners. The transmission of liability risk in this regard serves as a deterrent and preventive measure, discouraging main contractors and investors from hiring unreliable subcontractors and obliging them to actively verify compliance with labour law obligations under the host countries' legislative frameworks.⁶¹⁰ The European Parliament has also consistently emphasised the deterrent effect of the liability mechanism, as it would reduce companies' willingness to cooperate with undertakings that violate the law.⁶¹¹ Those arguments were previously additionally supported by the publications of Jorens, Peters, and Houwezijl, which showed that the introduction of liability schemes can significantly affect the protection of fair competition. According to them, such a mechanism helps reduce wage dumping practices by encouraging main contractors to exercise greater diligence and caution when establishing business relationships within the subcontracting chain. In this way, liability is not focused solely on the direct employers but is also extended to other parties in the chain, thereby restoring the preventive effect and narrowing the scope for violations in the sphere of the posting of workers.⁶¹² Also, it is used as a form of self-regulation among private actors, making it less strict and more proportionate than direct state interventions, such as inspections and sections, as highlighted in the proposal for the Enforcement Directive⁶¹³.⁶¹⁴

Overall, the liability rules have generally proven effective. Their success depends on preventive measures for clients or main contractors, as well as on clear, simple, and stable rules. Social partners also play a vital role in the proposal and implementation of the rules. Additionally, strengthening social responsibility initiatives at the company or sector level may reduce rights violations in subcontracting arrangements.⁶¹⁵ Nevertheless, as explained below, the preventive effect of liability schemes depends on their type, since chain liability has shown significantly greater preventive potential than direct liability.⁶¹⁶ Moreover, Haidinger⁶¹⁷

⁶¹⁰ Heinen, Müller, Kessler, 2017, pp. 22-23.

⁶¹¹ European Parliament, 'Resolution on the social responsibility of subcontracting undertakings in production chains' 2008/2249(INI); Bakermans, 2014, p. 8.

⁶¹² Houwezijl, Jorens, Peters, Gillis, 2012, pp. 158-159.

⁶¹³ Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services COM/2012/0131 final, page 22.

⁶¹⁴ Heinen, Müller, Kessler, 2017, pp. 22-23.

⁶¹⁵ Houwezijl, Peters, 2008, p. 3.

⁶¹⁶ Bakermans, 2014, p. 10.

⁶¹⁷ See: Haidinger, 2016.

distinguishes regulatory approaches based on soft-law or hard-law mechanisms. Although some soft-law mechanisms, such as voluntary practices for responsible governance of supply chain operations or international framework agreements, play an essential role in regulating working conditions in subcontracting, the study will focus primarily on hard-law mechanisms governed by specific (national) legislations. Within these, as in the example of Bogoeski's study from 2017⁶¹⁸, only the liability rules that directly affect the enforcement of the individual rights of posted workers will be examined. The broader institutional aspects of liability schemes, including tax and revenue authorities, social insurance authorities, and customs offices, will not be part of the analysis.

Nevertheless, as mentioned earlier, within the broader legislative spectrum, international law does not provide clear liability rules for subcontracting arrangements. However, at the EU level, several Directives⁶¹⁹ have been introduced to regulate liability in cross-border subcontracting arrangements.⁶²⁰

For example, the Employers Sanctions Directive 2009/52/EC⁶²¹ introduced a broadly structured system of chain liability in cases involving the hiring or illegal stay of third-country nationals⁶²². However, the provision's formulation leaves room for interpretation, as it distinguishes between parties in the chain who were aware of illegal employment and those who were not.⁶²³ In cases involving long subcontracting chains, it is difficult to expect those higher in the chain to possess knowledge of the relevant circumstances, and such knowledge is difficult to prove in court.⁶²⁴ Moreover, although the Directive aims to preserve a substantial preventive effect, the requirement to prove knowledge of the information and the possibility of excluding liability on the basis of due diligence have, in practice, allowed Member States and contractors to significantly limit the scope of liability. According to studies, such exceptions in practice facilitate the avoidance of liability, particularly when contractors rely on the written statements of the subcontracts, thereby making it even harder to establish the knowledge of the

⁶¹⁸ Bogoeski, 2017, p. 5.

⁶¹⁹ See more in: Heinen, Müller, Kessler, 2017.; Cremers; Houwerzijl, 2021, p. 19.

⁶²⁰ Cremers, Houwerzijl, 2021, p. 31.

⁶²¹ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L 168, 30 June 2009.

⁶²² See also: European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 10.

⁶²³ Cremers, Houwerzijl, 2021, p. 19.

⁶²⁴ Bakermans, 2014, p. 11.

other subcontracting chain parties.⁶²⁵ Finally, it can be concluded that the system introduced by this Directive is of limited effectiveness and is not widely implemented in practice.⁶²⁶

Furthermore, the Seasonal Workers Directive⁶²⁷ left Member States with discretion to introduce mechanisms for holding subcontractors employing seasonal workers liable for infringements of the law, which can be extended to higher levels of the supply chain. Such sanctions and financial obligations may extend to the main contractor or direct subcontractors, provided that, under national legislation, the requirements of due diligence were not met.⁶²⁸

Another example of the liability schemes can be found in the Directive on improving working conditions in platform work⁶²⁹. It introduced a special provision on intermediaries to prevent circumvention of obligations through third employers, including subcontracting chains. Since platform work is often performed through complex, multipartite relationships, Member States are obliged to establish adequate mechanisms, including, if necessary, joint and several liability schemes. The aim is to ensure that people who work through platforms enjoy the same level of protection as they would in a direct contractual relationship with the platform.⁶³⁰

Finally, and most importantly for this research on posted workers in subcontracting chains, the 2014 Enforcement Directive, as analysed previously, was the first legislation on the posting of workers to directly address preventive measures to protect the rights of posted workers in subcontracting arrangements. Article 12 of the Directive that introduced the system of direct liability in the construction sector was of particular interest. It seeks to ensure that posted workers are not deprived of effective protection of their rights due to complex subcontracting structures. Therefore, that provision requires Member States to establish mechanisms that allow posted workers, if their rights are violated, to seek redress against the employer's direct subcontractor, whether or not the subcontractor is adjacent to the employer, for the rights guaranteed by Article 3 of the PWD. However, the scope of the obligatory

⁶²⁵ Cremers, Houwerzijl, 2021, p. 19.; Bakermans, 2014, p. 11.

⁶²⁶ Bakermans, 2014, p. 11.

⁶²⁷ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, Official Journal L 94, 28 March 2014.

⁶²⁸ European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 10.

⁶²⁹ Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work, Official Journal L, 2024/2831, 11 November 2024.

⁶³⁰ European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 10.

application of that provision is limited⁶³¹. It is required only for the construction sector, including postings through temporary work agencies. Other sectors are left outside of the Directive's scope and are left to the Member States' discretion⁶³². Such sectoral limitation has resulted from a broader historical and regulatory context that predated the introduction of the Enforcement Directive. Even before its entry into force, posted workers in the construction sector were common, leading to the often fraudulent practices observed, for example, in Belgium in the nineties. That system clearly demonstrated the need for special mechanisms to protect workers in those arrangements, as highlighted by the social partners. Additionally, the legislative focus on this sector was evident in the PWD96, which, among other measures, allowed basic working conditions to be regulated through collective agreements or arbitration decisions. Additionally, this scope limitation was justified by the statistical results, which indicated that the sector had the highest percentage of posted workers.⁶³³ However, as explained in the previous part of the study, construction is not the only sector affected by the challenges posed by posted workers in subcontracting arrangements, since several other labour-intensive sectors are seriously affected, too⁶³⁴. Because they were excluded from the scope of obligation, they were left to the discretion of the Member States.

Secondly, the Enforcement Directive established a narrow scope of the joint and several liability. With it, liability for violations of posted workers' rights could be broadened to the direct partner in the chain of command, and limited to a single link up in that chain. In practice, this meant that the subject could be responsible for paying the net wages and the contributions owed to the joint fund or to the social partners' institutions, if those elements are included in Article 3(1) of the PWD.⁶³⁵ Commissions' 2024 study identified five basic liability models applied in the Member States in the context of subcontracting. Those are: direct liability in the construction sector, direct liability in other sectors, joint and several liability for unpaid wages, subsidiary liability, and the (full) chain liability⁶³⁶. In addition to those models, numerous Member States introduced national rules governing the prior check-up of subcontractors and liability.⁶³⁷ The study also found that most Member States decided to introduce joint and several

⁶³¹ See: Houwerzijl, Peters, 2008, pp. 46-47.

⁶³² See: Houwerzijl, Peters, 2008, pp. 46-47.

⁶³³ Bakermans, 2014, pp. 16-17.

⁶³⁴ See: Heinen, Müller, Kessler, 2017, p. 51.

⁶³⁵ Houwerzijl, Peters, 2008, pp. 46-47.

⁶³⁶ European Commission (2024) Study supporting the Monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU, pp. 48-49, 56-58.

⁶³⁷ The European Labour Authority is currently mapping national practices (report expected in the second half 2026).

liability for unpaid wages⁶³⁸. In thirteen Member States, such systems are applied to all economic sectors⁶³⁹, adopting a broader approach than that provided by the Enforcement Directive. Finally, in response to the study's results, the European Labour Authority and the Commission are currently analysing the challenges posed by posted workers in subcontracting arrangements. The aim of these activities is to enhance cross-border cooperation and provide additional protection for national measures in this area.⁶⁴⁰

Therefore, as highlighted by the 2017 and 2021 studies, the liability system introduced by the Enforcement Directive is considered only partially effective. The reason is that it can be easily circumvented, for example, by including letterbox companies in the subcontracting arrangement. Moreover, the Directive anticipates the possibility of including a due diligence defense, which is not clearly defined. It is leaving a broad discrepancy among the Member States and, consequently, creating legal uncertainty. Finally, an additional challenge is that only one sector is included in the scope of obligatory liability, even though the other sectors are also affected.⁶⁴¹

Nevertheless, any discussion of liability in subcontracting arrangements should be situated within a broader context, as it is one of the most controversial questions in EU law. Suggestions toward more stringent liability models, including chain liability, advocated by some social partners, such as IG-Bau, have failed to gain traction in negotiations on the Enforcement Directive. A significant number of Member States weren't ready to introduce such mechanisms in their national legal systems, particularly for more complex subcontracting structures. That kind of resistance should be surprising, especially since it resulted from the differing interests of the mostly host and mostly sending Member States. In such circumstances, the Enforcement Directive could be understood as the result of a necessary political compromise that left the system on the 'soft' liability approach.⁶⁴² Later on, despite the *Wolff and Müller* case, which brought legal certainty regarding the direction of the legislation, discussions in the European institutions have not stopped, especially regarding the East-West division. Eastern EU Member States have primarily advocated limiting or abolishing the liability system, arguing that it impedes the freedom to provide services. By contrast, West-EU

⁶³⁸ AT, BE, BG, CY, DE, EE, EL, ES, FR, HR, HU, IE, IT, LU, MT, NL, PL, PT, RO, SE, SK.

⁶³⁹ AT, BE, BG, CZ, DE, FR, HU, IT, LU, MT, NL, PT, SK.

⁶⁴⁰ European Commission (2025) Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions. Quality Jobs Roadmap. COM(2025) 944 final. Brussels, 4 December 2025, p. 12.

⁶⁴¹ See: Heinen, Müller, Kessler, 2017.; Cremers, Houwerzijl, 2021, p. 20.

⁶⁴² Heinen, Müller, Kessler, 2017, p. 51.

Member States have, in most cases, supported strengthening liability systems and even the provisions governing them, highlighting their role in preventing unfair competition in the context of the posting of workers.⁶⁴³

Even afterwards, the European Trade Union Confederation has advocated introducing obligatory chain liability, under which all subcontractors, including the main contractor, would be liable for compliance with the obligations under the subcontracting arrangement. With that approach, the entire liability system should become stronger. However, in their discussions, ETUC did not address the deeper reasons for considering chain liability more suitable than the existing liability system, but instead, it has spoken out against circumventing labour standards and working conditions by establishing complex, non-transparent subcontracting schemes.⁶⁴⁴

However, the latest 2024 European Commission study, conducted to support and monitor the PWD18 and Enforcement Directive, supports the ETUC's long-standing approach. According to their results, the liability system in subcontracting arrangements regulated by Article 12 of the Enforcement Directive has, in practice, proven especially effective in Member States that have introduced chain liability. In such systems, liability serves not only as a post hoc protection mechanism but also as a preventive and deterrent mechanism against violations of posted workers' rights.⁶⁴⁵

Finally, although liability systems designed to protect them in the Member States often share similar solutions, in practice, there are significant differences among them. These are primarily focused on the application's scope, the upper limits of applicable liability, and the possibility of avoiding liability.⁶⁴⁶ At the national level, they also introduce various workers' protection mechanisms within liability schemes, including wage payments, workplace health and safety, social contribution payments, and tax obligations. However, in practice, exceptions from liability, a focus on due diligence, and uneven interpretations of legal norms created opportunities for parties along the chain to avoid liability. In this case, workers are often confronted with significant enforcement challenges, particularly in initiating and pursuing civil proceedings and in the already complex process of posting. In this regard, it is worth emphasising that the Enforcement Directive strengthened the position of trade unions and other

⁶⁴³ Bakermans, 2014, p. 11.

⁶⁴⁴ Bakermans, 2014, pp. 24-25.

⁶⁴⁵ European Commission (2024) Study supporting the Monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU, p. 196.

⁶⁴⁶ European Commission (2024) Study supporting the Monitoring of the Posting of Workers Directive 2018/957/EU and of the Enforcement Directive 2014/67/EU, p. 196.

relevant associations and institutions in protecting the rights of posted workers by introducing the possibility of their participation in court and administrative procedures in the posted workers' interest, with their consent⁶⁴⁷. Certain countries, as will be analysed later, have taken additional steps to further protect the rights of posted workers in subcontracting arrangements, either by significantly broadening the scope of the liability systems or by emphasising the obligation of verification at the top of the chain or by fighting against the formal and artificial corporate constructions, etc.⁶⁴⁸

However, the question remains: how do posted workers claim their right to unpaid wages, given that the system is inherently complex, encompassing multiple legal systems and national jurisdictions, and whether the chain liability is actually effective. In practice, holding companies that are held liable for formally employing posted workers are often ineffective, particularly for letterbox companies or employers that are difficult to reach. Therefore, from the perspective of posted workers, once a more effective solution has been identified, the focus should be on the enforcement mechanisms in the host country where they are performing their services. That approach does not call into question the country of origin but reflects the need to identify a mechanism to ensure the enforcement of workers' rights when the direct employer fails to fulfil its legal obligations. Since the posting of workers occurs within multilayered contractual relationships governing service provision, it is important to determine under what conditions, and by which parties to those relationships, liability can be imposed for infringements of posted workers' rights.⁶⁴⁹ Therefore, the following analysis will first focus on the types of liability schemes and their (dis)advantages, and then examine the national practices of the (common) host countries to identify possible 'best' solutions for the general EU approach.

4.2.1. Joint and Several Liability

Joint and several liability is a form of liability limited to a single level of the employment relationship and triggered when the subcontractor fails to perform its payment obligations. The contractor, together with the subcontractor, can then be held fully liable for the total amount of unpaid debts.⁶⁵⁰ Consequently, if a subcontractor fails to pay wages, tax obligations, and social

⁶⁴⁷ Article 11(3) of the Enforcement Directive.

⁶⁴⁸ Cremers, Houwerzijl, 2021, p. 31.

⁶⁴⁹ Bogoeski, 2017, p. 4.

⁶⁵⁰ Houwerzijl, Peters, 2008, p. 2.

security contributions to its workers and to the relevant authorities, the contractor may be held liable for the debt. In this way, both workers and authorities have an additional guarantee of payment, without the need for a determination of guilt.⁶⁵¹ Since the payment and liability obligations would be split between the contractor and the subcontractor, it is up to them to sort out their respective obligations.⁶⁵² This concept is based on the idea that the creditor can enforce its rights against the party with the best financial capacity, typically the contractor positioned higher in the subcontracting chain, which is, in most cases, the main contractor.⁶⁵³

Under the Enforcement Directive, direct liability applies only to the contractor for whom the employer is a direct subcontractor.⁶⁵⁴ In practice, however, this liability can be easily circumvented by using longer chains of subcontractors. The consequence is that the main contractor is no longer directly liable for paying wages to posted workers, and if the additional subcontractor ceases to exist after the posting period, enforcing wage payment becomes almost impossible.⁶⁵⁵ Even in a comparison of draft versions of the Enforcement Directive, several procedural differences and flaws are evident. Namely, the second draft did not introduce conditions on the application of liability only in posting situations and did not require the non-discriminatory protection of the rights of workers of direct subcontractors. Additionally, the obligation to pay uncovered wages, taxes, and social security contributions, and the inclusion of funds and social partner institutions in enforcement, have been removed from the second draft.⁶⁵⁶ Therefore, already the Enforcement Directive procedure has weakened the position of (sub)contractors, reduced the level of protection for posted workers, and limited the effectiveness of the liability system, particularly in longer and more complex subcontracting arrangements. This highlights the need for additional mechanisms to ensure the adequate protection of posted workers in practice.

4.2.2. (Full) Chain Liability

Chain liability is a form of liability under which joint and several liability applies to all parties to the subcontracting arrangements, not only the direct contractor. This provides a

⁶⁵¹ Heinen, Müller, Kessler, 2017, p. 21.

⁶⁵² Houwerzijl, Peters, 2008, p. 9.

⁶⁵³ Houwerzijl, Peters, 2008, p. 9.

⁶⁵⁴ Art. 12 of the Enforcement Directive.

⁶⁵⁵ Bakermans, 2014, pp. 18-19.

⁶⁵⁶ Bakermans, 2014, pp. 18-19.

creditor with the option to enforce its rights against all parties in the chain, who are jointly and severally liable for the entire debt. In other words, liability may extend not only to the contractor but also to the main contractor.⁶⁵⁷ It is important to emphasise that the main contractor need not be the investor or client. When national legislation broadens liability for investors or clients, the notion of ‘full chain liability’ emphasises that it extends to all parties in the subcontracting chain.⁶⁵⁸ For example, the parent company in Germany receives the contract to build the apartment complex in the Netherlands. The company itself leads the project, but the work is divided among three main subcontractors: a finish electrical subcontractor, a Dutch masonry subcontractor, and an Italian architectural subcontractor. A Finnish subcontractor is further hiring a Portuguese second-tier subcontractor to install the optical cable, which then engages a French company to provide workforce (posted workers from Poland, Latvia, and Hungary). Finally, if the Finnish company fails to pay wages to Latvian workers, and if there is a system of full chain liability in the Netherlands, all parties in the chain, from the parent company to the last-hired company, could be held liable for the unpaid wages.⁶⁵⁹ Nevertheless, regarding chain liability, European social partners and their organisations hold diverse views on its importance and effectiveness. While trade unions consider that full chain liability represents the strongest mechanism for ensuring the effective functioning of the system of posted workers in subcontracting arrangements, employers emphasise that such liability is neither practical from an economic nor a contractual perspective.⁶⁶⁰ It is worth noting that chain liability offers significant advantages, particularly for small and medium-sized companies. For example, they are not exposed to unfair competition from foreign companies, yet they are considered reliable contractors, thereby reducing the risk of claims.⁶⁶¹

Furthermore, previous studies have found that chain liability is a more effective mechanism for protecting the rights of posted workers in subcontracting arrangements than direct liability, as it encompasses the entire subcontracting chain, including the main contractor and, in some cases, the investor. That encourages the more careful selection of subcontractors. Therefore, this liability form serves a dual function: protecting the posted workers in the chain and protecting the state by ensuring tax compliance. For this analysis, the emphasis is on the first function.⁶⁶² Consequently, chain liability has a greater preventive effect than direct liability,

⁶⁵⁷ Houwerzijl, Peters, 2008, p. 9.

⁶⁵⁸ Heinen, Müller, Kessler, 2017, pp. 21-22.

⁶⁵⁹ The example was taken from the source, but revised and adopted by the author. See: Amon, 2010, pp. 233-234.

⁶⁶⁰ Houwerzijl, Peters, 2008, p. 45.

⁶⁶¹ Bakermans, 2014, p. 44.

⁶⁶² Heinen, Müller, Kessler, 2017, pp. 22-23.

as it encompasses the entire subcontracting arrangement. This stimulates all parties involved to diligently select business partners and monitor their work to avoid liability.⁶⁶³ Here, it is important to emphasise that the choice of subcontractors is crucial in the system of the chain liability. For example, in the public procurement context, the price shouldn't be the only criterion for selecting business partners for construction and other projects. Directive 2004/18/EC on the coordination of the public procurement procedures, just as the ILO's Convention no. 94 on public contracts, predicts the possibility, and even the obligation, of involvement of social clauses in public contracts. In that way, they sought to secure respect for subcontractors' labour and social standards. The purpose of such clauses is to prevent situations in which clients, through, for example, too low prices or too short deadlines, indirectly put pressure on subcontractors that are unable to comply with wage, working conditions, or social protection legal requirements. In other words, liability for protecting workers cannot be pushed solely onto the last tier in the chain, but it needs to start already in the phase of choice and contracting.⁶⁶⁴

Therefore, although chain liability is more effective than direct liability, which affects only one section of the chain⁶⁶⁵, to improve the enforceability of chain liability for the protection of posted workers in subcontracting arrangements, as highlighted by Bogoeski, several elements must be considered. Firstly, the future provisions on EU-level liability must be clearly formulated and cover as broad a range of situations as possible. Because many parties in the chain are involved in the liability scheme, it is more likely that posted workers will assert their rights in host countries, particularly regarding wage payments. Furthermore, a clear, broadly formulated system of chain liability could eliminate existing differences among Member States in liability models and thereby facilitate cooperation among courts and relevant authorities in cross-border cases. Finally, despite the system of liability being broadly formulated, its practical effectiveness is hardly imaginable without the strong role of trade unions in representing posted workers, a development reflected in CJEU case law, particularly *Sähköalojen ammattiliitto*^{666, 667}. Nevertheless, despite all efforts to establish a comprehensive and effective liability system, it is important to recognise that there will always be instances of non-compliance, rule-circumvention, or fraudulent practices. The full effectiveness of the liability

⁶⁶³ Houwerzijl, Jorens, Peters, Gillis, 2012, p. 159.

⁶⁶⁴ Houwerzijl, Peters, 2008, p. 49.

⁶⁶⁵ Bakermans, 2014, p. 10.

⁶⁶⁶ Judgment of the Court (First Chamber) of 12 February 2015. *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*. Case C-396/13. ECLI:EU:C:2015:86.

⁶⁶⁷ Bogoeski, 2017, p. 3.

schemes and the enforcement rules is not possible. In the Member States, it is always possible to find extreme individual cases of fraudulent practices for which liability schemes are ineffective, however, such cases do not contribute to understanding the broader aspects of the phenomenon.⁶⁶⁸ Therefore, the research focuses on identifying the most effective or the most impactful liability schemes for the most common fraudulent practices in the context of the inclusion of posted workers within complex subcontracting arrangements.

4.2.3. National Approaches to Liability Schemes: Search for ‘Best Practices’

The liability rules governing subcontracting relationships have been developed gradually and at different times across European countries. While Italy and the Netherlands had already introduced such mechanisms in the 60s, Belgium, Finland, and France followed suit only in the next decade. By contrast, some countries, such as Spain, Austria, and Germany, established liability systems for subcontracting much later, mostly between the 80s and the early 2000s.⁶⁶⁹ In that context, liability schemes in subcontracting relationships, which involve the liability of multiple parties within the system, were usually developed through a clearly defined material, personal, and territorial scope of application across diverse national legal frameworks. Currently, they usually include obligations to pay wages, social security contributions, and employment taxes.⁶⁷⁰ Nevertheless, in light of a lack of harmonisation of legal solutions and the wide discretion left to Member States to strengthen existing liability schemes, it is worth highlighting the host country's legislation as a key determinant of the scope of the posting of workers. Specifically, the host-country rules under which the service is actually provided are shown to be key to protecting posted workers' rights, particularly in the context of liability in complex subcontracting arrangements. Consequently, given the data available at the time of writing⁶⁷¹, the analysis focuses on the effectiveness of Member States' liability systems, most commonly referred to as host countries with a good regulatory framework for posted workers. Their example could encourage other Member States to adopt good practices.

⁶⁶⁸ Heinen, Müller, Kessler, 2017, p. 68.

⁶⁶⁹ Houwerzijl, Peters, 2008, p. 10.

⁶⁷⁰ Houwerzijl, Peters, 2008, p. 2.

⁶⁷¹ The countries for the analysis were chosen based on the data published in May 2025: De Wispelaere, De Smedt, Pacolet, 2025.

Nevertheless, the effectiveness of the national liability models can be analysed at least from two perspectives. One comes from the role of institutions, competent authorities, and other involved actors, for whom the key question is whether this model can more effectively sanction rule violations and ensure the collection of public payments, including taxes, contributions, and similar obligations. Another approach, from the perspective of the individual rights of posted workers, asks whether the mechanism of liability could, in practice, help them enforce their rights, such as unpaid wages, by holding the subjects in the chain liable. Even though this model was introduced mainly in response to abusive practices and pressure on labour standards, especially in the construction sector, it is now more visible in broader public and institutional discourse. Instead of approaching posted workers as a factor in reducing wages or working conditions, as analysed previously, this approach recognises them as a precarious group that should benefit from the same rights as other workers in the same positions⁶⁷². Consequently, further analysis focuses on the latter approach, examining how chain liability can directly and concretely affect the protection of posted workers' individual rights in subcontracting arrangements.

Specifically, Germany, Belgium, Austria, and the Netherlands are selected as the relevant countries for analysing liability systems in subcontracting arrangements in the context of the protection of posted workers for two mutually interrelated reasons. On the one hand, these are countries highlighted in the European Commission's official reports⁶⁷³ as important hosts of posted workers, especially in labour-intensive sectors. On the other hand, those same countries are also highlighted in reports as examples of national legislation that, within the scope of liability for the payment of wages to posted workers and the protection of their rights, introduced measures that override the minimum standards set by the previously detailed, analysed EU legislation⁶⁷⁴. In this regard, it is worth emphasising that Italy, for example, also has a strict liability system, but is not affected to a greater extent by the cross-border subcontracting practices.⁶⁷⁵ Also, although France is one of the important host countries for

⁶⁷² Kahmann, 2006; See also approaches used in: Bogoeski, 2017.

⁶⁷³ European Commission (2025) Directorate-General for Employment, Social Affairs and Inclusion, Posting of workers – Collection of data from the prior declaration tools – Reference year 2023. Brussels: Publications Office of the European Union, p. 24.

⁶⁷⁴ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, Brussels, 30 April 2024.

⁶⁷⁵ See: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, Brussels, 30 April 2024.; Commission Staff

posted workers, the available relevant research⁶⁷⁶ has not identified it as a particular ‘good practice’ that could serve as an example for other Member States, especially CEE countries. On the other hand, Germany, Belgium, Austria, and the Netherlands are among the ten countries that have introduced various forms of chain liability or broadened liability schemes and have strong administrative and enforcement mechanisms.

Methodologically, the choice of those countries provides an overview of systems that are often perceived as examples of ‘best practice’ in the European regulatory discourse⁶⁷⁷, yet operate under real conditions of intensive posting of workers and strong market impact. In that way, the analysis of rarely applicable models is avoided⁶⁷⁸, and the focus is on the legal regimes that are shaped precisely in response to the concrete issues of non-payment of wages, circumvention of obligations, and fragmentation of liability in subcontracting relations. The critical evaluation framework for each system, as well as the comparative analysis of these countries, is therefore enabling a deeper understanding of how the different liability models are applied in practice, their boundaries, and the extent to which they contribute to the effective protection of posted workers in subcontracting relationships. The final aim of this analysis is not to advocate a unique, equalised model of liability at the EU level, but to observe the possibilities for developing a harmonised approach based on the recognisable elements of effective national models. Such an approach would be directed towards strengthening the existing EU legal framework, which has been analysed above, since, in its current version, as

Working Document Accompanying The Document Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD/2024/320 final.

⁶⁷⁶ See, for example: Heinen, Müller, Kessler, 2017.; Houwerzijl, Peters, 2008.

⁶⁷⁷ Therefore, the analysed countries are not the only ones considered as ‘best practice’, since Italy could also be classified as one, but they are a combination of the common host countries and the good regulatory solutions. See, for example, about the Italian system: Heinen, Müller, Kessler, 2017, pp. 78-82.

⁶⁷⁸ For example, Denmark and Finland have taken additional appropriate enforcement measures under Article 12(6) of the Enforcement Directive. In Denmark, the Labour Market Fund for Posted Workers has been established. If a worker posted to Denmark and included in the collective agreement does not receive their salary, they can request payment from the fund. After the payment, the employer and the Danish service recipient are obliged to pay the extraordinary contribution, and the fund then tries to reimburse it from the employer in their home country. The system is financed by contributions from all employers providing services in Denmark. On the other hand, in Finland, a posted worker who did not receive the minimum wage may inform the investor or main contractor, who are obliged to request proof of payment from the employer. It should deliver the evidence to the worker and, if needed, to the authorities. However, even though there are sanctions for non-compliance, liability for paying wages is not being transferred to the contractor. See: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System (‘the IMI Regulation’), COM/2019/426 final, 25th of September 2019.

highlighted even by the European Commission⁶⁷⁹, does not secure the decent and effective protection of posted workers in subcontracting chains in the EU.

4.2.3.1. Germany

In Germany's economy, work in sectors, most often involving posted workers, is organised through complex subcontracting chains in which several mutually connected undertakings participate. Empirical evidence from government sources indicated that posted workers in Germany are primarily concentrated in construction, the meat industry, slaughter, the metal industry, manufacturing, and private households. A common characteristic of those activities is the pronounced dependence on multilayered contracting, through which liability for working conditions is often diluted by complex contractual relationships. In such an environment, the German liability system is at the forefront, as it is designed to strengthen the protection of workers' rights, which is positioned at the end of those chains, especially for posted workers, who are most vulnerable in such arrangements.⁶⁸⁰

Historically, the liability system for subcontracting arrangements in Germany was first developed specifically in the context of the posting of workers (or the protection of migrant workers), underscoring its role in enforcing labour rights and addressing fraudulent practices in the construction sector⁶⁸¹. As a response to the spread of multilayered subcontracting structures, Germany already, in 1996, with the introduction of the Posted Workers Act (AEntG), introduced liability in the construction sector, and certain sectors connected to navigation.⁶⁸² Even though the new rules were formally intended to protect workers posted from other Member States to Germany, their main goal was to protect domestic employers and companies. With the introduction of such a liability system, Germany sought to limit the exposure of its labour market to competition arising from the globalised economy, especially from Portugal and Spain at the time.⁶⁸³ However, that system introduced only an embryonic liability scheme⁶⁸⁴, limited

⁶⁷⁹ See: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, Brussels, 30 April 2024.

⁶⁸⁰ Bogoeski, 2017, p. 5.

⁶⁸¹ Houwerzijl, Peters, 2008, p. 12.

⁶⁸² Bogoeski, 2017, p. 6.

⁶⁸³ Heinen, Müller, Kessler, 2017, pp. 71-73.

⁶⁸⁴ Arbeitnehmer-Entsendegesetz (AEntG 1996) - Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen vom 26.02.1996 (BGBl. I 1996, pp. 227-229).

to administrative sanctions⁶⁸⁵ and attributable to the contractor's knowledge or negligence⁶⁸⁶. Although that legislation established important preventive obligations for clients and contractors, including due diligence in selecting and controlling subcontractors, it did not provide workers with a direct, enforceable claim against other parties in the subcontracting chain. Legislators' focus was primarily on regulating the behaviour of business actors and strengthening controls, rather than on the individual rights of posted workers. Consequently, the protection of workers remained secondary and depended on administrative sanctions, thereby limiting the effectiveness of this early model relative to later, stronger liability schemes.⁶⁸⁷ Accordingly, the early and comprehensive legislative basis of the liability scheme focused on preventing the shifting of responsibility down the chain, at the expense of posted workers, who are usually positioned at the bottom. Therefore, although Germany was a pioneer in introducing the liability scheme in the posting of workers legislation, even before PWD96, the initial system had numerous defects.⁶⁸⁸

Later, the revision of the Posted Workers Act in 1999⁶⁸⁹, amid changes in the political landscape⁶⁹⁰, marked a significant shift in the approach to liability schemes in subcontracting arrangements. For the first time, a strict, unlimited-liability system has been introduced for all parties involved in subcontracting arrangements in the construction sector⁶⁹¹.⁶⁹² The new system allowed posted workers to claim unpaid net wages from any party in the chain, regardless of whether the party acted negligently or was even aware of the unpaid wages. Additionally, workers no longer needed a prior court decision against their direct employer to approach the other parties in the chain. Such a model triggered a significant backlash from employers' organisations and the main sending countries of posted workers. The complaints mostly argued that liability wasn't based on a breach of due diligence⁶⁹³, but was automatically

⁶⁸⁵ Arbeitnehmer-Entsendegesetz (AEntG 1996) - Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen vom 26.02.1996 (BGBl. I 1996, pp. 227-229).

⁶⁸⁶ Arbeitnehmer-Entsendegesetz (AEntG 1996) - Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen vom 26.02.1996 (BGBl. I 1996, pp. 227-229).

⁶⁸⁷ Bogoeski, 2017, p. 7.

⁶⁸⁸ Cremers, Houwerzijl, 2021, p. 21.

⁶⁸⁹ See § 1a, AEntG 1999; The revision of 1999 served to adapt the German Posted workers law to the Posted workers directive 96/71/EC.

⁶⁹⁰ Kahmann, 2006).

⁶⁹¹ § 1 a AEntG 1996.

⁶⁹² Bogoeski, 2017, pp. 7-8.; Schlachter, 2010, p. 39.

⁶⁹³ From its introduction, AEntG caused strong and long disagreements between social partners. Employers' organisations in the construction sector have opposed the liability system, arguing that it is unjustified because it imposes liability on undertakings that neither acted wrongly nor could have caused the violation. According to their view, liability should be linked to proven guilt or, at least, to the subject's negligence. Trade unions, by contrast, have defended the existing model, noting that its strength lies in its independence from guilt

triggered, even in subcontractors' insolvency cases⁶⁹⁴. However, the *Wolff and Müller* case before the CJEU later confirmed that wage payments are a legitimate public-interest aim and can justify the limitation of market freedoms.⁶⁹⁵ Even before that CJEU decision, the German Federal Labour Court took a clear position that guarantor liability can apply even in relationships involving companies outside the EU. In one of the 2004 decisions⁶⁹⁶, it was held that the German construction company that hired the Croatian subcontractor is liable for the payment of net wages to workers. That liability was based on the posting of workers' rules, just as the obligatory collective agreement that was regulating minimum wage in the construction sector.⁶⁹⁷ A few other German cases concerning liability that reached the appeal or cassation instance at that time further strengthened this approach, addressed the question of liability or of general subcontracting arrangements in the posting scenarios,⁶⁹⁸ and highlighted that chain

determination. Such an approach, in their view, enables quicker and more effective protection of posted workers and greater flexibility in complex subcontracting arrangements. See: Houwerzijl, Peters, 2008, p. 31.

⁶⁹⁴ See: Schlachter, 2010.

⁶⁹⁵ Bogoeski, 2017, pp. 7-8.

⁶⁹⁶ BAG Urteil v. 20.07.2004 – 9 AZR 345/03. Available at: <https://www.bundesarbeitsgericht.de/entscheidung/5-azr-95-10/> (Accessed: 13 December 2025).

⁶⁹⁷ Fechner, 2021, p. 110.

⁶⁹⁸ In practice, numerous questions arose regarding the liability of the contractors as guarantors. It has been discussed, for example, whether the contractor can call upon the lack of knowledge, just as on the limitations on its liability. It has also been clarified that this liability does not apply in all situations, for example, when the company is hiring a subcontractor to build its own business premises. In certain cases, courts have discussed questions of organisational independence of the main contractor, which was also relevant in the context of case law of the CJEU, just as the process questions, including the validity of the power of attorney that posted workers gave and the issues of proving, such as working time and the possibility for the guarantor to call upon being not informed. One of the more complex cases came before the Federal Labour Court in 2007 and showed how hard it is for posted workers to enforce their rights within these systems. It was the case of a construction worker who sought compensation for unpaid vacation pay while working in Germany. Even though certain payments were processed afterwards, partly by the guarantor and partly by the employer, the worker has not been informed in a timely manner of their rights, partly because the competent authority could not obtain the necessary data from the employer. The court has concluded that this does not affect the statute of limitations, which is why the request was submitted after the deadline. Case law also confirmed that liability need not be limited to the main contractor. That is how, as early as 2005, it was determined that even subcontractors in the chain can be held liable for paying the minimum wage if the direct employer does not. In one of the particularly interesting cases from 2007, the court had to decide on the request of workers who were formally declared self-employed under the law of another Member State. Despite the application of the German concept of the employment relationship, those workers were deemed employed and given minimum-wage protection. At the same time, it has been confirmed that neither the employer's insolvency nor the guarantor's inability to reimburse the amount paid frees them from liability to the workers. See: Fechner, 2021, p. 111.; BAG v. 02/08/2006 - 10 AZR 348/05. Available at: <https://lexetius.com/2006,2291> (Accessed: 14 December 2025).; BAG v. 28.03.2007 – 10 AZR 76/06. Available at: <https://lexetius.com/2007,895> (Accessed: 14 December 2025).; BAG v 19.11.2008. – 10 AZR 864/07. Available at: <https://datenbank.nwb.de/Dokument/328268/> (Accessed: 15 December 2025); BAG v 17.08.2011 - 5 AZR 490/10. Available at: <https://www.bundesarbeitsgericht.de/entscheidung/5-azr-490-10/> (Accessed: 15 December 2025); BAG v 14.08.2007 - 9 AZR 167/07. Available at: <https://lexetius.com/2007,3036> (Accessed: 15 December 2025); Labour State Court Rhineland-Palatinate 3 August 2005 – 9 Sa 1330/02.; Hessian State Labour Court 29 October 2007 – 16 Sa 2012/06.; See also, for example: BAG Urteil v. 12.01.2005 - 5 AZR 617/01, in which the German Court claims that the liability is in accordance with the freedom to provide services as the EU fundamental freedom. Available at: <https://datenbank.nwb.de/Dokument/207941/> (Accessed: 10 December 2025).

liability is a necessary and proportionate instrument for the effective enforcement of labour law⁶⁹⁹.

Therefore, reform had a clear preventive dimension, as it encouraged contractors to structure subcontracting relationships more carefully and strengthened the legal position of posted workers, particularly in insolvency cases and those involving disappearing employers⁷⁰⁰. An especially controversial aspect of the reform was the authorisation of the Labour Ministry, which, through a unilateral decision, could broaden the scope of mandatory collective agreements⁷⁰¹, creating the institutional basis for expanding chain liability beyond the construction sector.⁷⁰²

Nevertheless, key transformations and improvements to the system occurred since 2015 with the introduction of the statutory minimum wage (Mindestlohngesetz: MiLoG)⁷⁰³, which removed the link between liability in subcontracting arrangements and specific sectors, making it a universal mechanism applicable to all posted workers in the German market. Therefore, the system's basis became clear: under AEntG, in conjunction with MiLoG, the main contractor could be held liable for all debts incurred by subcontractors at lower levels of the chain. That liability includes not only unpaid wages but also legally required social security contributions⁷⁰⁴.⁷⁰⁵ Therefore, during this time, the liability system had several extensions of its scope of application. With it, liability has gradually intensified as the legislation has expanded to encompass a broader range of sectors and levels.⁷⁰⁶ According to the 2024 Report on the

⁶⁹⁹ See: Schlachter, 2010; Schlachter, 2013.

⁷⁰⁰ Briefing note No. IP/A/IMCO/SC/2006-070, Liability of principal contractors: Selected national experiences, Centre for European Policy Studies on behalf of DG Internal Policies, Policy department: Economic and Scientific Policy, 2006, Brussels.

⁷⁰¹ Schlachter, 2010, p. 35.

⁷⁰² Bogoeski, 2017, pp. 7-8.

⁷⁰³ Mindestlohngesetz (MiLoG 2015) – Gesetz zur Regelung eines allgemeinen Mindestlohns vom 11.08.2014. (BGBl. I S. 1348), das zuletzt durch Artikel 2 des Gesetzes vom 22. Dezember 2025 (BGBl. 2025 I Nr. 369) geändert worden ist.

⁷⁰⁴ The German liability for social security contribution that was introduced in 2002 had a limited effect in practice: a small number of sanctions and minimal financial results, with, at the same time, high administrative costs for the construction sector. The cost of enforcement was multiplied by the benefits, leading to a general consensus to implement the reform. While employers advocated abolishing the system due to its overly complex bureaucracy, trade unions advocated strengthening it by expanding the liability scheme and centralising control. The government acknowledged the potential benefits of the liability, but highlighted serious challenges to its practical enforcement. However, the German social security contribution scheme is much narrower than, for example, the Italian one. Chain liability in this regard exists in the construction sector, meaning the construction company can be jointly liable for its subcontractor's unpaid contributions, including those payable abroad. It can be relieved of liability if it can prove due diligence, such as by obtaining confirmation from the relevant authority. Houwerzijl, Peters, 2008, p. 33.: See more in: Van Hoek, Houwerzijl, 2011.; Wagner, Berntsen, 2016, pp. 193-206.; Heinen, Müller, Kessler, 2017, pp. 74-75.

⁷⁰⁵ Cremers, Houwerzijl, 2021, p. 21.; Bogoeski, 2017, p. 9.

⁷⁰⁶ Asshoff, 2008, p. 24.

Implementation of the Enforcement Directive, the German liability system has spread throughout the entire economy.⁷⁰⁷ That is particularly relevant for the meat industry, since only a small proportion of workers in that sector are directly employed, and a significant number are posted workers hired through subcontractors⁷⁰⁸. Also, the wages in that sector were particularly low, and the workers were often posted through letterbox companies from Poland, Hungary, and Romania.⁷⁰⁹

Therefore, the German system's strictness and effectiveness stem from its uncompromising legal approach, which holds the top-tier subjects liable regardless of guild or personal status. That means they cannot avoid the obligation by claiming they were cautious. Even if they conducted the most comprehensive due diligence check-up before hiring the subcontractors, that does not exclude him from the potential liability, since there is no 'escape clause', as predicted by the Enforcement Directive.⁷¹⁰ According to the current Article 14 of the Posted Workers Act, *'A contractor who engages another contractor to perform work or services is liable for the obligations of that contractor, a subcontractor, or a temporary employment agency engaged by the contractor or a subcontractor to pay the minimum wage to employees or to pay contributions to a joint institution of the collective bargaining parties pursuant to Section 8, as if they were a guarantor who has waived the right to raise the defense of prior recourse. The minimum wage within the meaning of sentence 1 comprises only the amount payable to employees after deduction of taxes, social security, and unemployment insurance contributions or equivalent social security expenses (net wage).'*⁷¹¹ With this provision, the German legislator sought to ensure that, despite the behaviour of the direct employer, posted

⁷⁰⁷ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), COM/2019/426 final, 25th of September 2019.

⁷⁰⁸ See also: Cremers, Houwerzijl, 2021, p. 12.

⁷⁰⁹ In order to prevent those abuses, in 2017, the Law on Ensuring Workers' Rights in the Meat Industry was adopted, introducing joint and several liability for contractors and subcontractors for social security contributions in that industry. Additionally, in 2020, Germany introduced the Occupational Safety and Health Inspection Act, which strengthened OHS inspections and introduced bans and strict restrictions on outsourcing and agency work in that sector. For large plants (slaughtering, cutting, and deboning with more than 50 employees), bans on service contracts and agency work were introduced, while in other parts of the sector, agency work has been temporarily allowed, only under the collective agreement and with strict limitations. See more in: Heinen, Müller, Kessler, 2017, pp. 74-75.; Cremers, Houwerzijl, 2021, p. 13.; Erol, Kärcher, Schulten, Walser, 2025.

⁷¹⁰ Cremers, Houwerzijl, 2021, p. 21.

⁷¹¹ Arbeitnehmer-Entsendegesetz (AentG 2013) - Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen vom 20.04.2009. (BGBl. I S. 799), das zuletzt durch Artikel 8 des Gesetzes vom 22. Dezember 2025 (BGBl. 2025 I Nr. 369) geändert worden ist. § 14 Haftung des Auftraggebers.

workers could enforce their right to wages⁷¹², presumably from the most creditworthy subject in the subcontracting arrangement⁷¹³. Nevertheless, although the provision initially suggests overall liability for all parties in the chain, German national case law of the highest labour court significantly narrows such an interpretation.

Namely, the German Federal Labour Court adopts a purposive approach and holds that liability does not necessarily attach to every contractual entity, but rather to those who actively delegate part of their contractual obligations to third parties.⁷¹⁴ This can be seen, for example, in BAG 5 AZR 241/18, or often referred to as the ‘Mall of Berlin’ case, where the Federal Labour Court confirmed that approach, which sparked considerable discussion⁷¹⁵. In this case, the defendant, who owned a property in Berlin, commissioned the construction of a shopping centre for her business. She entrusted the construction to a main contractor, who engaged several subcontractors. The plaintiff was a posted worker providing services for a subcontractor on the construction site. After a final judgment of a labour court against his employer and the opening of bankruptcy proceedings against the main contractor, the plaintiff claimed payment of the unpaid net salary from the defendant, relying on Article 14 of the Posted Workers Act. The Federal Labour Court dismissed the claim on the grounds that the defendant was only an ‘entrepreneur’ within the meaning of Article 14, since it had not undertaken the obligation to carry out the work nor had it delegated the performance of its contractual obligations to subcontractors, but had solely acted as investor.⁷¹⁶ This decision could hardly have been considered a positive signal for trade unions, labour law experts, and activists who had long been advocating the expansion of chain liability to investors or clients, especially in cases where contractors or subcontractors cannot be held effectively liable.⁷¹⁷ Accordingly, in practice, there is often a reference to the liability of the main or principal contractor, even though this notion does not fully reflect the legal terminology, which speaks of the liability of the contractor

⁷¹² See: Asshoff, 2008.

⁷¹³ Bakermans, 2014, p. 34.

⁷¹⁴ Bogoeski, 2017, p. 9.

⁷¹⁵ See more about the case and the role of trade unions in the ‘Mall of Shame’ action: Bogoeski, 2017, pp. 14-15.; Guga, 2016, pp. 5-6.; More about the factual situation of the case see FAU Berlin (2015), ‘Mall of Shame - Built on Exploitation’. FAU Berlin - Mall of Shame, https://berlin.fau.org/kaempfe/mall-of-shame?set_language=en&cl=en [accessed 26 April 2017]. See also Romanian country report, LABCIT project: http://migrationonline.cz/romania_country_report.pdf.; Lillie, 2012, pp. 148-167; Lillie, Wagner, Berntsen, 2014, pp. 312–331.

⁷¹⁶ Bundesarbeitsgericht, Urteil vom 16. Oktober 2019 – 5 AZR 241/18 – Vorinstanz: Landesarbeitsgericht Berlin-Brandenburg, Urteil vom 25. Januar 2018 – 21 Sa 1231/17 (Available at: ECLI:DE:BAG:2019:161019.U.5AZR241.18.0) (Accessed: 11 December 2025).; See also: Bundesarbeitsgericht, Urteil vom 16 October 2019 – 5 AZR 80/19 (Available at: <https://www.bundesarbeitsgericht.de/entscheidung/5-azr-80-19/>) (Accessed: 11 December 2025).

⁷¹⁷ Bogoeski, 2017, pp. 14-15.

(Auftraggeberhaftung) in a broader sense. Despite interpretative limitations, the normative construction of German chain liability remains broad, both with respect to the rights and obligations involved and the responsible subjects and territory.⁷¹⁸

Therefore, the system is not flawless, as evidenced by several structural disadvantages, one of which is mentioned above. Another exception to the mostly positive approach toward the German system concerns social security contributions⁷¹⁹, which are deemed ineffective and an administrative burden. In other words, while most measures are considered solid, this model of liability for contributions is often seen as problematic because it fails to deliver expected results and creates significant additional paperwork and bureaucracy.⁷²⁰ Additionally, the final client, including public authorities, is usually outside the scope of MiLoG and AEntG. With that approach, worker protection declines in complex subcontracting chains, particularly in public procurement, where the absence of public liability clauses in tenders is counterproductive. Also, although temporary agency workers are generally excluded from the chain liability system, the legislation provides a functionally important exemption when the TWA acts as a subcontractor in fulfilling contractual obligations. Therefore, the 2017 reform represents a milestone, as it systematically suppressed key forms of fraudulent use of agency work in subcontracting chains, especially by prohibiting ‘Chain Leasing’ and sanctioning the covert transfer of workers. The combination of imposing high fines and automatically creating a permanent employment relationship with a user demonstrated a clear legislative intention to strengthen the real, not merely formal, protection of temporary mobile workers.⁷²¹

Furthermore, the position of posted workers in Germany is sometimes complicated by additional real practical obstacles. For example, posted workers often lack written contracts or a basic documentation system, and additional challenges arise from the difficulty of accessing legal aid, particularly when they are not unionised. The research showed that larger construction companies are developing internal mechanisms of control on construction sites to protect themselves from liability for subcontractors' debts. Such mechanisms often include collecting signed statements from workers attesting to the payment of the minimum wage⁷²², even though

⁷¹⁸ Bogoeski, 2017, p. 9.

⁷¹⁹ See more about the liability for the social security contributions: Article 28e of the Fourth Book of the German Social Code – Sozialgesetzbuch IV (SGB IV). Available at: https://www.gesetze-im-internet.de/sgb_4/?utm_source (Accessed: 2 December 2025).

⁷²⁰ Houwerzijl, Peters, 2008, p. 44.

⁷²¹ Cremers, Houwerzijl, 2021, p. 21.

⁷²² Wagner, Berntsen, 2016, pp. 193-206.

those statements do not always reflect the actual conditions⁷²³. Even though these practices do not formally exclude liability, they can significantly complicate the proof of violations in proceedings, as evidenced by the example of liability interpretation.⁷²⁴ An additional obstacle is finding a trade union⁷²⁵ or a lawyer willing to take over the case if the evidence is weak, meaning that a significant proportion of posted workers do not receive appropriate legal aid.⁷²⁶

However, people who are dealing with such liability cases, including trade union representatives and workers' councils, claim that chain liability is, in practice, two-faced, depending on whether the case is resolved in court or in out-of-court proceedings. When a case is being resolved out of court, especially in the construction sector, chain liability is proving particularly effective. In many cases, just informing the main contractor or contractor that, under the law, it can be held liable for the working conditions of the posted workers at the end of the chain is enough to prompt them to react and provide the workers with what is required. Certainly, a lot of it depends on how many workers are included, the size of the companies, how reputationally sensitive they are, and whether there is a risk of media coverage. When all this is combined, the results can be concrete and effective, as in the cases reported by trade unions in Bogoeski's research. In one case he observed, workers from Eastern Europe successfully received their wages through the main contractors. Such cases are especially effective when the subcontractor did not receive the full payment for the services provided, as the main contractor then agrees to redirect the unpaid amount to the workers, rather than to the subcontractor.⁷²⁷

On the other hand, chain liability can also serve as a strong basis for court proceedings. Nevertheless, in practice, there are only a few publicly available cases in which existing legislation has been used effectively to enforce posted workers' rights and to sanction misbehaviour by parties in the chain throughout court proceedings.⁷²⁸ Also, the German Federal Government has highlighted that it lacks statistical data on how often posted workers in practice rely on existing mechanisms of rights enforcement, such as chain liability.⁷²⁹ Some of the reasons for that are the language, lack of information and financial support, non-unionisation,

⁷²³ Bogoeski, 2017, pp. 11-12.

⁷²⁴ Kall, Lillie, 2017, p. 29.

⁷²⁵ Trade unions can represent posted workers before the Labour Court under the Labour Act, but the requirement is that the workers must have been members for at least 3 months, which most posted workers do not meet. See: Art. 1 (2) 2 des Arbeitsgerichtsgesetzes (ArbGG), which is in line with Art 11 of the Enforcement Directive. For further details on trade union representation of posted workers see Case C-396/13 Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna.; Wagner, Hassel, 2016, pp. 163-178.

⁷²⁶ Bogoeski, 2017, pp. 11-12.

⁷²⁷ Bogoeski, 2017, pp. 12-13.

⁷²⁸ Kall, Lillie, 2017, p. 29.

⁷²⁹ Bogoeski, 2017, p. 10.

problems with accessing free legal aid, and, very often in the early phase of the procedure, a lack of proof of their status, number of working hours, and the amount of the debt. With it, there are also legal uncertainties on who can be held liable, as in the previously mentioned ‘Mall of Belin’ case.⁷³⁰ Despite those obstacles, there are cases in which posted workers have enforced their rights because of chain liability in the German national system.

For example, in the case of the German Federal Labour Court, BAG, 5 AZR 490/10, it was confirmed that the main contractor that hires subcontractors for the construction work can also be held liable for the payment of net minimum wages of posted workers at the end of the chain. This liability is defined as the liability of the guarantor who waived the objection that the direct employer must be sued first. Also, the Court clarified that the main contractor cannot claim he lacked knowledge of the posted workers' working hours, since, by virtue of his obligation to control the construction site and, therefore, the work of subcontractors' employees, he is required to know that information. Additionally, it was highlighted that since the worker was posted from another country, in this case, Romania, with the then-applicable E-101 document, that country's social security rates apply, not Germany's as the host country. Therefore, in this way, the Court also removed the uncertainty regarding the calculation of net minimum wages in the liability system, meaning that it includes the deductions of the social security contributions and taxes according to the sending country, not the home country's rates, since the posted worker remains contractually interconnected with the sending country.⁷³¹ Consequently, this case, even though brought under the latest revision of the Posted Workers Act, has effectively clarified that companies cannot escape wage obligations by hiring a long chain of subcontractors, since the main contractor could be held liable for the financial risk of the entire chain. In that way, main contractors are forced to be cautious in choosing subcontractors and to control the working conditions on their projects. Also, it facilitated access to justice in the host country (Germany) by enabling enforcement of their rights against the domestic company before domestic courts, and it also clarified the wage amounts that can be enforced.

Furthermore, in the more recent decision of the Federal Labour Court 10 AZR 101/20, the question arose regarding the participation of TWAs in the construction sector social security fund procedure (ULAK-SOKA-BAU) when they hire construction-site workers for companies

⁷³⁰ Bogoeski, 2017, pp. 12-13.

⁷³¹ Bundesarbeitsgericht, Urteil vom 17. August 2011 – 5 AZR 490/10 – Vorinstanz: Landesarbeitsgericht Düsseldorf, Urteil vom 30. Juni 2010 – 4 Sa 1481/09 (Available at: <https://www.bundesarbeitsgericht.de/wp-content/uploads/2021/01/5-AZR-490-10.pdf>) (Accessed: 20 December 2025).

that are not primarily engaged in the construction sector. Namely, the Court has decided that the TWA that provides construction workers to a company that is not a construction company itself still participates in the annual leave procedure under the Posted Workers Act (AEntG). If the agencies were excluded from the system of the procedure, there would be strong economic incentives for illegal work or for circumventing worker reporting, undermining the transparency of subcontracting chains.⁷³² Even though the decision concerns the right to recover funds from the treasury, its findings strongly support the mechanisms that make the German system of chain liability effective. The Court highlighted that the purpose of the Posted Workers Act is to prevent employers from avoiding their obligations regarding working conditions by using TWA workers, ensuring that each worker is covered by the same standards, regardless of the legal form of their engagement. The system of liability in the subcontracting chain depends on applying this universal legislation to prevent trading in a cheaper workforce through subcontractors or agencies. With this decision, the Court clarified that the usual practice of agencies avoiding payment of contributions to social funds by claiming that the company to which posted workers were assigned is not an officially recognised construction company is not legally correct. With it, the liability under the subcontracting arrangement is more effective because it follows the workers' actual on-site activities rather than relying on the company's official registration, and it guarantees that posted workers will receive their compensation for annual leave even if their main company disappears or goes bankrupt. By confirming the constitutionality and the precision of the provisions, the court provided legal certainty that prevents the main contractor in the chain from avoiding its obligations.

Finally, since there are no official studies or statistical data that would confirm the number of out-of-court or on-court proceedings, including posted workers relying on the mechanism of chain liability for the protection of their rights in subcontracting arrangements^{733, 734} the following assessment of the effectiveness of the German system is based primarily on the conducted research and analysed case law.

4.2.3.1.1. Critical Evaluation Framework

⁷³² Bundesarbeitsgericht, Urteil vom 8. Dezember 2021 – 10 AZR 101/20 – Vorinstanz: Hessisches Landesarbeitsrecht, Urteil vom 17. Dezember 2019 – 12 Sa 460/19 SK (Available at: <https://www.bundesarbeitsgericht.de/entscheidung/10-azr-101-20/>) (Accessed: 11 December 2025).

⁷³³ Fair Mobility Project: <http://www.faire-mobilitaet.de/> and Berlin counselling office for posted workers: http://berlin-brandenburg.dgb.de/beratung/eb/?tab=tab_0_6.

⁷³⁴ Bogoeski, 2017, p. 10.

The German liability system has been developed in response to the complex structural challenges of the labour market, including multilayered subcontracting arrangements, particularly in sectors where posted workers are highly represented. Compared with systems limited to basic liability schemes, the German model tends to directly strengthen the enforcement of posted workers' rights by shifting the risks of non-compliance with legal requirements from the lowest levels of the chain to the highest. Given its broad scope, the German system is a relevant example for evaluating the effectiveness of chain liability as a mechanism for protecting posted workers' rights in complex subcontracting arrangements. In this regard, its chain liability has two significant advantages. Firstly, it provides better security for workers posted to the site, as they will receive the wages they have earned, since if the direct employer does not pay the contracted amount, the liability can be extended to other companies in the subcontracting relationship. Secondly, such a system serves as a warning to all involved, because they can bear the consequences of others' omissions, they will more carefully evaluate with whom they enter into business relationships and conduct additional checks before cooperating. In Germany, that is often called "Plausibilitätsprüfung".⁷³⁵ Generally, Germany is optimistic about the effectiveness of their system. However, as analysed above, this does not mean that all stakeholders are satisfied with the current results or that everything functions flawlessly.⁷³⁶ Nevertheless, to clarify the effectiveness of the German system, the author further analyses it through three prisms: as an effective enforcement mechanism, as a deterrent effective mechanism, and as a practically effective mechanism.

Firstly, the German system demonstrates a high level of effectiveness as an enforcement mechanism, mainly due to its strict, clear norms. The key strength of the system lies in the fact that the liability for the working conditions of posted workers, especially the payment of wages, is settled as the strict and unlimited liability that includes the main contractor, which is being activated without the need to prove the guilt, knowledge, or failure to exercise due diligence. In that way, one of the biggest practical challenges the posted workers face in subcontracting arrangements, the need to prove who knew, could have known, or was negligent, is eliminated. Compared to the 'older' models, which mainly relied on administrative sanctions and the preventive obligations of business subjects, today's German system grants a direct and individual right of the posted worker against the other subjects in the chain, without the need to

⁷³⁵ Koberski, Asshoff, Eustrup Verlag, 2011, p. 173.; Bakermans, 2014, p. 41.

⁷³⁶ Houwerzijl, Peters, 2008, p. 44.

first assert a claim against the direct employer. That is particularly relevant in insolvency cases, in cases of employer disappearance, or in cases involving letterbox companies. The effectiveness of enforcement is further strengthened by expanding its scope beyond the construction sector. With the introduction of the statutory minimum wage (MiLoG), chain liability has ceased to be a sectoral exception and has become a horizontal mechanism applicable across the whole economy. This was important, especially in sectors such as the meat industry, where the concentration of posted workers is high and direct employment is not often. In this way, the system gained a stable, universal basis, which increased legal certainty and enforcement possibilities. However, enforcement effectiveness is still hampered by judicial interpretation. Even though the legal framework is formulated broadly, national case law shows that liability is not automatically imposed on all parties in the chain, but rather primarily on those actively delegating their contractual obligations. Consequently, investors who do not have a role in the execution of the services can be excluded from the scope of liability, which, in some cases, narrows the system's enforcement reach precisely where the financially strongest subjects are. Therefore, as an enforcement mechanism, the German system is strong, as it enables direct enforcement of rights, eliminates evidentiary barriers, and ensures an effective response to irregularities, such as letterbox companies. Its main weakness lies not in the normative structure but in the interpretative barriers that national case law imposes at the highest levels of the chain.

Secondly, the German system also has a strong deterrent effect, stemming from its basic logic that risk cannot be passed down the chain. The fact that the main contractor can be liable as a guarantor, without the possibility of invoking caution, ignorance, or prior verification, is radically changing companies' behaviour on the market. Compared to national systems that offered due diligence escape clauses under the Enforcement Directive, the German system intentionally does not allow formal compliance without actual control. Exactly that unconditionality of liability is encouraging the development of internal control mechanisms, known as plausibility checks, with which the main contractors are increasingly evaluating the actual working conditions on the sites. In that regard, the deterrence effect is not just legal but also organisational, since the liability scheme shapes how subcontracting relationships are planned and controlled. A specifically strong deterrent effect is visible in sectors with a history of serious fraudulent practices, such as the construction and meat industries. The research presented above showed that, in such sectors, the mere possibility of chain liability can sometimes be enough to lead to an out-of-court settlement, as main contractors are sensitive to

reputational risk, media coverage, and potential financial consequences. Nevertheless, the deterrent effect is incomplete. The national court limitations on investor liability, as well as the exceptions in public procurement procedures, are weakening the preventive effect in the most complex subcontracting arrangements. Additionally, formal practices such as collecting workers' wage statements, even though they do not exclude liability, can obscure actual working conditions and complicate proving violations. Therefore, even though the German system has a strong deterrent effect because it is strict, automatic, and does not allow formal excuses, it leaves a gap in situations where the strongest subjects in the chain are involved or where liability can be procedurally avoided.

In practical terms, Germany's liability system can be viewed from two perspectives. On the one hand, it represents one of the most accessible and effective tools for protecting posted workers' rights, especially wages, especially in out-of-court situations. On the other hand, its practical effectiveness depends significantly on evidence, support, and the institutional environment. In situations where there is at least basic documentation and the main contractor can be identified, the system provides relatively quick and effective pressure. That is why it is often more successful outside of the court than before it. However, posted workers often face serious practical obstacles, such as the lack of written contracts and evidence of working hours, language barriers, limited knowledge of the law, and limited access to legal aid, especially if they are not unionised. Court proceedings are additionally exposing the practical weaknesses of the system. Even though there are serious precedents establishing the main contractor's liability, the number of relevant publicly available court decisions is relatively low, and the state lacks statistical data on the use of the mechanism. That leaves the impression of a normatively strong but empirically insufficiently visible system. The good side is that the legislator has, through the latest amendments, shown a clear intention to close legal gaps, especially by strictly regulating temporary employment agencies. In this way, the system's practical effectiveness increases, as liability is linked to actual work and activities rather than to the formal registration of subjects. Therefore, in practice, the German system functions best as a tool for quick, out-of-court protection, while in court proceedings, its effectiveness depends on the evidence, legal aid, and the boundaries of interpretation.

Finally, the German chain liability system is among the most developed and strictest mechanisms for protecting the rights of posted workers in subcontracting arrangements. Its main role lies in the combination of strict liability, a broad sectoral scope, and a clear message that liability cannot be transferred down the chain. However, the system is not flawless, as court

limitations, exceptions for certain subjects, and serious practical obstacles for posted workers limit its full potential. Despite that, the German model remains, in the authors' opinion, the most relevant point of discussion for how chain liability can serve as a functional mechanism for protecting posted workers' rights, especially wages, in complex subcontracting arrangements.

4.2.3.2. Austria

According to Houwerzijl and Peters, Austria has consequently highlighted that many posted workers, especially in the construction sector, and particularly in the context of subcontracting chains, are in a specifically socio-economic precarious position.⁷³⁷ Nevertheless, to address such a challenge, based on the Report on the Implementation and Application of the PWD18, Austria, like Germany, is among the countries that have introduced a broader scope of liability beyond the basic one provided by the Enforcement Directive, namely chain liability. Additionally, the Report did not identify a due diligence defence system, indicating that Austria also falls within the stricter systems.⁷³⁸ Earlier research showed that Austria had long sought to address fraudulent practices involving posted workers in subcontracting chains. One example was legislation that tended to prevent letterbox companies, which were identified as particularly problematic in such arrangements, since, through them, the violations and circumventions of legal obligations toward the workers were often.⁷³⁹ Such an initiative demonstrated how Member States can learn from one another and adopt solutions that proved effective in practice. In that sense, Austrian legislation included a liability scheme whose logic and structure were based on those of Germany and the Netherlands.⁷⁴⁰

Therefore, the Austrian Act on Tackling Social Fraud (SBBG)⁷⁴¹ was enacted together with the Act Tackling Wage and Social Dumping (LSD-BG)⁷⁴² that entered into force at the

⁷³⁷ Houwerzijl, Peters, 2008, p. 37.

⁷³⁸ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), COM/2019/426 final, 25th of September 2019.

⁷³⁹ Cremers, Houwerzijl, 2021. p. 21.

⁷⁴⁰ Houwerzijl, Peters, 2008, p. 46.

⁷⁴¹ Bundesgesetz zur Verbesserung der Sozialbetrugsbekämpfung (Sozialbetrugsbekämpfungsgesetz – SBBG) StF: BGBl. I Nr. 113/2015 (NR: GP XXV RV 692 AB 770 S. 85. BR: 9406 AB 9410 S. 844.) (Available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009245&FassungVom=2023-10-26>) (Accessed: 20 December 2025).

⁷⁴² Bundesgesetz, mit dem ein Gesetz zur Bekämpfung von Lohn- und Sozialdumping erlassen wird (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG) StF: BGBl. I Nr. 44/2016 (NR: GP XXV RV 1111 AB

beginning of 2017 and with which Austria fully implemented Article 12 of the Enforcement Directive. Special emphasis was placed on the construction sector, where subcontractor relations were often problematic, and the risk of fraudulent practices was high. One of the most important provisions of that Act is §9 and §10 on the liability of the client, or the company that is using the services of posted workers⁷⁴³. Based on it, workers posted from other countries to Austrian construction projects can enforce their wages.⁷⁴⁴ Namely, §9 of the LSD-BG provides that the client who is not conducting the contracted construction work is liable, as guarantor and payer, for unpaid wages that, under the law, by-laws, and collective agreements, belong to workers hired by the contractor who provided the work in Austria. Such liability on the part of the client who is not performing work is limited to situations in which he knew, or could have known, that the contracted wage would not be paid, and he accepted that condition. The client's liability is additionally subject to certain procedural conditions. The worker has to inform the Bauarbeiter-Urlaubs-Abfertigungskasse at least 8 weeks before the due date of the unpaid wage about the amount of the claim and the period to which it refers. Such information needs to include the employer, the existence of the working relationship, the place and time of the work, and the type of work performed. After the check-up, the institution should provide written information to the client about the determined amount of the claim, for which the liability can be applied, just as the claim didn't stop because of the statute of limitations or other legal reasons.⁷⁴⁵ Additionally, §10 LSD-BG is a continuation of §9, regulating liability in subcontracting relations when the implementer, or, in a subcontracting chain, the main contractor, hires another company to perform the work or a part of it. According to that provision, the implementer or the main contractor is liable as the guarantor and payer for the unpaid wages hired by the subcontractor, if the subcontracting of work is against the law or the contract, with which that liability is referred to the posted workers within the EU, the EEA, or

1133 S. 128. BR: AB 9590 S. 854.) (Available at: <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555&FassungVom=2023-12-22>) (Accessed: 20 December 2025).

⁷⁴³ § 8 of the same Chapter 2 addresses the employer's liability for wages in third countries and is not part of the detailed analysis in this study. See: Bundesgesetz, mit dem ein Gesetz zur Bekämpfung von Lohn- und Sozialdumping erlassen wird (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG) StF: BGBl. I Nr. 44/2016 (NR: GP XXV RV 1111 AB 1133 S. 128. BR: AB 9590 S. 854.) (Available at: <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555&FassungVom=2023-12-22>) (Accessed: 20 December 2025).

⁷⁴⁴ Cremers, Houwerzijl, 2021, p. 21.

⁷⁴⁵ § 9, Chapter 2, Bundesgesetz, mit dem ein Gesetz zur Bekämpfung von Lohn- und Sozialdumping erlassen wird (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG) StF: BGBl. I Nr. 44/2016 (NR: GP XXV RV 1111 AB 1133 S. 128. BR: AB 9590 S. 854.) (Available at: <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555&FassungVom=2023-12-22>) (Accessed: 20 December 2025).

Switzerland. The provision also broadens the transparency obligation regarding contractual relationships within the subcontracting chain. On the workers' request, the implementer or the indirect implementer is obliged within 14 days to give true and full information on the contractual partners to which the work was subcontracted, just as on all the other relevant contractual relationships. If such information is not delivered or is unclear or incorrect, it is considered that the implementer or the indirect implementer is a contractual partner in relation to all other contractual connections and for all related claims of wages, is guaranteed and paid as the guarantor and payer. In the cases in which the client is a public authority, the obligation of provision of information also includes the explanation if the further subcontracting of work is allowed according to the rules on public procurement, with which the liability can be applicable if the claimant is not stopped due to the due date or some other legal reason.⁷⁴⁶ Therefore, the protection is not unlimited, except in situations where there were indications of fraudulent practices from the outset. In the most serious cases of wage dumping, Austrian authorities do not stop at monetary fines, they can also impose stricter measures, such as revoking trade licenses, to send a clear message that systemic violations of workers' rights are not tolerated.⁷⁴⁷

Finally, even though the Austrian case-law does not contain the publicly available decisions in which the court have directly applied the provisions on the liability in subcontracting arrangements for the protection of individual rights of posted workers, there are decisions that can prove the applicability and effectiveness of the administrative mechanisms of securing and enforcement in the situations typical for the posted workers, especially in construction sector and in the cross-border context. That is particularly relevant, since the Austrian model is not based solely on the court proceedings of the workers, but also on administrative intervention in the financial flows of the subcontracting chain, which is why the case law mainly appears in administrative, rather than labour law, cases. One of the good examples in this regard that even reached the CJEU is the *Čepelnik* case⁷⁴⁸, which is not

⁷⁴⁶ § 10, Chapter 2, Bundesgesetz, mit dem ein Gesetz zur Bekämpfung von Lohn- und Sozialdumping erlassen wird (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG) StF: BGBl. I Nr. 44/2016 (NR: GP XXV RV 1111 AB 1133 S. 128. BR: AB 9590 S. 854.) (Available at: <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555&FassungVom=2023-12-22>) (Accessed: 20 December 2025).

⁷⁴⁷ Cremers, Houwerzijl, 2021, p. 21.

⁷⁴⁸ In this case, the Slovenian company Čepelnik has been hired as the subcontractor for the construction site in Austria and has posted its workers to Austria. Austrian authorities have, due to concerns about violations of wage and working conditions rules, requested that the Austrian client stop payment of the contracted amount to Čepelnik until he provides a money guarantee to cover potential fines and claims. They refused it, claiming it imposes disproportionate restrictions on their freedom to provide services. The CJEU agreed with it, finding that such a measure constitutes a disproportionate limitation, but it confirmed that it is legitimate because it aims to protect

specifically directed to protecting individual posted workers' rights regarding wages, but is crucially relevant for understanding the Austrian model of enforcement in subcontracting arrangements. It has been clarified that protecting posted workers and ensuring the enforcement of labour law are legitimate public-interest goals, but that the principle of proportionality applies to administrative measures that affect contractual relations between the client and the final work executor. With it, this decision shaped the boundaries within which the Austrian system of chain-oriented enforcement measures can be effectively and legally enforced.⁷⁴⁹

Similarly, at the national level, and taking into account the *Čepelnik* case, the Austrian court has directly analysed whether its prohibition on payments is in accordance with the freedom to provide services. It concluded that such measures need to be analysed within the scope of proportionality, but that they are not excluded or non-applicable. However, it is not enough that the measures exist, they need to be properly stable.⁷⁵⁰ Also, in the case LVwG-S-2688/001-2018, the Court has considered the legality of the measure with which the Financial police has requested forbidding of the payment of the rest of contracted amount from the client toward the final subject in the chain that was established outside of Austria, since there was a real concern that the money will be taken out of the country, with which the obligation towards the workers, including wage payment, would become practically impossible. The court concluded that such a measure was legal and proportionate since it served to preserve the resource for the further enforcement of workers' rights.⁷⁵¹ Furthermore, in the case LVwG-2018/27/0270-1, the Tirol Regional Court has been examining the various mechanisms of guarantee regulated by the LSD-BG, particularly the prohibition on payment without additional guarantees. The court held that such an approach is legitimate and that the relevant authorities may choose the measures based on the particular case.⁷⁵² This decision showed that the Austrian system is not formalistic or rigid, but operational and adaptable. For the protection of posted workers, this means enforcement does not depend solely on a single measure, but authorities can act pragmatically and quickly to prevent fraudulent practices in subcontracting

workers' rights. See: Judgment of the Court (Grand Chamber) of 13 November 2018. *Čepelnik d.o.o. v Michael Vavti*. Case C-33/17. ECLI:EU:C:2018:896.

⁷⁴⁹ See: Fekete, 2019, pp. 93-111.

⁷⁵⁰ Landesverwaltungsgericht Niederösterreich, LVwG-S-2708/001-2018 (22st of January 2019) (Available at: [https://www.ris.bka.gv.at/Dokumente/Lvwg/LVWGR_NI_20190122_LVwG_S_2708_001_2018_01.html?utm_source](https://www.ris.bka.gv.at/Dokumente/Lvwg/LVWGR_NI_20190122_LVwG_S_2708_001_2018_01/LVWGR_NI_20190122_LVwG_S_2708_001_2018_01.html?utm_source)) (Accessed: 19 December 2025)

⁷⁵¹ LVwG Niederösterreich, LVwG-S-2688/001-2018 (1st of February 2019) (Available at: https://www.ris.bka.gv.at/Dokumente/Lvwg/LVWGT_NI_20190201_LVwG_S_2688_001_2018_00/LVWGT_NI_20190201_LVwG_S_2688_001_2018_00.html) (Accessed: 19 December 2025).

⁷⁵² Landesverwaltungsgericht Tirol, LVwG-2018/27/0270-1 (12th of March 2019) (Available at: https://www.ris.bka.gv.at/JudikaturEntscheidung.wxe?Abfrage=Lvwg&Dokumentnummer=LVWGT_TI_20190312_LVwG_2018_27_0270_1_00&ShowPrintPreview=True&utm_source) (Accessed: 19 December 2025).

arrangements. Consequently, these cases show that, instead of relying solely on lengthy, uncertain court proceedings against foreign or insolvent employers to protect posted workers, the Austrian model acts in advance and higher up the chain, stopping the money where it still exists.

4.2.3.2.1. Critical Evaluation Framework

The Austrian system of liability in subcontracting arrangements has been developed in response to complex labour market challenges, especially in sectors highly exposed to the high rate of posted workers in such arrangements. Its basic logic is not to automatically broaden liability to all parties in the chain, but to precisely identify situations in which the real risk from fraudulent practices, violations of workers' rights, and wage dumping exists. As a result, the Austrian model is both targeted and conditional, but it is also accompanied by strict sanctions. In the European Commission's Report, Austria is among the countries that have introduced the strictest systems, alongside Germany and Belgium.

When its effectiveness is analysed as a system of enforcement mechanisms, the Austrian approach provides some protection, but not unlimited protection. On the one hand, the law clearly predicts the possibility for a posted worker who did not receive payment of wages in the construction sector to claim their rights even outside of the relationship with their direct employer, which is especially relevant in cases when the employer is not financially stable, or it is a letterbox company. In this way, it is formally recognised that liability cannot be limited solely to the bottom of the chain. On the other side, that possibility is not activated automatically. The client's liability is limited to the direct contractual relationship and depends on whether, at the time of entering into the contract, he knew or could have known that the wages would not be paid. In practice, it means that the worker, besides being obliged to prove that their wages were not paid, must show that there was a certain level of knowledge or a clear clue on the client's side. Such a model can increase legal certainty for undertakings, but it also weakens the system's direct enforcement powers for workers in subcontracting arrangements, especially posted workers who are temporarily working on a site, lack full documentation, and face language and institutional barriers.

As a deterrent, the Austrian model is proving highly effective. The fact that the law is focused on structural fraudulent practices, such as letterbox companies, sends a clear message

to the market. In the most serious cases of wage dumping, the relevant authorities are not limited to fines, but they can also use more drastic measures, such as revoking trade licenses. Such measures have a strong preventive effect, especially in the construction sector, where the loss of a license often means the end of business operations. Even though the protection is not unlimited and does not apply in all cases, the system clearly signals that serious violations of labour rights are not an acceptable part of business risk.

The most significant aspect of the Austrian system becomes apparent when its practical effectiveness is analysed. Compared to systems that rely solely on court proceedings initiated by workers, the Austrian approach relies heavily on administrative interventions in the financial flows of subcontracting arrangements. With it, the system tries to act earlier and higher in the chain, where the money still exists. National case-law, even though it does not involve a range of publicly available decisions in which the liability provisions are directly applicable to the individual rights of posted workers, confirms that such administrative measures are acceptable, legal, and proportionate. In that way, courts clarified that the system is not rigid or formalistic, but rather flexible enough to adapt to the specific circumstances of each case. In this context, the CJEU case law, in particular *Čepelnik*⁷⁵³, takes a special place. Even though that decision does not directly address the individual rights of posted workers regarding wages, it is crucial to understanding the Austrian system.

Overall, the Austrian liability scheme in subcontracting arrangements can be described as preventive, administrative, strong, and selective. Its effectiveness is not a result of the often court proceedings initiated by posted workers or trade unions, but of the state's ability to intervene at key points in the subcontracting chain and prevent the avoidance of obligations before the damage becomes irreparable. That ability to act in advance and beyond the direct employer represents the basic strength of the Austrian model in protecting the rights of posted workers, but at the same time, it is its main specificity compared to the previously analysed German system.

4.2.3.3. The Netherlands

⁷⁵³ Judgment of the Court (Grand Chamber) of 13 November 2018. *Čepelnik d.o.o. v Michael Vavti*. Case C-33/17. ECLI:EU:C:2018:896.

The Netherlands is another Member State with a high density of regulations pertaining to liability in subcontracting chains, much like Germany.⁷⁵⁴ Firstly, on 18 June 2016, the Terms of Employment Posted Workers in the European Union Act (WagwEU)⁷⁵⁵ entered into force, under which the national implementation of the PWD and the Enforcement Directive has been combined within a unique legislative framework. Under the new Act, employers who temporarily post workers to the Netherlands must provide them with a guarantee of a minimum scope of mandatory working and payment conditions. They are based on Dutch labour law legislation, which covers, for example, the minimum wage and minimum holiday allowance⁷⁵⁶, working time⁷⁵⁷, working conditions⁷⁵⁸, employment by intermediaries⁷⁵⁹, and equal treatment⁷⁶⁰.⁷⁶¹ Additionally, the Policy rule on the imposition of fines under the Posted Workers in EU Act 2025 (WagwEU)⁷⁶² provides concrete guidance on calculating and enforcing administrative fines when companies fail to meet their obligations. In it, besides other provisions, are regulated the normative range of fines for the different violations of the obligations from the WagwEU, the rules on the increase of fines in the case of repeating the same or similar violations, and the rules on decreasing the fines depending on the seriousness of violations and other circumstances. The purpose of it wasn't just to specify the range of fines, but also to ensure that the sanctioning policy is fair and proportionate to the severity of the violation, including the situations where the employers or investors did not respect their obligations of reporting, evidence, and payment that the posted workers have the right to.⁷⁶³

⁷⁵⁴ Heinen, Müller, Kessler, 2017, pp. 87-92.

⁷⁵⁵ Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie (WagwEU), Staatsblad 2016, 219, (Available at: <https://wetten.overheid.nl/BWBR0038054/2024-01-01>) (Accessed: 6 December 2025).

⁷⁵⁶ Wet minimumloon en minimumvakantiebijslag, Staatsblad 1968, 657, as amended, in force since 27 November 1968, with amendments entering into force on 1 January 2024 and 1 January 2025 (Available at: <https://wetten.overheid.nl/BWBR0002638/2026-01-01>) (accessed: 6 December 2025).

⁷⁵⁷ Arbeidstijdenwet, Staatsblad 1995, 598, as amended, in force since 1 April 1996, with amendments entering into force on 1 January 2024 and 1 January 2025 (Available at: <https://wetten.overheid.nl/BWBR0007671/2025-07-01>) (Accessed: 6 December 2025).

⁷⁵⁸ Arbeidsomstandighedenwet, Staatsblad 1999, 184, as amended, in force since 1 November 1999, with amendments entering into force on 1 July 2017 and 1 January 2024 (Available at: <https://wetten.overheid.nl/BWBR0010346/2025-07-01>) (Accessed: 6 December 2025).

⁷⁵⁹ Wet allocatie arbeidskrachten door intermediairs, Staatsblad 1998, 306, as amended, in force since 1 July 1998, with amendments entering into force on 1 January 2024 and 1 July 2024 (Available at: <https://wetten.overheid.nl/BWBR0009616/2025-07-01>) (Accessed: 6 December 2025).

⁷⁶⁰ Algemene wet gelijke behandeling, Staatsblad 1994, 230, as amended, in force since 1 September 1994, with amendments entering into force on 1 January 2020 and 22 February 2023 (Available at: <https://wetten.overheid.nl/BWBR0006502/2026-01-01>) (Accessed: 6 December 2025).

⁷⁶¹ Heinen, Müller, Kessler, 2017, pp. 87-92.

⁷⁶² Beleidsregel boeteoplegging Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie 2025, in force since 1 February 2025 (Available at: <https://wetten.overheid.nl/BWBR0050711/2025-02-01>) (Accessed: 8 December 2025).

⁷⁶³ See more in: Staatscourant van het Koninkrijk der Nederlanden, Ministerie van Sociale Zaken en Werkgelegenheid, Staatscourant 2025, 3125, 27 January 2025 (Available at: zoek.officielebekendmakingen.nl/stcrt-2025-3125.html?utm_source) (Accessed: 8 December 2025).

Therefore, the importance of this legislation is that it fulfils the WagwEU, since the provisions alone, without clearly defined sanctions, would be hardly enforceable in practice.⁷⁶⁴

Furthermore, the Netherlands has a dualist or hybrid system, with statutory law supplemented by collective labour agreements.⁷⁶⁵ Since they apply the system under which certain collective agreements are declared generally binding, foreign employers posting workers to the Netherlands must comply with the basic conditions set out in those agreements in the sectors to which they belong. It means that before posting, they need to check whether there is a concrete collective agreement for the services they plan to provide. In the case of non-compliance, the Dutch labour inspectorate is authorised to impose significant fines. Moreover, breaches of the basic provisions of collective agreements with general binding effect can be the subject of court proceedings initiated by workers or social partners against employers^{766, 767}. Therefore, in the Netherlands, part of the protection in subcontracting chains is further strengthened by generally binding collective agreements, especially in sectors such as construction, the metal industry, and transnational transport. Liability in this regard is based not only on formal reporting but also on a real check of the application of the relevant sectoral rules. The main user undertaking must notify the subcontractor and/or the temporary work agency of the relevant rules and ensure that the prevailing sectoral agreement is correctly applied.⁷⁶⁸

Additionally, the Netherlands exercised the option under Article 9 of the Enforcement Directive and introduced several administrative requirements for foreign employers temporarily

⁷⁶⁴ Boetebedragen bij overtreden Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie (WagwEU), Nederlandse Arbeidsinspectie Ministerie van Sociale Zaken en Werkgelegenheid (Available at: <https://www.nlarbeidsinspectie.nl/nederlandse-arbeidsinspectie/sancties-en-handhavingsmethoden/boete/boetes-wagweu?utm>) (Accessed: 8 December 2025).

⁷⁶⁵ Heinen, Müller, Kessler, 2017, pp. 87-92.

⁷⁶⁶ In this sense, it is worth mentioning the case analysed by Even. Namely, in the 2012 trade union-initiated case before the District Court Groningen against the Polish subcontractor, the generally binding collective agreement was applied, which raised several questions about what was incorporated into the minimum wage in that regard. The Court firstly determined that the provisions of that agreement are being applied in terms of classification of the working place and the payment group, with which the level of the working place has been put in a lower category, partly because the trade union intentionally simplified the claim. At the same time, it has been noted that certain in-kind compensation workers receive cannot be included in the minimum wage calculation, as it represents cost coverage rather than real earnings. The court also said that the 8% vacation addition is included in the minimum wage the employer must pay. On the other hand, the question of non-working-day compensation, as provided for in the collective agreement on work distribution, has proven more complex. Even though the trade union stated that, also for those days, the salary should be paid as the minimum standard, the court concluded that those provisions have a different purpose, the preservation of employment and did not incorporate it into the minimum wage. On the contrary, compensation for work performed outside working hours is recognised as part of the minimum wage. This case showed how difficult it can be in practice to determine which parts of the collective agreement are incorporated into the minimum wage, especially in cross-border situations. See: Even, 2021, pp. 175-176.; District Court Groningen, 5 October 2012, ECLI:NL:RBGRO:2012:BX9234.

⁷⁶⁷ Heinen, Müller, Kessler, 2017, pp. 87-92.

⁷⁶⁸ Cremers, Houwerzijl, 2021, pp. 21-22.

posting workers⁷⁶⁹. In this way, they sought to ensure transparency and effective control over the working conditions of posted workers. Foreign employers need to provide relevant information to the labour inspectorate, report the provision of services in advance, and ensure that documentation, such as pay stubs and evidence of working hours, is available in the workplace or in digital form. Also, they need to nominate a contact person with whom the inspectorate can communicate directly, while the Dutch service recipient must verify that the application has been submitted correctly. Furthermore, to prevent bogus self-employment, these requirements also apply to self-employed persons temporarily providing services in the Netherlands, ensuring that the formal status cannot be used to circumvent labour law provisions. Besides, the Dutch system established a general obligation to verify the identity of all workers by requiring them to present identification documents, regardless of their citizenship or the type of contractual relationship. That obligation applies to employers, contractors, and subcontractors, who must be able, at the inspectorate's request, to deliver copies of those documents in the short term.⁷⁷⁰

When it comes specifically to liability in subcontracting chains, the Netherlands did not need to implement Article 12 of the Enforcement Directive separately, since such a mechanism already existed. It was further strengthened by the Artificial Constructions Act⁷⁷¹, introduced in 2015 and subsequently amended in 2016 and 2017. The basic purpose of that law is to prevent unfair competition and systemic evasion of wage obligations or wage reductions, especially in complex subcontracting structures, while strengthening workers' legal protections. It applies to all sectors, regardless of whether domestic or foreign service providers are involved, since Dutch law is based on the core of the activity rather than the company's nationality. Compared to the previous system, in which the worker could seek unpaid wages only from the employer, the new system broadened liability to other parties in the chain, including the main contractor.⁷⁷² The mentioned Act is not limited to situations involving complex subcontracting chains or unpaid wage cases involving foreign temporary work agencies, but its scope of application is much wider. For example, if a company hires an IT firm to create its website and the firm goes

⁷⁶⁹ Article 9(1) of the Enforcement Directive says as follows: 'Member States may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and Directive 96/71/EC, provided that these are justified and proportionate in accordance with Union law.'

⁷⁷⁰ Heinen, Müller, Kessler, 2017, pp. 87-92.

⁷⁷¹ Wet aanpak schijnconstructies, Staatsblad 2015, 233, as amended, in force since 1 July 2015, with amendments entering into force on 1 January 2016 and 1 January 2017 (Available at: <https://wetten.overheid.nl/BWBR0036706/2017-07-01>) (Accessed: 5 December 2025).

⁷⁷² Heinen, Müller, Kessler, 2017, pp. 87-92.

bankrupt during the project, the firm's workers could approach the investor to pay their wages. Such an approach clearly shows that the Act requires an active role and responsible behaviour in contractual relationships. Businesses need to ensure that workers are paid in accordance with the law, and they should be careful about offers that seem unusually low, as such cases often increase the risk of violations of workers' rights.⁷⁷³

Therefore, the Dutch system did not introduce the classic, automatic chain liability. It is a successive liability that arises only if the previous subject cannot or does not want to comply with the obligation, for example, in cases of disappearing subcontractors, insolvency, or non-enforceability of the court decision. Nevertheless, the law predicts the exceptions that benefit the worker. In cases of serious or long-term non-payment, the worker may skip certain levels and proceed directly to the main contractor. Importantly, the Dutch legislator did not predict the due diligence defence system; rather, it introduced the advised model of preventive behaviour in several steps, whose role is to decrease liability risk. Nevertheless, previous research shows that even compliance with those recommendations does not guarantee relief from liability if the court concludes that reasonable measures have not been taken to prevent non-payment of wages. Also, since 2017, the Dutch labour inspectorate has been publishing the results of inspections and the names of employers breaching wage rules. With it, they are increasing the transparency of the labour market and easing the screening of business partners before entering into subcontracting relations, which is increasingly emphasised as an example of good regulatory practice.⁷⁷⁴ Although there is no officially published Dutch national case law confirming that the current legislation protects posted workers in subcontracting chains, previous research⁷⁷⁵ and the legislative system could give the impression that the PWDs and the Enforcement Directive have been successfully implemented and are being applied in practice more broadly. As in Germany, Dutch reports are generally positive, indicating that most existing rules remain effective, though this does not mean all stakeholders are satisfied with the solutions.⁷⁷⁶

Finally, although the tax rules are not formally under Article 153 TFEU, and are not the focus of this research, it is worth emphasising that they play an important role in regulating liability within subcontracting chains in the Dutch context. The Dutch tax system is well developed and applied in situations where investors hire temporary work agencies or domestic

⁷⁷³ See: Jonker, 2023.

⁷⁷⁴ Heinen, Müller, Kessler, 2017, pp. 87-92.

⁷⁷⁵ For example: Heinen, Müller, Kessler, 2017, pp. 87-92.

⁷⁷⁶ Houwerzijl, Peters, 2008, p. 44.

or foreign subcontractors⁷⁷⁷. In such cases, all the subjects involved must be registered with the tax and customs authorities, as they are obligated to pay wages and social contributions, while employers must regularly pay taxes and contributions for their workers. If they fail to do so, the relevant authorities can broaden liability against the investor or the main contractor, and, in certain cases, also against obligations related to sales tax. The system also predicts mechanisms to limit such liability, such as cooperating with certified agencies or paying a portion of the contracted amount into the protected account, which is solely for the payment of wages and taxes. Due to strict administrative and tax requirements, tax fraud, and the establishment of fictitious companies in the Netherlands, letterbox companies are rare. Control over the enforcement of these rules, especially by the labour inspectorate, also involves publishing data on employers who circumvent wage rules. Even though there are attempts to circumvent the rules through unjustified wage deductions, inspectorates are actively sanctioning such attempts. The question of bogus self-employment is also addressed by special legislation that determines tax liability when formally self-employed persons are in practice in an employment-like relationship, especially where there is an intention to misuse such status.⁷⁷⁸

4.2.3.3.1. Critical Evaluation Framework

The Dutch system for the protection of posted workers in subcontracting chains is characterised by high normative intensity and a combination of multiple interrelated mechanisms, which makes it, in terms of complexity and strictness, closely comparable to the German system. Its specificity stems from the fact that protection is not concentrated in a single legislative solution, rather, it is a combination of legislation on posted workers, the system of generally obligatory collective agreements, special rules on liability in subcontracting chains, and administrative and tax enforcement mechanisms.

Through the lens of effectiveness as the enforcement mechanism, the Dutch system shows a relatively strong, multilayered approach. With the entry into force of the PWD and Enforcement Directive, the two directives are unified within a single legislative framework. With it, the minimum working conditions and wage requirements employers must meet to post workers were defined, which directly rely on Dutch labour law. However, a specific emphasis

⁷⁷⁷ See also: Van Hoek, Houwerzijl, 2011.; Kall, Lillie, 2017, p. 29.

⁷⁷⁸ Heinen, Müller, Kessler, 2017, pp. 87-92.

is on the fact that the WagwEU is supported by detailed rules on sanctioning, especially the Policy rules from 2025, which precisely determine the range, increments, and decrements of the fine depending on the severity and repetition of violations. In this way, the normative rights of posted workers are linked to concrete and predictable consequences for employers and investors who do not comply with the law, thereby strengthening the enforcement aspect of the system. Furthermore, enforcement is supported by collective agreements, since in certain sectors they are generally obligatory, and foreign employers, before posting workers to the Netherlands, need to check which one applies to the services they are providing. In cases of non-compliance, the relevant inspectorate can impose sanctions, and posted workers and social partners have the right to judicial protection. With it, liability in subcontracting chains is not limited to formal reporting, but it also involves the real obligation to check the application of sectoral rules. However, despite generally positive grading on effectiveness, some older studies⁷⁷⁹ found that collective agreement provisions on wage protection are more declaratory than operational, indicating limitations in this part of the system.

If the system is analysed as the mechanism of deterrence, it shows a strong preventive potential. With the possibility of using Article 9 of the Enforcement Directive, several administrative obligations for employers have been introduced, including the prior reporting of postings, the handling and accessibility of documentation, the designation of a contact person, and the verification of the identity of posted workers. Those obligations apply not only to employers but also to self-employed persons who are temporarily providing services to prevent bogus self-employment. Additionally, the Dutch recipient's obligation to check whether the reports are correctly submitted is broadening liability to multiple parties in the chain. A combination of high administrative requirements, the possibility of heavy fines, and the publication of employers who violate wage rules is having a strong deterrent effect, especially in sectors where subcontracting is more common. The main focus here is the Artificial Constructions Act, which has further strengthened the existing liability system in subcontracting chains. Its goal is not limited to typical cases of non-payment of wages in the construction sector or in temporary work agencies, but extends to all sectors and all forms of contractual relations. The fact that liability can also extend to investors clearly signals to the market that social dumping and violations of working conditions carry real legal risk. With it,

⁷⁷⁹ Houwerzijl, Peters, 2008, p. 44.

companies are required to take an active role in monitoring their business partners, thereby increasing the system's preventive function.

Finally, when the system is analysed from the aspect of the effectiveness as a practical mechanism, the Dutch system shows certain specificities. Liability in chains is not arranged as the classic, automatic chain liability, but rather as successive liability that is activated only when the preceding subject fails to comply with its obligations, such as in cases of disappearance, insolvency, or the non-enforceability of court decisions. However, the legislation is expected to include exceptions that benefit workers, allowing workers to skip certain steps in the chain and claim it directly from the main contractor. It is also important that the due diligence defence is not possible, but the legislator predicted the recommended model of the preventive behaviour. The practical aspect of the system is additionally strengthened by the tax mechanisms, even though they are not formally required by the EU legislation. Even though there is a lack of publicly available national case laws that would directly confirm the application of these mechanisms in the benefit of posted workers in subcontracting chains, the overall legislative framework and the accessible research indicate that the rules on the posting of workers and their enforcement in the Netherlands are established as a functional and operative system.

4.2.3.4. Belgium

Belgium introduced special liability rules in the 1970s to prevent fraudulent practices that were then being circumvented in the labour market. Namely, the challenges arose regarding the intermediaries (or 'gangmasters') who would report the workers to the tax authority and in the social security system under the regular procedure, but would never actually pay those taxes and social contributions into the workers' wages. This model of control first appeared in the construction sector through an agreement between social partners, and over the years, it has been adjusted several times. Until 1st of January 2008, the system was based on contractor registration (which still exists today). A contractor could be registered if it can demonstrate compliance with certain reliability criteria. According to the rules in force at the time, if the investor or contractor hired a foreign partner not registered in Belgium, it had to retain 15% of the amount that would normally be paid for the services performed. If it wouldn't comply, it needed to be liable, together with that partner, for its tax debts. However, this system was abolished following the CJEU's 2006 decision, which found it limited the freedom to provide

services⁷⁸⁰, as explained in detail above.⁷⁸¹ However, in practice, it has been shown that, while the registration system, the obligation to withhold 15% of the amount, and the system of joint and several liability have been in force⁷⁸², they have had a real effect on reducing fraudulent practices in the Belgian construction sector. Nevertheless, it is not quite clear whether such a mechanism of liability could be considered as the main reason why the ‘gangmasters’ were discouraged. Despite this, within the framework of domestic subcontracting relationships, the measures introduced, together with the other mechanisms that followed, were generally considered effective.⁷⁸³ Nevertheless, after the introduction of the new rules, trade unions were concerned that the employers would lose the motivation to register at all. They were particularly bothered that registration is no longer connected to the work of the registration commission, so the whole system seems less controlled than before. A similar view was held by the employers’ associations, which considered that the ‘old’ registration system should have been given greater weight, without returning it to its previous level. Even the trade unions admitted that the previous system was overly complicated, but they weren’t satisfied with the changes. Above all, they wanted the liability rules broadened across the entire subcontracting chain, not only at particular levels.⁷⁸⁴

Consequently, the broader system was later introduced. According to the 2024 Report on the Implementation of the PWD, Belgium is noted as one of the states that introduced chain liability, as well as an additional measure, which is a ceiling on the number of levels in subcontracting chains.⁷⁸⁵ Therefore, in Belgium, the protection of posted workers in subcontracting arrangements is structured to rely not only on the liability of the direct employer but also on a broader range of rules that ensure that, for work in Belgium, their working conditions and pay are respected. The foundation of that system in terms of protection of wages is the Law of 12 April 1965⁷⁸⁶ that is applicable in the general context of posting of workers, so that the employers that are posting the workers to Belgium have to ensure that they respect the

⁷⁸⁰ Judgment of the Court (First Chamber) of 9 November 2006. *Commission of the European Communities v Kingdom of Belgium*. Case C-433/04. ECLI:EU:C:2006:702.

⁷⁸¹ Houwerzijl, Peters, 2008, p. 11.

⁷⁸² Kall, Lillie, 2017, p. 29.

⁷⁸³ Houwerzijl, Peters, 2008, p. 34.

⁷⁸⁴ Houwerzijl, Peters, 2008, p. 34.

⁷⁸⁵ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, 30 April 2024.

⁷⁸⁶ 12 AVRIL 1965. - Loi concernant la protection de la rémunération des travailleurs. (NOTE : Consultation des versions antérieures à partir du 24-01-1985 et mise à jour au 21-06-2024) [Online] (Available at: <https://www.ejustice.just.fgov.be/eli/loi/1965/04/12/1965041207/justel>) (Accessed: 18 December 2025).

Belgian rules on wages and other obligatory elements of the remuneration, including the minimum hourly rates and supplements that are the result of the Law or the obligatory collective agreements. Therefore, that scheme enables the posted worker that did not receive the wage from their direct employer, with the written confirmation of the labour inspectorate, it can ask for the payment from the other subjects in the chain, such as clients, contractors or subcontractors, in the part that is related to the service provided for them, with which the liability is usually related to the wages that are due in the liability period, and up to a year after the expiring of 14 days from the information. That system applies to both direct and indirect contractual relations, provided it is determined by the decree (for example, in cleaning, the food industry, agriculture, etc.).⁷⁸⁷ However, the systems of joint and several liability differ depending on whether they apply to the general economy or to construction-related activities.

Namely, in the construction sector, if the employer does not pay what it owes, the posted worker in certain situations does not need to limit itself just on that level, but it can ask for the payment also from the other subjects included in the subcontracting arrangement, for example the investor or the main contractor, but just when it comes to the direct contractual relationship. This mechanism applies only to construction activities and concerns only unpaid wages for the work performed, not compensation the worker would receive after the conclusion of the working relationship. The system is designed to encourage broader liability across the chain while preventing circumvention of liability in cases where confirmation of regular wage payments exists. However, if it is proven that wages are not paid, the liability can be reactivated for future non-payments, and after 14 working days from the date the liable subjects acknowledge the issue, often through official information from the labour inspectorate. To make it more transparent, the inspectorate can request that information on non-payment be highlighted in the workplace, and the trade unions and employers' associations can support court proceedings to protect workers, provided they obtain the workers' approval.⁷⁸⁸

⁷⁸⁷ Federal Public Service. Employment, Labour and Social Dialogue. General scheme of joint and several liability for unpaid wages - general scheme. (Available: <https://employment.belgium.be/en/themes/international/posting/working-conditions-be-respected-case-posting-belgium/remuneration-0>) (Accessed: 18 December 2025).; Federal Public Service. Employment, Labour and Social Dialogue. Joint and several liability for unpaid wages - general scheme (Available: https://employment.belgium.be/en/themes/international/posting/working-conditions-be-respected-case-posting-belgium/remuneration-4?utm_source) (Accessed: 18 December 2025).

⁷⁸⁸ Federal Public Service. Employment, Labour and Social Dialogue. Special scheme of joint and several liability for unpaid wages in construction-related activities. (Available: <https://employment.belgium.be/en/themes/international/posting/working-conditions-be-respected-case-posting-belgium/remuneration-3>) (Accessed: 19 December 2025).

Finally, Belgium was one of the Member States that claimed that the introduced system of chain liability is effective.⁷⁸⁹ Social partners have highlighted that certain segments of the liability system merit mention as good practice. Firstly, the legal framework provides for the suspension of payments and the activation of the liability mechanism when certain flaws are identified, thereby strengthening the enforcement of rules. Secondly, employers' representatives and trade unions had a role on the registration committee, and thereby were included in the practical application of the liability scheme, which, under the old legislation, secured a certain level of social control and joint responsibility.⁷⁹⁰ Nevertheless, no publicly available case law has yet provided specific evidence of such effectiveness, particularly in protecting the wages of posted workers in subcontracting arrangements.

4.2.3.4.1. Critical Evaluation Framework

The Belgian system of liability in subcontracting arrangements, analysed through the prism of the protection of posted workers, is an example of a model that tends to connect two key functions: to secure the effective enforcement of the workers' claims in cases of their rights violations, but also to act preventively on the behaviour of the companies in the chain. In a case of the transnational provision of services, in which the working relationships are often short-term, fragmented, and layered, such a system has a special importance since posted workers are often in a precarious position, especially regarding the payment of wages, non-transparent contractual relations, and boundaries in enforcing the rights against the employer that is outside of the host country. The Belgian system responds to those challenges by recognising joint and several liability not only in the relationship between the worker and the direct employer, but also as a mechanism that involves other companies in subcontracting arrangements.

Firstly, regarding the effectiveness of the enforcement mechanism, the Belgian system has advantages, as it enables liability to be imposed even on those with the highest control over the choice of business partners. In the construction sector, there is a special scheme of extended joint and several liability that can include the client or principal, who, further, hires contractors and subcontractors. Consequently, at least in this sector, the probability that the posted worker will receive their wages is higher, even when their employer is not paying or is insolvent, since

⁷⁸⁹ Cremers, Houwerzijl, 2021, p. 20.

⁷⁹⁰ Houwerzijl, Peters, 2008, pp. 35-36.

enforcement does not stop at the lowest level of the chain. However, it is important to note that the Belgian system cannot be described as full chain liability in all circumstances. It combines the construction scheme with the general scheme for the other sectors, and the application of liability depends on the specific requirements and procedures, including the role of labour inspections. Therefore, since the enforcement effectiveness of the system cannot be determined solely by the normative scope of the liability, but also by how quickly and effectively it can be activated, and by how easy it is in practice to prove the performed work, the debt, and the connection between the posted worker and the subcontracting arrangement, the Belgian system can be considered as an effective enforcement mechanisms. However, the distinction between the two schemes, depending on the sector involved, unnecessarily compounds the system's lack of clarity and may complicate procedures in practice.

Secondly, when the system is analysed as a deterrence mechanism, the possibility of including the investor or the main contractor in the liability is especially relevant, since those subjects, in practice, shape competition behaviour. If the main contractor or the investor knows it can be liable for workers' wages in the subcontracting chain, then the business risk logic changes. Then, the hiring of the cheap but risky subcontractor is not only a matter of price but also potentially entails financial and reputational costs. At that level, the system can act proactively and encourage self-protective behaviour at higher levels of the chain through due diligence, controls, and cautious contracting. However, the deterrent effect does not come automatically from the existence of the rules. It depends on how applicable and reliable the risk of liability activation is in practice, and how much control and consequences are actually used. In sectors outside construction, where the general scheme is applicable, and liability activation often involves formal steps and inspection controls, deterrence can be weaker if the system is seen as rarely applicable or hardly enforceable. Additionally, deterrence is reduced when violations of workers' rights are carried out through hidden models, such as bogus self-employment or complex cross-border arrangements, since then even the top of the chain can claim it was not reasonable to detect the irregularities.

Thirdly, regarding practical effectiveness, the Belgian system has clear value but also typical weaknesses that are particularly relevant for posted workers. On the one hand, the system's practical benefit is that it provides workers with an additional payment option, and the fact that liability can extend to the investor or the main contractor in construction gives the system real value and increases the likelihood of debt repayment. On the other hand, posted workers often find themselves in situations where it is hard to use legal instruments, meaning

they work for only a short time in one place, often change locations, have limited ability to collect evidence, and their direct employer can disappear or be replaced by another subcontractor. In such circumstances, even the system that normatively allows for the broad applicability of a liability scheme can become operationally complex. Practical effectiveness, therefore, mainly depends on how accessible the evidence of the work and workers' status is and how quickly and effectively institutions can intervene. In that context, administrative formalities, such as the LIMOSA application⁷⁹¹, are gaining additional value because they provide the basic evidence of the posting and, more generally, of the presence of posted workers in Belgium. However, administrative registration alone is insufficient if it is not supported by effective control and clear proof of the work performed and unpaid wages. Nevertheless, in Belgium, the lack of available cases demonstrating the system's practical effectiveness makes the applicability of court proceedings questionable and limits evaluation.

In conclusion, the Belgian system of liability in subcontracting arrangements is intended to increase the level of protection for workers beyond that of the direct employer and, in the construction sector, to also include the investor and the main contractor. That characteristic gives a particular enforcement and deterrent potential. However, the fact that liability can reach the top of the chain does not automatically mean that Belgium has a full chain liability system across all sectors and situations. The effectiveness of the system is finally measured not only in the scope of the rules, but also in how those rules are applied in practice, how controls are real, and how easy it is for the posted worker to prove and enforce their rights in real, often unclear and fragmented subcontracting relations. Unfortunately, such a measurement in the Belgium case is hard due to the lack of relevant publicly available case law.

4.2.3.5. Comparative Critical Evaluation Framework

The introduction of enforcement mechanisms for posted workers in subcontracting arrangements in EU countries has been prompted by widespread practices of circumventing employers' legal obligations and frequent violations of workers' rights. Although the reasons for legislators' interventions were common, the highlights differed across countries. For example, in Austria, such mechanisms were developed to address challenges in cross-border

⁷⁹¹ Limosa [Online] (Available at: <https://www.workinginbelgium.be/en/limosa.html>) (Accessed: 10 December 2025).

contexts⁷⁹², whereas in Germany, they focused on preventing illegal activities⁷⁹³. Consequently, the main aim of this legislation was to prevent abusive labour practices or unlawful market competition. In addition to these direct objectives, the legislative framework aimed to protect the broader public interest, as in Belgium.⁷⁹⁴ Given the stated objectives and reasons for introducing basic enforcement mechanisms in subcontracting arrangements, it is unsurprising that the current legal framework at the EU and Member State levels remains only partially harmonised. Although there is currently no single, optimal, stricter model applicable across all Member States beyond the obligatory model introduced by Article 12 of the Enforcement Directive, certain national systems are often highlighted as potentially effective instruments for strengthening the protection of the law and the rights of posted workers in subcontracting arrangements,⁷⁹⁵ especially in the liability scheme aspect.

Therefore, even though the German, Austrian, Dutch and Belgian systems of liability in subcontracting arrangements have been developed under different historical and institutional circumstances⁷⁹⁶, they have not been established as abstract legislative structures, but as responses to concrete practical challenges. Those include, as analysed above, long subcontracting chains, non-payment of wages, disappearing employers, letterbox companies, abusive business structures, and the systemic transfer of liability down the chain until the worker is left without any realistic possibility of enforcing their rights⁷⁹⁷.

For that reason, these models provide an especially important basis for questioning the potential future EU approach, particularly regarding the protection of posted workers in subcontracting arrangements, who are almost always the weaker party. In this regard, it is also important to emphasise that the national approaches considered ‘best practices’ are not developed outside the EU regulatory framework, but within it and around its loopholes. Therefore, the author considered it relevant to compare previously analysed national liability schemes recognised in the EU discourse, given their evolving nature and the fact that these countries are significant hosts for both posted workers and subcontracting practices. Such

⁷⁹² Cremers, Houwerzijl, 2021, p. 21.

⁷⁹³ Houwerzijl, Peters, 2008, p. 12.

⁷⁹⁴ Houwerzijl, Peters, 2008, p. 11.

⁷⁹⁵ Bogoeski, 2017, p. 4.

⁷⁹⁶ See, for example: Bogoeski, 2017, p. 6.; Houwerzijl, Peters, 2008, p. 11.; Cremers, Houwerzijl, 2021, p. 21.; Heinen, Müller, Kessler, 2017, pp. 87-92.

⁷⁹⁷ See: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, Brussels, 30 April 2024.

analysis allows not only a comparison of normative solutions but also the identification of specific mechanisms that could serve as ‘best practices’ for the future development of the harmonised EU model.

As seen, although models of national approaches differ, they share the common feature of not being limited to a single obligation and typically involve at least two areas of worker protection. Additionally, the personal scope of the systems reflects the logic of the subcontracting liability. While the scope of subjects that may be liable varies across national legislation, the position of workers within these protection mechanisms is largely similar, thereby ensuring a basic level of protection for their rights. Finally, with respect to territorial scope, the most relevant rules apply to the entire host country, including business entities established in other Member States that provide services in the host country's territory. In this way, the liability system's role as an instrument for safeguarding the effective enforcement of workers' rights and fair market competition is further confirmed.⁷⁹⁸

In this context, it is specifically relevant that the European Commission, in its document⁷⁹⁹, emphasised several ‘good practices’ that could help Member States and social partners to strengthen transparency and liability in subcontracting chains. Commission is, in this way, clearly starting from the presumption that the Enforcement Directive represents a minimum framework and that the Member States can and should go further, but under the conditions of proportionality and non-discrimination⁸⁰⁰. The analysis of German, Austrian, Dutch, and Belgian systems allowed the mapping of ‘good practices’ onto concrete national solutions, as well as the evaluation of which of them are actually functioning and which are limited or insufficiently developed. As seen, neither of the analysed national systems encompasses all the ‘best practices’, and effective protection cannot be achieved with a single mechanism. Therefore, in the following part of the study, the author provides an overview of the selected national mechanisms that have emerged as potentially the most effective in multiple respects.

⁷⁹⁸ Houwerzijl, Peters, 2008, p. 2.

⁷⁹⁹ Commission Staff Working Document Accompanying The Document Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD/2024/320 final.

⁸⁰⁰ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, Brussels, 30 April 2024.

The first and potentially most significant practice that even the Commission mentions is broadening liability across the chain, meaning the real transfer of risk towards the top of the chain, at least until the main contractor, with the possibility of a direct claim. This element is present in the analysed system in multiple forms. Germany is the most relevant example, as it developed a model of chain liability, particularly regarding wages, which can be extended up the chain until the main contractor⁸⁰¹. Such a system shows that legal protection is effective only when it allows the worker to claim directly from the subject with real financial power and control over the project. The normative logic of such a system is based on the fact that the direct employer of the posted workers in the chain is often financially unstable, temporary, or legally untraceable. In such circumstances, keeping liability only at the lowest level of the chain makes the right to wage a mere formality, not enforceable.

In this regard, it is worth noting the idea advocated by Langille⁸⁰² and further elaborated by Davidov: leading companies should bear liability in pursuit of the broader objective of strengthening human capabilities and freedoms. Accordingly, the focus is not only on formal relationships between subjects, but also on workers themselves and their real position. However, such an approach opens important questions. If we want to improve the position of workers, who should actually bear the brunt of that goal? Why would it be the leading company, and not, for example, the state or the society as a whole? Even though Langille didn't explain it in full, it can be presumed that he starts from the idea that the leading company should be liable, since it has real power over the behaviour of its business partners and over preventing rights violations. A similar argument is also made by other authors⁸⁰³, who consider that the challenges in chains could be mitigated by the leading company setting minimal standards for workers of its contracting partners, thereby limiting negative competition.⁸⁰⁴

That is why the German system, despite certain limitations in case law⁸⁰⁵, shows a high level of effectiveness as an enforcement mechanism, since it eliminates the main barrier, which

⁸⁰¹ Arbeitnehmer-Entsendegesetz (AentG 2013) - Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen vom 20.04.2009. (BGBl. I S. 799), das zuletzt durch Artikel 8 des Gesetzes vom 22. Dezember 2025 (BGBl. 2025 I Nr. 369) geändert worden ist. § 14 Haftung des Auftraggebers.

⁸⁰² Langille, 2015, pp. 257-280.

⁸⁰³ See, for example: Anner, Bair, Blasi, 2013, pp. 1-43.

⁸⁰⁴ Davidov, 2015, p. 23.

⁸⁰⁵ See, for example: Bundesarbeitsgericht, Urteil vom 16. Oktober 2019 – 5 AZR 241/18 – Vorinstanz: Landesarbeitsgericht Berlin-Brandenburg, Urteil vom 25. Januar 2018 – 21 Sa 1231/17 (Available at: [ECLI:DE:BAG:2019:161019.U.5AZR241.18.0](https://www.ecli.de/ECLI:DE:BAG:2019:161019.U.5AZR241.18.0)) (Accessed: 11 December 2025).; See also: Bundesarbeitsgericht, Urteil vom 16. Oktober 2019 – 5 AZR 80/19 (Available at: <https://www.bundesarbeitsgericht.de/entscheidung/5-azr-80-19/>) (Accessed: 11 December 2025).; Bogoeski, 2017, p. 9.; Guga, 2016, pp. 5-6.

is the need to prove guilt or knowledge on the part of subjects higher in the chain. At the EU level, this element could serve as the basic harmonisation standard, providing the minimum protection in typical risk situations, such as insolvency or the employer's disappearance. The basis of the conclusion here is functional: the system is strongest when the worker does not need to navigate a procedural labyrinth and when legal protection is not merely formal but a real, enforceable right. The EU level can adopt this practice as the minimum harmonisation standard. Therefore, it does not necessarily need to be a full chain liability in all contractual relationships, but it should be an obligatory minimum that, in typical scenarios such as non-payment, insolvency, or a letterbox company, the main contractor be addressed as the debtor, not just as a supervisor. It can be argued that this is a 'best practice' because it is the only one that addresses the core challenge in the context of posting workers: the worker is temporary in the host country, evidence is weak, and the employer is often out of reach.

Nevertheless, it is important to emphasise that other analysed countries also adopted some form of broadened liability. Belgium, for example, is combining a special chain liability regime in the construction sector with the general regime that allows liability to be broadened along the chain.⁸⁰⁶ In the EU Reports, it is identified as the country that exceeded the minimum requirements of Article 12.⁸⁰⁷ Austria is also recognised as an example of the partial application of this practice, but the highlighted influence, especially in the construction sector, where the liability is connected to the elements of knowledge or the possibility of knowledge on non-payment.⁸⁰⁸ The Netherlands is additionally specific since it did not establish a classic chain liability, but a successive model in which the liability is gradually transferred to a higher level of the chain only when the lower level cannot or does not want to comply with the obligation, with the exceptions that allow the worker, in the most serious cases, to skip certain levels.⁸⁰⁹

Exactly the latter model is the second practice that could be identified as the 'best practice': the model of successive liability, with the possibility of skipping certain levels in

⁸⁰⁶ Federal Public Service. Employment, Labour and Social Dialogue. General scheme of joint and several liability for unpaid wages - general scheme. (Available: <https://employment.belgium.be/en/themes/international/posting/working-conditions-be-respected-case-posting-belgium/remuneration-0>) (Accessed: 18 December 2025).; Federal Public Service. Employment, Labour and Social Dialogue. Joint and several liability for unpaid wages - general scheme (Available: https://employment.belgium.be/en/themes/international/posting/working-conditions-be-respected-case-posting-belgium/remuneration-4?utm_source) (Accessed: 18 December 2025).

⁸⁰⁷ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, 30 April 2024.

⁸⁰⁸ Cremers, Houwerzijl, 2021, p. 21.

⁸⁰⁹ Heinen, Müller, Kessler, 2017, pp. 87-92.

serious cases, as established in Dutch law⁸¹⁰. This approach shows how the balance between the worker and the proportionality principle can be applied. Potentially, instead of automatic chain liability for all subjects in the chain, liability should be activated gradually, and the law also predicts exceptions that benefit workers when such a gradual path would be unreasonable or ineffective. In that way, it is ensured that the protection of rights does not lose its sense due to long-term or complex procedures. The basis of this conclusion is the process rationality of the Dutch system, which clearly defines the conditions under which liability ‘climbs’ up the chain. Exactly that predictability and functionality make it an appropriate example at the EU level. Therefore, the EU harmonisation can take over the standardised triggers, including objectively measurable situations in which the worker has a right to speed up the way to the top of the chain (for example, insolvency, disappearance of the subject, enforceability of the court decision, longer lack of payment, etc.), instead of leaving everything to different national procedures. That could be considered the best practice, since it addresses one of the biggest practical challenges: even when there is a liability, workers often lose a sense of protection regarding procedural steps and deadlines.

The third relevant practice that can be considered as the ‘best practice’ is, for sure, the broadening of the obligatory liability in subcontracting arrangements to all sectors, not limited only to the construction sector. Even though the construction sector has historically been a focal point for developing chain liability, modern violations of posted workers' rights are increasingly evident in other labour-intensive sectors. Limiting liability to a single sector does not respond to the real patterns of the labour market or to the structure of modern subcontracting arrangements. This practice has already been applied for a long time in analysed national systems. For example, Germany has already, with the MiLoG⁸¹¹, eliminated sectoral limitations. The Netherlands has, through the Artificial Constructions Act⁸¹² also established the liability system applicable to all sectors. Belgium, while maintaining a stronger, specialised system for the construction sector, is also applying the general liability system to all sectors where subcontracting is identified as a risk. Austria, even though focused on construction, through

⁸¹⁰ See more in: Heinen, Müller, Kessler, 2017, pp. 16, 87-92.

⁸¹¹ Mindestlohngesetz (MiLoG 2015) – Gesetz zur Regelung eines allgemeinen Mindestlohns vom 11.08.2014. (BGBl. I S. 1348), das zuletzt durch Artikel 2 des Gesetzes vom 22. Dezember 2025 (BGBl. 2025 I Nr. 369) geändert worden ist.

⁸¹² Wet aanpak schijnconstructies, Staatsblad 2015, 233, as amended, in force since 1 July 2015, with amendments entering into force on 1 January 2016 and 1 January 2017 (Available at: <https://wetten.overheid.nl/BWBR0036706/2017-07-01>) (Accessed: 5 December 2025).

broader administrative mechanisms of control and intervention in financial flows, is also reacting to other sectors, especially in a cross-border context.

The fourth key practice is a result of the Austrian system and concerns the administrative guarantee of the enforcement of rights through interventions in the financial flows of the subcontracting chain⁸¹³. Here, the ‘best practice’ is not in providing the worker with another claim, but in the fact that it starts from the realistic presumption that court proceedings often come too late, especially in cross-border cases. Therefore, protection does not depend solely on individual workers’ claims, but also on the state's ability to respond in a timely manner and prevent the financial flow from falling within the enforcement reach. That preventive dimension, stopping the money where it still exists, is one of the main contributions of the Austrian system. The basis of the conclusion is operative, since it’s a mechanism designed mainly for letterbox companies and cross-border contractors that can access financial sources within the scope of domestic enforcement. The EU level could take over such a practice as the harmonised set of mechanisms for preserving financial sources in the chain, with the strict conditions of proportionality, for example, with temporary insurance measures, mandatory guarantees, or suspension of payments in clearly defined risk circumstances. It can be argued that this ‘best practice’ is solving the problem that civil liability often cannot: the question of time and financial availability.

The fifth practice combines liability with the chain transparency obligation and the informing obligation, with strong consequences for retaining the information. Here, the Austrian model is particularly relevant, in which the obligation to provide full and correct information about contractual partners in the chain is turned into a legal presumption to increase liability⁸¹⁴. The basis of the conclusion is simple: in chains involving posted workers, the biggest practical enemy of enforcement is not necessarily a lack of norms, but a lack of information, since the worker does not know who the subjects are, and inspections often lack a full structure. EU harmonisation in this regard could establish such a mechanism, with a minimum standard of chain transparency and penalties for non-transparency, so that non-compliance with information obligations does not go unpunished and instead imposes stronger

⁸¹³ As could be seen in the example of the Judgment of the Court (Grand Chamber) of 13 November 2018. *Čepelnik d.o.o. v Michael Vavti*. Case C-33/17. ECLI:EU:C:2018:896.; See also: Cremers, Houwerzijl, 2021, p. 21.

⁸¹⁴ See particularly: § 10, Chapter 2, Bundesgesetz, mit dem ein Gesetz zur Bekämpfung von Lohn- und Sozialdumping erlassen wird (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG) StF: BGBl. I Nr. 44/2016 (NR: GP XXV RV 1111 AB 1133 S.128. BR: AB 9590 S.854.) (Available at: <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555&FassungVom=2023-12-22>) (Accessed: 20 December 2025).

liability on the subject who failed to provide information. This could be perceived as a ‘best practice’ because it addresses the proven imbalance in which, instead of the worker proving the structure of the chain that he or she cannot know, the burden of proof is shifted to those who are contracting and administering the chain.

The sixth practice that has a strong deterrent effect is the structure of the administrative obligations related to the posting of workers, such as reporting, documentation, and a contact person. It creates tracks to prove and facilitate inspection control, with two-sided liability, in which the service recipient must also supervise. In Dutch system analysis, it is described as the layer that not only protects the worker declaratively but also establishes the conditions under which violations can be identified and proven. The basis is not that the administrative report itself guarantees wages, but that, without such an evidentiary framework, neither the worker nor the inspector has sufficient grounds⁸¹⁵. Belgian LIMOSA⁸¹⁶ example has a similar role, not as a replacement for liability, but as support. At the EU level, such a practice could be harmonised as the evidence structure's harmonised minimum, not necessarily identical to national solutions, but as a standardised package of obligations that provides clear tracks of who, where, and under what conditions is working, and involves the recipient's cooperation obligations. It can be preserved as a ‘best practice’ because it clarifies the intercorrelation between the law and enforcement, meaning that without evidence, even strict liability remains just a theory.

The seventh practice that proved key to preventing violations of posted workers' rights in subcontracting arrangements is the absence of the due diligence defence, or at least its strict limitation, since the system is easily slipping into mere formality⁸¹⁷. However, this segment will be further analysed below.

When all the practices are combined, it is visible that the ‘best practice’ in this context is not just one norm, but a normative, administrative and institutional system that simultaneously deals with three aspects: enables the posted worker a real way to enforcing its rights, changes the behaviour of the top of the chain and gives a state mechanisms to prevent disappearing of

⁸¹⁵ See: Heinen, Müller, Kessler, 2017, pp. 87-92.

⁸¹⁶ Limosa [Online] (Available at: <https://www.workinginbelgium.be/en/limosa.html>) (Accessed: 10 December 2025).

⁸¹⁷ See on which countries introduced due diligence defence: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System (‘the IMI Regulation’), COM/2019/426 final, 25th of September 2019.

financial sources and evidences. Based on that, the author believes the future EU approach should be harmonised across functional elements, rather than unified in form. That means the EU should set functional standards to prevent protection from depending on the sector's inclusion, the worker's procedural courage, or the chain's ability to disappear. This comparative analysis served as the basis for the considerations examined below, including the two possible legislative approaches of the EU. First, it can be a strengthening and amendment of the posted workers' legal framework, especially the Enforcement Directive, or the development of a broader, horizontal instrument that would systemically regulate liability in subcontracting chains, including, but not limited to, posted workers. Both approaches have legal and political implications, but the previous analysis of the national systems shows that without a certain level of harmonisation of the key 'best practices', the structural weaknesses cannot be eliminated from the existing EU framework, which currently does not secure enough effective protection of posted workers in complex subcontracting arrangements.

4.3. Overview of Selected Complementary Mechanisms: Due Diligence (Defence) and Chain Levels Limitation

As concluded above, the liability scheme is considered the necessary system at the EU level for preventing fraudulent practices, and, in combination with other complementary mechanisms, it enables a comprehensive approach to the enforcement of posted workers' rights, especially the payment of wages. Therefore, even though it is an effective mechanism, it is insufficient if it is not supported by other mechanisms of control and enforcement, or if it is weakened by those mechanisms. As seen above, in a balanced system, it is important to connect more instruments to the liability scheme so that protection is not merely formalistic. Similar logic was also applied when introducing Directive 2009/52⁸¹⁸, where the need to combine the liability scheme with other mechanisms was emphasised.⁸¹⁹ Even in the Commission Staff Working Document accompanying the 2024 Report on PWD18, listed some of the comprehensive mechanisms as 'good practices'. The first one mentioned, together with the chain liability, was limiting the number of levels in subcontracting chains. Other ones included

⁸¹⁸ Article 8(3) says: 'A contractor that has undertaken due diligence obligations as defined by national law shall not be liable (...)'. See: Consolidated text: Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L168, 30 June 2009.

⁸¹⁹ Bakermans, 2014, p. 12.

*‘imposing “social clauses” in public procurement contracts published by Member States, allowing workers to take a specific claim directly to the top of the subcontracting chain, without the need to go through each level of the chain, enhancing cooperation between Member States in order to facilitate inspections and tackle the abusive practices of letterbox companies, including on a cross-border basis, and by exchanging information, enhancing the possibility for trade unions to access workplaces at national level with the aim of protecting workers and providing information on their rights, designating a coordinator with an overview of all the different entities in a subcontracting chain, including provisions in collective agreements stating that before works start, companies are obliged to communicate to the national competent authorities the complete list of companies involved in contracts and subcontracts (including cross-border service providers)’.*⁸²⁰

Nevertheless, due to the limitations of the research, the author selected two comprehensive mechanisms for further overview. One already exists in the posted workers' legal framework: the due diligence defence system. The second is mentioned in the Commission's Document as a 'good practice' and a subject of current discussions on the new legislative framework: measures aimed at limiting the length of subcontracting chains.

4.3.1. Due Diligence

Terminologically, countries use different terms for due diligence, especially in the context of human rights, which can cause confusion in practice. For example, in the common law tradition, the term 'duty of care' is often used, whereas in France, the term 'vigilance' is used, which is linked to a detailed, precisely defined legal framework⁸²¹.⁸²² However, the basic idea of due diligence in that context is widely accepted and well established in legal traditions: companies should not harm people. To ensure that, they need to establish systems that allow them to recognise human rights risks and respond in a timely manner, not only in their own business activities but also throughout the supply chain.⁸²³ The common terminology is based

⁸²⁰ Commission Staff Working Document Accompanying The Document Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD/2024/320 final.

⁸²¹ See: LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Légifrance, 27 March 2017. (Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626?>) (Accessed: 30 December 2025).

⁸²² Smit, *et. al.*, 2020, pp. 156-157.

⁸²³ Smit, *et. al.*, 2020, pp. 156-157.

on a concept developed in the UN Guiding Principles on Business and Human Rights (UNGPs)⁸²⁴. The UN emphasised that companies can show real respect for human rights through three key steps. First, through the implementation of a clear and consistent policy that confirms that obligation; second, through the systemic recognition and evaluation of potential risks through the process of due diligence; and third, through the existence of mechanisms with which any damage that may have occurred can be fixed or compensated.⁸²⁵ Therefore, those principles establish a simple yet robust liability framework, saying that the state must actively protect people's rights, companies must comply with them in their operations, and individuals have the right to enforce their rights if they are violated. For companies, it means more than just formal compliance with the law. They need to systematically consider where, in their activities or contractual chains, there is a risk that could harm people, respond promptly to eliminate or mitigate risks, and openly show what they are doing. The key change of this kind of approach compared to older ones⁸²⁶ is that the focus is no longer on operating the business at risk solely to protect the company, but also on liability toward people the business can affect directly, such as workers, or indirectly.⁸²⁷

Nevertheless, due diligence is not limited to human rights in a broader sense, but it is clearly and directly connected to labour rights. Even though those two areas are intercorrelated, in some respects they can be analysed separately, depending on the focus. For example, the ILO⁸²⁸ primarily emphasises workers' rights, whereas the UNGPs take a broader approach to human rights. Despite this, labour rights today are an essential part of the due diligence process. In order to enforce such a process in an appropriate way, it is necessary to clarify what is expected from companies when it comes to labour rights, such as equal treatment, safe and fair working conditions, and freedom of unionisation, and how such principles should be enforced through the subcontracting chain. In that context, the UN⁸²⁹, the ILO⁸³⁰, and the OECD⁸³¹ are providing guidelines and recommendations that are helping companies to transfer those

⁸²⁴ United Nations Human Rights Office of the High Commissioner, 2011, pp. 15-16.

⁸²⁵ Hiller, Hiller, 2014, p. 121.

⁸²⁶ See: Nolan, Frishling, 2020, p. 109.

⁸²⁷ Hess, 2022, pp. 37-38.

⁸²⁸ International Labour Organization, 2006. See also the latest version of the ILO Declaration in that regard: International Labour Organization, 2022.

⁸²⁹ The UNGPs represent the inaugural globally recognised standard on business and human rights aimed at addressing adverse impacts on human rights stemming from business activities. See more in: United Nations, 2011.; Márquez Carrasco, 2022, pp. 76-99.

⁸³⁰ International Labour Organization, 2006. See also the latest version of the ILO Declaration in that regard: International Labour Organization, 2022.

⁸³¹ OECD, 2011. See also the latest version of the OECD Guidelines in that regard: OECD, 2023.

standards into concrete, practical examples.⁸³² However, one of the key challenges in due diligence related to labour rights is a concrete question of what exactly is considered a risk, and how it is measured. UNGPs start from the premise that companies need to manage risks for people, but in practice, there is still no equalised, clear way to assess real damage or its intensity. Authors such as Bauman-Pauly emphasise the importance of developing sector-specific standards and measurable indicators to evaluate, as objectively as possible, whether companies respect labour rights. The problem is that existing international instruments, such as those mentioned above, do not provide a clear definition of the negative aspects of labour rights. That is why it is necessary for legal theory and business ethics to clearly define them, especially what it means in practice to secure fair and decent working conditions. Without further clarification, companies find it hard to manage risks in a way that is truly significant rather than merely formal.⁸³³ The second important challenge is to turn the idea of due diligence within the scope of labour rights into a legally binding responsibility, or into concrete due diligence that can be subject to legal control. Even though there is an important approach multinational companies need to take to respect labour and human rights throughout the value chain, discussions so far have mainly focused on the liability of parent companies. The question of responsibility of the contractor and subcontractor is not sufficiently elaborated and is legally unclear, as analysed above.⁸³⁴ Besides, due diligence by companies requires them to check their business partners and third parties to determine whether there is a risk of violations of labour (or human) rights in their operations. Generally, due diligence is often described as a form of ‘soft law’ because it is based mainly on guidelines and recommendations rather than binding legal provisions. Court proceedings that have so far been linked to due diligence are mainly handled in civil-law jurisdictions, particularly in cases of environmental liability. Such cases are mainly directed against parent companies for damage caused by their subsidiaries' operations and raise questions about the parent company's liability and due diligence. On the contrary, respect for basic social rights, such as equal treatment, protection of dignity, and the securing of fair working conditions, is significantly less developed and is less often the subject of detailed legal analysis.⁸³⁵

An EU framework on due diligence, including labour rights, could bring legal clarity and contribute to the gradual change of the legal practice, especially in complex cross-border

⁸³² Brown, 2018, pp. 134-135.

⁸³³ Bueno, 2019, pp. 435-436.

⁸³⁴ Bueno, 2019, p. 436.

⁸³⁵ Cremers, Houwerzijl, 2021, p. 31.

situations, such as subcontracting arrangements. The clear and harmonised rules would ease the enforcement of workers' rights for victims of violations, since procedures would be more predictable and standards of responsibility more harmonised at the EU level.⁸³⁶ In order to make proper progress in this regard, it is necessary for lawyers to cooperate with economists and market specialists, since without understanding the real structure and dynamics of the value chains, it is hard to shape effective rules. In that sense, there are already attempts to connect law and business ethics that offer practical guidance and show how due diligence can function in everyday business, not just as a theoretical concept.⁸³⁷ In this regard, Bueno emphasises that both the EU and countries need to shift from general principles to concrete measures, or to move due diligence from the scope of general human rights⁸³⁸ to that of labour law, and not only to voluntary but to legally enforceable obligations. Ideally, it would also mean legal clarity regarding the company's liability for damages caused in the chain, regardless of where they occurred. However, such a model is not easy to achieve, as regulating cross-border business activities raises numerous questions and creates additional barriers. That is exactly why there are still significant legal gaps in this area, since countries are expected to lead and develop a solution that is sustainable in practice.⁸³⁹ One such example occurred in the context of posted workers, where the Enforcement Directive not only did not introduce an obligation to conduct due diligence but also made it voluntary for Member States to use it as a mechanism to 'escape' liability. Such a missed opportunity for an effective, comprehensive mechanism for the liability scheme warrants further (critical) analysis.

4.3.1.1. Due Diligence Defence System: Another Flaw of the Enforcement Directive?

⁸³⁶ Velluti, 2024, p. 20.

⁸³⁷ Bueno, 2019, p. 436.

⁸³⁸ The debate specifically on due diligence regulation occurred at the EU level in spring 2020, when EU Commissioner for Justice Didier Reynders announced that they are planning to introduce mandatory rules for companies on both environmental and human rights responsibilities. In February 2022, the European Commission proposed the Corporate Sustainability Due Diligence Directive. Nevertheless, one of the main challenges of the Directive was excluding small and medium-sized enterprises, which are often located at the end of the supply chain and are often the violators of workers' rights. Also, the Directive was eventually watered down in the Omnibus package, and its purpose became questionable. See: Cremers and Houwerzijl, 2021, p. 16.; Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, Official Journal L, 2024/1760.; Smit, *et. al.*, 2020, pp. 129-130.

⁸³⁹ Haar, Kun, 2019, p. 456.

As a voluntary measure for Member States, as mentioned above, due diligence has been introduced under the EU posted workers legislation, the Enforcement Directive.⁸⁴⁰ In the first draft of the Directive, Article 2 outlined how suitable due diligence could be structured and implemented at the national level. According to that proposal, the contractor could avoid liability if it would ask for and get certain documentation, such as pay slips and other evidence on the payment of wages, confirmation on the compliance with the social security contributions obligations and taxes obligations, and evidence on respecting the rules on posting of workers that are applicable in the host country.⁸⁴¹ In the second draft of the Directive, the possibility of invoking due diligence has been raised, but in a different manner, primarily as an option for the contractor to prove that, given the circumstances, it did everything reasonably possible and expected to prevent violations of obligations. In comparison, the first draft mentioned was more concrete and took a narrower, more structural approach, with specific recommendations for implementing such a system in national legislation. On the other hand, this second draft omitted detailed directions and left open the possibility for Member States to introduce a due diligence defence as an element of the national system. In that way, broad discretion has been left to Member States to determine for themselves the provisions governing how such a due diligence defence will be structured, without a clear EU-level framework or instructions.⁸⁴² Another difference between the first and second drafts is that the second draft is closer to the solution introduced in Directive 2009/52⁸⁴³. While the first draft predicted some restrictions and a clear framework, highlighting that the due diligence defence system must be transparent, non-discriminatory, and proportionate, the second draft kept itself limited to the possibility of its introduction, without any further normative explanation.⁸⁴⁴

In the final version of the Directive, it is predicted that Member States, either instead of introducing liability rules or in addition to them, may provide that a contractor who has acted with due diligence, as defined by national law, will not be held liable. In practice, it means that the solutions across countries differ, even within sectors, depending on how they use that possibility⁸⁴⁵.⁸⁴⁶ In that way, together with the already mentioned limited area of the

⁸⁴⁰ Cremers, Houwerzijl, 2021, p. 31.

⁸⁴¹ Heinen, Müller, Kessler, 2017, p. 50.

⁸⁴² Bakermans, 2014, pp. 19-20.

⁸⁴³ Article 8(3) says: 'A contractor that has undertaken due diligence obligations as defined by national law shall not be liable (...)'. See: Consolidated text: Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L168, 30 June 2009.

⁸⁴⁴ Bakermans, 2014, pp. 27-28.

⁸⁴⁵ European Commission, 2024, pp. 58-59.

⁸⁴⁶ European Commission, 2025, p. 11.

applicability of liability, with Article 12(5) of the Enforcement Directive, Member States got the option to introduce a so-called ‘escape clause’ based on due diligence. According to that clause, a contractor that proves that it took all the measures of the due diligence required by the national law, will ‘escape’ liability. However, the Directive itself does not set concrete criteria or clarify exactly what due diligence entails, leaving that to national legislators. Therefore, the system of liability from Article 12 of the Enforcement Directive can be described as a relatively ‘soft’ approach, since not only is the obligatory liability limited to only one level above the direct employer, but it is additionally watered down with the due diligence defence system, on which the structure or scope is not defined or harmonised.⁸⁴⁷

According to the Commission's Report, sixteen Member States have introduced a due diligence escape clause in their national legislation. In most of those countries, the possibility to escape liability is mainly based on the overall evaluation of the behaviour of the contractor in a concrete case, or on the fact that if, in certain circumstances, the subject in the chain has behaved carefully enough, such as in Cyprus, the Czech Republic, Estonia, Greece, Ireland, the Netherlands, Poland (and the UK). On the other hand, twelve Member States, such as Austria, Belgium, Croatia, the Czech Republic, France, Hungary, Luxembourg, the Netherlands, Poland, Romania, Slovakia, and Spain, in their legislation have strictly regulated criteria which the contractor needs to fulfil in order to control or encourage rule compliance of the subcontractor. Such criteria are not uniformly defined across Member States. For example, in Italy, the due diligence institute is limited to the transport sector. In other words, although the possibility of avoiding liability through the due diligence procedure is widely accepted, its regulation varies significantly among Member States, from broad evaluations, such as in Poland, to precisely defined obligations, such as in Croatia.⁸⁴⁸ Namely, Croatian Article 31(5) of the Law on Posting of Workers to the Republic of Croatia and Cross-Border Enforcement of Decisions on Fines, that is regulating the liability system for the construction sector, is saying that the contractor shall be exempt from liability if it has taken all appropriate steps to request and obtain from its subcontractor, before the start or during the duration of the posting, following: *‘a copy of the subcontractor's statement on posting of workers and all subsequent amendments to it; a list of*

⁸⁴⁷ Heinen, Müller, Kessler, 2017, p. 48.

⁸⁴⁸ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System (‘the IMI Regulation’), COM/2019/426 final, 25th of September 2019.

*all workers employed in the performance of the service contract between the contractor and the subcontractor; for each individual worker: worker identification data, date of birth, job description, citizenship, start and end date of posting, place of posting, regular working hours, including overtime, and gross monthly salary; a written guarantee by the subcontractor that, as the employer, it will pay the posted worker the salary within the time limit and in the amount due to him during the posting; during the duration of the contract between the contractor and the subcontractor, for each individual posted worker at least once a month: a record of working hours, a record of wages, a salary calculation clearly showing, all data on which the amount of the salary depends, and the amount of the salary on these grounds, the currency in which it is paid and proof of payment of wages within the period and the amount to which the worker is entitled during the secondment’.*⁸⁴⁹

Therefore, even though there are some normatively better composed due diligence defence systems, as the latter mentioned, for which, however, there is no concrete evidence of their effectiveness, the Enforcement Directive is still showing a significant flaw in this regard. Not regulating the minimum requirements on what can be considered as the ‘due diligence’, is opening up a space for Member States that are already not lean for the liability system idea in subcontracting chains, to use that flaw and set such low standards that the contractors or investors can easily circumvent liability, basically just by ticking the minimum requirements.⁸⁵⁰

4.3.1.1.1. Critical Evaluation Framework

Since there is no unique definition of due diligence at the EU level, Member States have a broad margin of appreciation.⁸⁵¹ On the one hand, that is politically understandable, since it concerns a sensitive area in which Member States' interests differ significantly. However, such an approach can seriously call into question the liability system, since the due diligence defence system can become a mechanism for avoiding liability rather than an instrument of real prevention.⁸⁵² Even before it was shown that the unclear and insufficiently defined legal categories at the EU level often lead to unequal application and legal uncertainty. Exactly this

⁸⁴⁹ Zakon o upućivanju radnika u Republiku Hrvatsku i prekograničnoj provedbi odluka o novčanoj kazni, Official Gazette (Narodne novine) no. 128/20, 114/22, entered into force on 01 January 2023.

⁸⁵⁰ Heinen, Müller, Kessler, 2017, pp. 92-96.

⁸⁵¹ Heinen, Müller, Kessler, 2017, p. 51.

⁸⁵² Bakermans, 2014, pp. 19-20.

should have been avoided in this case. Since the obligations of due diligence are left to national legislators, some countries may set lower standards, including less stringent requirements for the type, quality, and reliability of the documentation the contractor must provide.⁸⁵³ Therefore, the evaluation of whether the contractor did enough ‘due diligence’ to defend itself against liability is left to national courts. In that way, the possibility of interpreting the same institute in different ways remains open, creating additional legal uncertainty in the regulation of subcontracting chains for posted workers.⁸⁵⁴

In that sense, the European Trade Union Confederation took an approach that the possibility of proving due diligence shouldn’t be involved in the liability-in-subcontracting-arrangements provision of the Enforcement Directive. Critics of such a solution, who come not only from social partners but also from legal doctrine, are showing its flaws. For example, some authors have highlighted that, in practice, the introduction of the due diligence exception is creating unnecessary administrative burdens and, as a result, is not suitable for the effective protection of workers' rights.⁸⁵⁵ In other words, instead of contributing to effective legal enforcement, such a solution often leads to additional bureaucracy and not a real liability.

Despite criticism from the ETUC and the academic literature, there are also arguments in favour of the concept of due diligence. Jorens, Peters, and Houwerzijl, starting from the *Wolff and Müller* judgement⁸⁵⁶, conclude that the obligations of due diligence are not, on their own, disproportionate, provided that the liability system clearly contributes to the protection of workers' rights.⁸⁵⁷ It would mean that if such a liability system is really strengthening the position of posted workers, then requiring a certain level of due diligence would not be problematic. The same authors claim that the previously mentioned Article 8 of Directive 2009/52 illustrates how many questions can arise from the introduction of the due diligence defence system in the liability context. Such provision has also been transposed in Member States in various ways, leading to a lack of harmonisation in practice. Therefore, the question in practice is whether a one-time check-up of a subcontractor at the beginning of the cooperation is sufficient, or whether the contractor should continuously monitor subcontractors throughout the business relationship.⁸⁵⁸ Such unclarities show how complex this institute is and how

⁸⁵³ Heinen, Müller, Kessler, 2017, p. 51.

⁸⁵⁴ Heinen, Müller, Kessler, 2017, p. 12.

⁸⁵⁵ Govaert, Van Beers, 2013, pp. 27-28.

⁸⁵⁶ Judgment of the Court (Second Chamber) of 12 October 2004. *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix*. Case C-60/03. ECLI:EU:C:2004:610.

⁸⁵⁷ Houwerzijl, Peters, 2008, p. 42.; Bakermans, 2014, pp. 27-28.

⁸⁵⁸ Houwerzijl, Peters, 2008, p. 163.; Bakermans, 2014, pp. 27-28.

important it is to define its boundaries. Moreover, the authors argue that introducing a due diligence system in the chain liability scheme could also be disproportionate for *bona fide* undertakings. They are highlighting that due diligence should not allow the client or main contractor to avoid liability when they know that the contractor or subcontractor has violated workers' rights and the mandatory rules that protect them.⁸⁵⁹ At the same time, they are admitting that it would be hard in practice to prove such knowledge, even the intention, on the clients' or contractors' side. Therefore, they emphasise that the chain liability system, without the due diligence defence, should be analysed alongside complementary mechanisms to prevent liability from unjustifiably falling on undertakings acting in good faith.⁸⁶⁰

Specifically, with respect to the current Enforcement Directive's concept of direct joint and several liability, the due diligence defence system should not apply. As mentioned, because there is no unified definition of due diligence, its application varies across national interpretations. As Member States have discretion in this regard, there is a real danger that the due diligence criteria are set so broadly or so formally that compliance becomes easy. In that way, the liability system is directly weakened, especially when due diligence is invoked to escape liability. In other words, due diligence should not become a mechanism for avoiding liability.⁸⁶¹ It is worth emphasising that in the previous analysis of the German and Dutch liability systems⁸⁶², it has been highlighted that those systems also advocated that due diligence should not be used as an excuse to avoid liability, as there is a persistent tendency to create fictitious documentation that conceals the real condition. The basis is practical, meaning that if the due diligence is too broad, the real risk burden shifts back to the worker, who must prove that the top of the chain knew or wasn't cautious enough, which is often not possible.⁸⁶³

Finally, improving the current system in the posted workers context can be achieved by harmonising the different standards. The due diligence defences need to be either eliminated in high-risk sectors or strictly limited by objective criteria, rather than mere tick-box compliance. It is important that due diligence should be a complementary mechanism to the liability scheme, not a way to escape liability. In that way, with a combination of those two mechanisms, posted workers receive additional preventive protection. This can be considered the seventh 'best

⁸⁵⁹ Houwerzijl, Peters, 2008, p. 163.; Bakermans, 2014, pp. 27-28.

⁸⁶⁰ Bakermans, 2014, pp. 27-28.

⁸⁶¹ Bakermans, 2014, p. 31.

⁸⁶² Cremers, Houwerzijl, 2021, p. 21.; Heinen, Müller, Kessler, 2017, pp. 87-92.

⁸⁶³ Koberski, Asshoff, Eustrup Verlag, 2011, p. 165.

practice’ since it protects the core and purpose of the liability, aiming to influence market behaviour rather than just contractual provisions, without real control.

4.3.2.1. Subcontracting Chain Levels Limitation

The Commission, in its Staff Working Document accompanying the 2024 Report on PWD18, listed several comprehensive mechanisms as ‘good practices’, and the first, together with chain liability, was limiting the number of levels in subcontracting chains.⁸⁶⁴ Additionally, it was mentioned that the limitation on the length of the subcontracting chain in a certain form was introduced in Norway, Belgium, France, Italy and Spain.⁸⁶⁵ Nevertheless, that wasn’t the last attempt to advocate for such a mechanism, as in 2025, the initiative was still led by representatives of social partners.⁸⁶⁶ They have been inviting the European Commission to propose measures to establish a general rule under which, in sectors with a higher risk of workers’ rights violations, subcontracting should be limited to a maximum of two levels below the main contractor. In this regard, it is especially important to recognise the high-risk sector at the national level and to establish a procedure that, with clear justification, would step away from that general rule, but only at the national level, in cooperation with the social partners.⁸⁶⁷ In that sense, it has been emphasised that there is a clear need for EU legislation to set clear boundaries, ensuring that subcontracting chains in practice cannot be expanded indefinitely but are limited to one or two additional levels.⁸⁶⁸

⁸⁶⁴ Commission Staff Working Document Accompanying The Document Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD/2024/320 final.

⁸⁶⁵ Consultation Document, First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers’ rights – Quality Jobs Act, C(2025)9944 final, Brussels, 4th December 2025, p. 11.

⁸⁶⁶ European Trade Union Confederation (2025) ‘For an EU Directive on subcontracting and labour intermediation’. Resolution adopted at the Executive Committee meeting of 1-2 October 2025. [Online] (Available at: <https://www.etuc.org/sites/default/files/document/file/2025-10/EN%20-%20Adopted%20-%20Resolution%20for%20an%20EU%20Directive%20on%20subcontracting%20and%20labour%20intermediation%20and%20annexes.pdf>) (Accessed: 30 November 2025).

⁸⁶⁷ Draft Report on addressing subcontracting chains and the role of intermediaries in order to protect workers’ rights (2025/2133(INI)), Committee on Employment and Social Affairs, Rapporteur: Johan Danielsson, 2025/2133(INI), 17 July 2025, p. 4.

⁸⁶⁸ European Federation of Building and Woodworkers (2024) ‘The EFBWW urgently calls for new rules on subcontracting and their enforcement’. Press Release. [Online] (Available at: <https://www.limitsubcontracting.eu/>) (Accessed: 10 September 2025).

As a result of these initiatives, as will be explained in detail below, the EMPL Committee of the European Parliament voted on 3rd of December 2025⁸⁶⁹ on the main proposals for the regulation of subcontracting, based on Danielsson's Draft Report on addressing subcontracting chains and the role of intermediaries to protect workers' rights (2025/2133(INI)). Also, the Draft Reports' requests have been framed to advocate the introduction of preventive measures, followed by control measures and sanctions. As a preventive measure, the Report advocated that the European Commission present the previously mentioned general rule limiting subcontracting to a maximum of two levels under the main contractor, especially in high-risk sectors identified by Member States.⁸⁷⁰ Certain Member States, such as Belgium, France, Italy, Spain, and Norway, have also introduced limitations on the length or scope of the chain, but only in certain sectors or specific workers-related situations.⁸⁷¹ However, this proposal was primarily based on the Norwegian example of limiting the use of subcontractors in public procurement⁸⁷², and on the permission that the aim of it is the protection of workers' rights⁸⁷³ as the legitimate motivation for the limitations of the fundamental rights, such as the right to conduct business⁸⁷⁴.

Namely, restrictions on the use of subcontractors in Norway have primarily been introduced to increase the liability of main contractors and to allow investors and control authorities to improve oversight of working conditions in public procurement procedures. In practice, it is usually enforced to ensure that the maximum number of levels in the vertical subcontracting chain is met.⁸⁷⁵ In this regard, the 2015 strategy of the Solberg government to combat labour-related crime also proposed introducing a special legal provision to limit the use of subcontractors in high-risk sectors⁸⁷⁶. In the proposal for new legislation on public

⁸⁶⁹ Legislative Observatory, European Parliament, Addressing subcontracting chains and the role of intermediaries in order to protect workers' rights, 2025/2133(INI) [Online] (Available at: [https://oeil.europarl.europa.eu/oeil/en/procedure-file?reference=2025/2133\(INI\)](https://oeil.europarl.europa.eu/oeil/en/procedure-file?reference=2025/2133(INI))) (Accessed on: 28 December 2025).

⁸⁷⁰ Draft Report on addressing subcontracting chains and the role of intermediaries in order to protect workers' rights (2025/2133(INI)), Committee on Employment and Social Affairs, Rapporteur: Johan Danielsson, 2025/2133(INI), 17 July 2025.

⁸⁷¹ European Commission (2025) Consultation Document. First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act. C(2025) 9944 final. 4 December 2025, p. 11.

⁸⁷² See: Blinkenberg, 2025.

⁸⁷³ Draft Report does not specifically refer to posted workers, but rather all workers included in the subcontracting arrangement. Nevertheless, it is considered important and impactful in the context of posted workers as well.

⁸⁷⁴ See more in: Barnard, 2022, p. 500.

⁸⁷⁵ Blinkenberg, 2025, p. 3.

⁸⁷⁶ Ministry of Labour and Social Inclusion (2015) Strategi mot arbeidslivskriminalitet. Norwegian government. (Available at: [https://www.regjeringen.no/content-assets/4f7ae70171bd480682b8dafddadaf311/strategi_mot_arbeidslivskriminalitet.pdf](https://www.regjeringen.no/contentassets/4f7ae70171bd480682b8dafddadaf311/strategi_mot_arbeidslivskriminalitet.pdf)) (Accessed: 10 January 2026), p. 8.

procurement, it has been highlighted that control over the chain is easier when the number of levels is lower^{877, 878}. Finally, in 2017, the limitation on the chain's levels was formally introduced into national legislation with the entry into force of the new Public Procurement Act.⁸⁷⁹ For contracts related to construction or cleaning services, the contracting authority must request that the supplier have no more than two levels of subcontractors below it. In that way, the vertical chain in those sectors is limited to three levels, including the main contractor. Nevertheless, this limitation is unrelated to the horizontal level, and the rule applies to projects with a financial value above a certain threshold. At the same time, the provision leaves some room for flexibility. If the main contractor determines that, to secure genuine market competition, it is necessary to allow more levels in the chain, the competition documentation may need to step outside the standard limitation. Also, after the contract is concluded, it may be possible to obtain approval to broaden the subcontracting chain if it is necessary for the regular finalisation of the work.⁸⁸⁰ In accordance with the public procurement rules, the obligation for the subcontracting chain to be limited to a maximum of two tiers⁸⁸¹ below the main contractor has also been incorporated into the provisions that are directly related to the construction sector. They include, on the one hand, conditions that must be met to comply with legal requirements, and, on the other hand, recommendations that represent the preferred standards of behaviour in practice. The aim of these integrated rules is to prevent and deter labour-related crime in the construction sector, especially by increasing transparency and control over who participates in enforcing the contract. In practice, some local authorities have introduced even stricter rules, including allowing just one level of subcontracting under the main contractor.⁸⁸²

⁸⁷⁷ NOU 2014: 4. (2014) Enklere regler – bedre anskaffelser. Forenkling av det norske anskaffelsesreguleringer-ket. Simpler Rules – Better Procurement. Simplifying the Norwegian Procurement Regulations. Ministry of Trade, Industry and Fisheries, p. 114.

⁸⁷⁸ Blinkenberg, 2025, p. 4.

⁸⁷⁹ Act on Public Procurement (2016) Lov om offentlige anskaffelser. Act on Public Procurement (LOV-2016-06-17-73). Lovdata. (Available at: <http://lovdata.no/dokument/NL/lov/2016-06-17-73>) (Accessed: 10 January 2026).; Regulation on Public Procurement (2016) Forskrift om offentlige anskaffelser. Regulation on Public Procurement. (FOR-2016-08-12-974). Lovdata (Available at: <https://lovdata.no/dokument/LTI/forskrift/2016-08-12-974>) (Accessed: 10 January 2026).

⁸⁸⁰ Blinkenberg, 2025, p. 4.

⁸⁸¹ As explained by Blinkenberg, 'Two tiers refers to rules that allow a maximum of two subcontracting tiers below the main/design and build contractor, i.e. a supply chain with a maximum of three tiers, which is the general rule in the Public Procurement Regulation. One tier refers to rules that allow a maximum of one subcontracting tier below the main/design and build contractor, i.e. a supply chain with a maximum of two tiers, a requirement imposed by some local authorities.' See: Blinkenberg, 2025, p. 5.

⁸⁸² Blinkenberg, 2025, p. 4.

Based on the interviews conducted by Blinkenberg for the 2025 research, the public procurement rule that limits the number of levels in the subcontracting chain is already the norm, or at least, in the context of construction-sector projects, does not cause major controversy. The participants suggested that this limitation is widely applied and that market actors largely accept it as the standard. However, it should be emphasised that this conclusion was partly due to the sample structure, as mostly larger actors were included on both the contracting and contractor sides. Additionally, the possibility of broadening the subcontracting chain after contract execution is recognised as a particularly important mechanism, as it can enable effective project execution in certain circumstances. While it seems that the construction sector can mainly operate under a two-tier limitation, a one-tier requirement is significantly harder to implement in practice, as it would require organising work as a wider horizontal chain of subcontractors, which can be impractical and ineffective for complex construction projects. Nevertheless, in more complex projects, it is often necessary to broaden the scope, and the question of whether such a broadening will be approved can create additional uncertainty even in the tender stage.⁸⁸³

On the other hand, from the European Employers' Institute perspective, the above initiatives to limit subcontracting at certain levels raised a sensitive question about the freedom to choose a business partner. For them, it is clear that such a limitation would directly affect entrepreneurs' right to independently decide with whom they will conclude a contract and how they will organise their business activities. Nevertheless, they emphasised that the introduction of the liability schemes does not have the same effect, as it does not forbid or limit the choice of business partners, instead, it regulates the consequences of that choice. That is why they highlight that the previously mentioned proposition would constitute a serious interference with the freedom of contract based on the freedom to conduct a business guaranteed by Article 16 of the EU Charter⁸⁸⁴.⁸⁸⁵ However, that right is not absolute. In the EU legal framework, there are already numerous limitations on the freedom of contract, such as in competition law, where dominant undertakings are subject to special obligations, and in labour law, where contractual autonomy is limited to protect workers and ensure equal treatment.

Nevertheless, any intervention into a fundamental right must be carefully evaluated, taking into account its social role and the criteria set out in Article 52(1) of the Charter.

⁸⁸³ Blinkenberg, 2025, p. 13.

⁸⁸⁴ Charter of Fundamental Rights of the European Union, Official Journal C 326/391, 26 October 2012.

⁸⁸⁵ Sinander, 2025, p. 11.; See also: Judgment of the Court (Grand Chamber), 22 January 2013. *Sky Österreich GmbH v Österreichischer Rundfunk*. Case C-283/11. ECLI:EU:C:2013:28, p. 42.

According to that provision, every limitation needs to comply with several conditions. It needs to be predicted by the law, it cannot interfere with the aim of the right or freedom to which it relates, and it needs to be proportionate. Therefore, if the limitation on the number of levels in subcontracting chains were introduced at the EU level, it would probably be implemented by a Directive, as advocated in Danielssons' Report, thereby meeting the legal requirement. However, employers are raising a key question of whether such a limitation would respect the core of the right to conduct business. In other words, it should be evaluated whether such a measure crosses the boundary of permissible intervention into entrepreneurs' freedom to independently decide with whom and how they organise their business relationships. The CJEU has already dealt with such tensions between workers' protection and business freedom. In C-426/11⁸⁸⁶, it has been analysed whether the British rules, introduced following the implementation of Directive 2001/23⁸⁸⁷, are consistent with the freedom to conduct business. The Court has decided that the concrete solution was unacceptable because the new employer is not permitted to participate in collective bargaining, even though it was required to respect the results of such bargaining. In that way, it has been emphasised that, even though limitations can be legitimate, they cannot lead to a complete erosion of basic business autonomy.⁸⁸⁸ Therefore, it has been concluded that EU law was breached in that case.

Furthermore, the Employers Institute emphasises that introducing limits on the number of subcontractors could pose a particular challenge for small and medium-sized enterprises, since they, compared to larger companies, often cannot compete in the market under the same conditions if subcontracting is prohibited or strictly limited. However, even if the question of whether this limitation is in accordance with the freedom to conduct business, it would still need to pass the proportionality test, as mentioned above. The CJEU has, for example, clearly stated that national market interests cannot themselves justify⁸⁸⁹ the obstacles prohibited by EU contracts⁸⁹⁰. For the CJEU to determine whether a measure is proportionate, it starts by asking

⁸⁸⁶ Judgment of the Court (Third Chamber), 18 July 2013. *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*. Case C-426/11. ECLI:EU:C:2013:521.

⁸⁸⁷ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, Official Journal L 82, 22 March 2001.

⁸⁸⁸ Sinander, 2025, p. 12.

⁸⁸⁹ In determining if a measure is justified, often the 'Gebhard test' is used. See: Judgment of the Court (Grand Chamber) of 21 December 2016. *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis*. Case C-201/15. ECLI:EU:C:2016:972. 'In this judgment, the CJEU held that national legislation implementing an EU directive must comply with the freedom to conduct a business under the free right to establishment in EU law.' See: Sinander, 2025, p. 14.

⁸⁹⁰ Judgment of the Court (Grand Chamber) of 21 December 2016. *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis*. Case C-201/15.

whether the same aim could have been achieved with less restrictive measures or with measures that are less intrusive on the protected right.⁸⁹¹ In that case, factors such as the scope of regulation, the nature of the right, the intensity of intervention, and the desired aim are considered.⁸⁹² In that sense, limiting the number of levels in the subcontracting chain could represent a significant restriction on the freedom to conduct business, since it does not affect all parties equally. As mentioned, such a limitation can disproportionately affect small and medium-sized enterprises that are often dependent on subcontracting⁸⁹³. That is why employers believe the aim of protecting workers can be achieved through different, less restrictive measures⁸⁹⁴.⁸⁹⁵ Finally, Sinander emphasises that in the EU legislation there is no example in which the limitation of the chain of a certain number of levels is directly regulated, even though they do exist in certain national solutions, such as the one analysed above, and also they do exist as the mechanisms for enforcing some EU legal framework. At the same time, the author highlights that EU case law, especially in C-298/15⁸⁹⁶, shows that such national limitations are not well accepted and are sometimes evaluated against EU law. That is why he found it unexpected that the European Commission listed that mechanism as a ‘good practice’.⁸⁹⁷

Finally, based on the social partners’ opinions and evaluations, particularly Danielssons’ Report, EMPL has voted on the initiatives. It supported measures to establish an obligatory legal framework that would prevent fraudulent practices and violations of workers’ rights in subcontracting arrangements, increase transparency, and ensure that companies within subcontracting chains are accountable for such violations. However, despite strong requests from trade unions, the initiative to limit the number of levels in the chain did not receive final

ECLI:EU:C:2016:972.; Sinander, E. (2025) Can the EU restrict subcontracting? A legal perspective. Brussels: European Employers’ Institute, p. 12.

⁸⁹¹ Judgment of the Court (Grand Chamber), 8 April 2014. *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*. Joined Cases C-293/12 and C-594/12. ECLI:EU:C:2014:238.

⁸⁹² See: Judgment of the Court (Grand Chamber), 8 April 2014. *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*. Joined Cases C-293/12 and C-594/12. ECLI:EU:C:2014:238.

⁸⁹³ See: Judgment of the Court (Fifth Chamber) of 5 April 2017. *UAB ‘Borta’ v VĮ Klaipėdos valstybinio jūrų uosto direkcija*. Case C-298/15. ECLI:EU:C:2017:266.

⁸⁹⁴ That is particularly relevant for the free movement of services and the right to establishment, freedom of contract, and the right to conduct a business. See: Judgment of the Court (Grand Chamber) of 21 December 2016. *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*. Case C-201/15. ECLI:EU:C:2016:972. ‘In this judgment, the CJEU held that national legislation implementing an EU directive must comply with the freedom to conduct a business under the free right to establishment in EU law.’; Judgment of the Court (Fifth Chamber) of 5 April 2017. *UAB ‘Borta’ v VĮ Klaipėdos valstybinio jūrų uosto direkcija*. Case C-298/15. ECLI:EU:C:2017:266.; See: Sinander, 2025, p. 14.

⁸⁹⁵ Sinander, 2025, pp. 13-14.

⁸⁹⁶ Judgment of the Court (Fifth Chamber) of 5 April 2017. *UAB ‘Borta’ v VĮ Klaipėdos valstybinio jūrų uosto direkcija*. Case C-298/15. ECLI:EU:C:2017:266.

⁸⁹⁷ Sinander, 2025, p. 17.

support and will stay a subject of further discussion⁸⁹⁸. Nevertheless, even though that particular initiative did not pass, allowing other elements of the Draft Report to be seen as an important step toward strengthening workers' rights in complex subcontracting arrangements.

4.3.2.1.1. Critical Evaluation Framework

Limiting the number of levels in subcontracting chains has recently appeared in European regulatory discourse as an example of 'good practices', alongside, for example, chain liability, especially after the European Commission incorporated it into the Staff Working Document related to the 2024 PWD Report⁸⁹⁹. However, compared to the liability scheme and the due diligence defense, this mechanism still lacks a stable normative and empirical status at the EU level. Its development is more a part of the social partners' initiatives⁹⁰⁰ and of individual national solutions, such as the Norwegian public procurement example⁹⁰¹, than of the consistently accepted and case-law-confirmed mechanisms for protecting workers' rights in a cross-border context.

Namely, the basic idea of limiting the number of levels in the chain started from the logic that the shorter the chain, the easier it is to control workers, working conditions, and liability for violations. This has previously been seen in the Norwegian explanation in the public procurement sphere, where it is highlighted that control is easier when there are fewer levels⁹⁰². This measure is therefore primarily an instrument of transparency and risk assessment in supply chains, rather than a classical mechanism for enforcing claims, such as the liability system. In recent EU initiatives by social partners, such a logic is additionally legislatively directed

⁸⁹⁸ See: European Federation of Food, Agriculture and Tourism Trade Unions (2025) 'Employment Committee vote to curb abusive subcontracting and unregulated labour intermediaries sends a clear signal to the European Commission' [Online] (Available at: <https://effat.org/featured/employment-committee-vote-to-curb-abusive-subcontracting-and-unregulated-labour-intermediaries-sends-a-clear-signal-to-the-european-commission-2/>) (Accessed: 23 December 2025).

⁸⁹⁹ Commission Staff Working Document Accompanying The Document Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD/2024/320 final.

⁹⁰⁰ European Trade Union Confederation (2025) 'For an EU Directive on subcontracting and labour intermediation'. Resolution adopted at the Executive Committee meeting of 1-2 October 2025. [Online] (Available at: <https://www.etuc.org/sites/default/files/document/file/2025-10/EN%20-%20Adopted%20-%20Resolution%20for%20an%20EU%20Directive%20on%20subcontracting%20and%20labour%20intermediation%20and%20annexes.pdf>) (Accessed: 30 November 2025).

⁹⁰¹ See: Blinkenberg, 2025.

⁹⁰² Blinkenberg, 2025, p. 4.

towards the general rule limiting the maximum to two tiers under the main contractor, particularly in high-risk sectors. In that way, the principles of proportionality and flexibility are sought to be maintained, but at the same time, it raises questions of harmonisation. If the identification of sectors and exceptions is left to Member States, there is a high probability that the measures will remain fragmented, as happened with Article 12 of the Enforcement Directive.

Additionally, from a practical perspective, it is clear that the system's application is highly limited and heavily context dependent. In Norway, such a rule applies to public procurement in certain sectors, such as construction and cleaning, and above certain financial thresholds. Also, vertically, it is limited to levels under the main contractor, but horizontally, the number of subcontractors is unlimited⁹⁰³. Therefore, the chain's complexity can be transferred from its depth to the width of contractual relations. Besides, the system predicts exceptions when needed to secure competition or work competition. Such flexibility shows that, in the national context, the limitation on levels does not function as an absolute, strict rule, but rather as a framework that adapts to real market challenges. Also, in 2025 research⁹⁰⁴, it has been highlighted that such exceptions for broadening the chain, although practical, can create uncertainty even in the initial procedural phase. All that shows is that, even though the mechanism is functional in some respects, it is not without serious practical limitations.

Furthermore, the previous analysis reveals clear distinctions between the social partners' approaches, raising questions about the sustainability of such a solution at the EU level. Trade unions and workers' representatives start from the premise that the chain's unlimited expansion helps avoid liability and strengthens workers' protection, especially in high-risk sectors⁹⁰⁵. For them, the limitation of the levels is, first of all, a preventive mechanism that narrows the space for manipulation and eases the enforcement of other mechanisms, such as inspection controls and sanctions⁹⁰⁶. On the other hand, employers' representatives are highlighting that such a measure directly intervenes in the right to contract and the freedom to conduct business. Compared to the liability mechanism, which does not prohibit the conclusion of contracts with

⁹⁰³ Blinkenberg, 2025, p. 4.

⁹⁰⁴ Blinkenberg, 2025.

⁹⁰⁵ See, for example: European Trade Union Confederation (2026) 'Quality Jobs Act must tackle abuse in subcontracting and labour intermediation, following European Parliament vote' [Online] (Available at: <https://www.etuc.org/en/pressrelease/quality-jobs-act-must-tackle-abuse-subcontracting-and-labour-intermediation-following>) (Accessed: 13 February 2026).

⁹⁰⁶ See, for example: Draft Report on addressing subcontracting chains and the role of intermediaries in order to protect workers' rights (2025/2133(INI)), Committee on Employment and Social Affairs, Rapporteur: Johan Danielsson, 2025/2133(INI), 17 July 2025.

certain business partners but regulates the consequences of such a choice, limiting the levels directly affects how the business organisation operates. Special emphasis is placed on small and medium enterprises that often rely on subcontracting to participate in the market⁹⁰⁷.

In that context, the question of compliance with EU law is raised. Even though the freedom to conduct business is not absolute, as it can be limited for the general interest, any such limitation must comply with certain criteria. The CJEU has already shown the sensitivity of measures that overly intervene in business autonomy, and in the *Borta UAB* case⁹⁰⁸, it took a restrictive approach to national limitations on subcontracting. This was why some authors⁹⁰⁹ were surprised that the mechanisms limiting the number of levels in the chain were enumerated as a ‘good practice’ by the European Commission, given the case-law so far.

If everything is analysed together, it can be concluded that such a mechanism has a clear preventive logic and, in certain sectors and contexts, can contribute to greater transparency and control. However, in the context of protecting workers' rights in subcontracting arrangements, there are, for now, not enough convincing national examples to show that such a mechanism is contributing to measurable improvements in their positions. Additionally, the strong resilience of the employer side and the open legal questions regarding the freedom to conduct business and proportionality could significantly slow down or complicate the wider reform, especially in the posted workers context, including the broadening of the liability system or the elimination of the negative consequences of the due diligence defence system.

Consequently, the authors’ approach is that limiting the number of levels in subcontracting chains at this time should not be classified as a priority ‘best practice’ for applying the EU-level protection of posted workers. Even though it has the potential to contribute to greater transparency and accountability, its limited research and sensitivity to business freedoms warrant caution. Compared to the system of chain liability and other proposed mechanisms that are already showing concrete effectiveness and proportionality, limiting the chain's levels for now is more a normative initiative than a proven solution.

⁹⁰⁷ See: Sinander, 2025.

⁹⁰⁸ Judgment of the Court (Fifth Chamber) of 5 April 2017. *UAB ‘Borta’ v VĮ Klaipėdos valstybinio jūrų uosto direkcija*. Case C-298/15. ECLI:EU:C:2017:266.

⁹⁰⁹ For example: Sinander, 2025.

4.4. Concluding Remarks

Analysis in this chapter further deepened the research's basic hypothesis that the challenges in protecting posted workers are of both normative and enforcement nature. While the previous chapter showed that the existing EU legislative framework contains certain basic mechanisms of protection, this chapter clearly showed that its effectiveness is significantly dependent on concrete enforcement mechanisms and their interrelationship. In that sense, it is becoming clear where the system actually functions and where it remains at the level of declaratory aims.

Furthermore, analysis of different enforcement mechanisms, especially liability schemes, confirms that the mere existence of a legislative framework is insufficient if there is no real possibility of its enforcement. In the context of complex subcontracting arrangements, liability is being systematically watered down through the chain of contractual relationships, with the worker remaining at the bottom of the chain, often without a realistic possibility of identifying the liable party and, even more so, without effective legal protection. In that context, stricter liability schemes represent an attempt to bring liability back to the top of the chain, or to the subjects with real economic power and control over the project. Such a distribution of risk is shown as the key presumption of any serious enforcement mechanism. However, the previous analysis especially highlighted that the effectiveness of the liability system does not automatically follow from its formal establishment. Differences between national models clearly show that the way normative shaping is carried out plays a decisive role. Systems based on strict chain liability, without the possibility of avoidance through formal defences, such as in the German system, are showing a stronger effect in protecting posted workers and in serving as a preventive measure for market subjects. On the contrary, models that introduce elements of conditionality, such as a request to prove knowledge or the possibility of knowledge, or that leave broad scope for a due diligence defence, often weaken the system's enforcement potential where it is most needed.

In that context, this chapter did not just analyse the existing solutions descriptively, but also critically evaluated them through three mutually interconnected criteria: enforcement, deterrence and practical effectiveness. Such an approach allows liability systems to be seen not just as legal institutions but as functional tools that operate within the concrete economic and institutional environment. In that sense, it is becoming clear that certain models, even though legislatively sophisticated, can remain limited in practice due to a lack of legal protection,

challenges in proving, or weak institutional support. Comparative analysis of national systems additionally confirms this.

The German model, with its strictly defined and largely unconditional chain liability, shows how a clear normative solution can have a strong impact on enforcement and prevention. Its particular value lies in eliminating one of the biggest burdens in practice, which is the need to prove knowledge or guilt of subjects higher up in the chain. In that way, the burden of proof is shifted toward those who have real control over the project, and consequently changes behaviour in the market. On the other hand, the Austrian system illustrates a different logic of action, in which the emphasis is on timely state intervention, especially through the control of financial flows. It shows that the approach can be effective as a preventive mechanism that acts before damage occurs or becomes irreparable. The Dutch model, with its successive liability and well-developed administrative obligations, also highlights the importance of transparency and documentation as preconditions for any serious enforcement mechanism. The Belgian system, even though legislatively ambitious, also shows how the regime's complexity and differentiation can complicate practical application, especially in a cross-border context. From this national diversification of solutions, the chapter identified elements consistently shown to be effective. Broadening liability up the chain, at least to the level of the main contractor, is being highlighted as an almost necessary precondition for real protection of posted workers. Flexibility in fulfilling claims, especially by circumventing ineffective levels in the chain, contributes to practical functionality. At the same time, administrative requests that ensure transparency and availability of data on posted workers and contractual relationships are creating a necessary evidentiary basis, without which enforcement would remain unachievable.

However, the analysis also clearly showed where the system is undermining itself. Especially regarding the due diligence defence, which, under current EU legislation, is insufficiently defined and left to national interpretation. In theory, it is designed as an instrument to encourage responsible business behaviour, but in practice, it often amounts to merely fulfilling formal administrative requirements, without real control over working conditions across the chain. In that way, the risk is again transferred to the worker, who needs to prove that the subject higher in the chain knew or could have known of violations, which is, in a cross-border context, extremely hard to achieve. Consequently, in certain situations, this mechanism, rather than strengthening enforcement, serves to circumvent liability.

Similarly, a contradictory status has also been an idea of limiting the levels of the subcontracting chains. Even though, at first glance, it seems logical that the shorter chains allow

for easier control and more transparent distribution of liability, the analysis showed that such an approach raises several practical and legal questions. National examples, such as the Norwegian model of public procurement, show that such a measure can function in specific contexts, but its broader application at the EU level faces serious challenges, particularly regarding freedom of business conduct and proportionality. Besides, there is a real possibility that the complexity of chains is not being reduced but is just being reorganised, for example, by broadening horizontal relationships. That is why this mechanism, even though normatively interesting, at this moment can hardly be considered as developed and provenly effective as liability schemes.

If all the elements were reviewed together, it would become clear that the effective protection of posted workers requires a carefully balanced system in which different mechanisms act in a complementary manner. Liability systems play a key role in redistributing risk and creating a real possibility of rights enforcement. Administrative and transparency mechanisms are allowing its functionality. On the other hand, not precise enough institutions, such as due diligence defence, can significantly weaken the whole system if they are not clearly settled.

Therefore, this chapter further confirmed the previous conclusions from the legislative framework analysis and provided a concrete evaluation of the mechanisms' effectiveness. It shows that fragmentation and lack of harmonisation at the EU level are not merely theoretical challenges but have direct consequences for the protection of posted workers and the functioning of the market. Also, this analysis opened up the space for the final chapter. If the key elements contributing to or limiting effectiveness are identified here, the next necessary step is to ask how to apply those findings to the coherent legislative framework. Especially, it will be examined in which sense the identified best practices from national systems can serve as a base for legislative amendments or additions on the EU level, and how to shape the system that is not going to stay just on a level of formal harmonisation, but will secure a real and effective protection of posted workers' rights in complex subcontracting chains.

CHAPTER 5: Policy Recommendations and Conclusion

5.1. Introduction

As the study showed, resolving labour law challenges in subcontracting chains necessarily raises tensions between the freedom of business and the fundamental purpose of labour law, the protection of workers, in this case, posted workers. Since subcontracting relationships are often complex and multilayered, every legal measure that limits them must be carefully crafted and proportionally limited in scope and application.⁹¹⁰ Therefore, throughout the thesis, the intention was to analyse the flaws in the protection of posted workers' rights within subcontracting arrangements in the EU and to identify possible solutions for future legislative directions. In that regard, some of the interesting observations were as follows.

Firstly, regarding the liability measure, as Bogoeski highlighted, even though liability schemes, such as the German model, offer a strong instrument of protection, especially in the wages context, practice shows that their effectiveness depends heavily on workers' ability to use them. As mentioned, posted workers often lack written contracts, evidence of working hours, or clear information about salary deductions, which makes it significantly harder to prove violations of workers' rights. In a cross-border context, additional barriers include language barriers, uncertainty about residence status, and mistrust of court proceedings.⁹¹¹ Nevertheless, as the analysis showed, a suitable liability system is necessary as the basis for effective protection, since, together with other enforcement mechanisms, it contributes to a comprehensive system of control and protection of posted workers at the EU level. The impact assessment following Directive 2009/52⁹¹² showed that similar arguments were considered important in the introduction of the liability scheme within that framework.⁹¹³ According to it, the combination of preventive and practical measures was expected to positively impact the achievement of policy goals. However, that effect is predicted only if the Member States ensure a certain level of enforcement activities.⁹¹⁴ Therefore, the study shows that, in certain situations, such as with letterbox companies or the employer's insolvency, chain liability is the only

⁹¹⁰ Sinander, 2025, p. 18.

⁹¹¹ Bogoeski, 2017, pp. 15-16.

⁹¹² Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L 168/24, 30th June 2009.

⁹¹³ European Commission, 'Commission staff working document accompanying document to the proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, impact assessment' SEC (2007), p. 603.

⁹¹⁴ Bakermans, 2014, pp. 8-9.

realistic way to ensure payment of wages⁹¹⁵. It confirms that such mechanisms have additional value for posted workers in complex, fragile, and unstable subcontracting structures. However, as seen above, the lack of court proceedings and the relatively low number of successful judgments indicate that structural constraints are diminishing its real effectiveness⁹¹⁶. Consequently, establishing an effective liability scheme is necessary as the first step, but it should be accompanied by additional mechanisms that make access to justice or proof of their rights easier.⁹¹⁷

Additionally, it was interesting to see that among the social partners, there was no agreement on the type of liability scheme, raising the question of which solutions should be considered ‘good practice’.⁹¹⁸ Employers’ representatives often argue that the enforcement of labour law is primarily a state’s task and that broadening their liability would merely be an additional administrative and organisational burden. However, in certain situations, they confirm that the broader liability model, such as chain liability, can contribute to more equalised market conditions and to the protection of those who conduct business in accordance with the law.⁹¹⁹ The more successful national solutions in this regard were often closely linked to the active involvement of the social partners in their shaping and introduction. However, across a broad range of Member States, the question of chain liability still carries strong political weight for the more serious reforms⁹²⁰.

Thirdly, the analysis showed that the introduction of liability with the broad due diligence defence system is weakening the position of posted workers. If the liability system itself already has significant flaws, it is hard to expect that a system requiring proof of the main contractor's guilt or negligence will be better. Such an approach diminishes the preventive function of the liability scheme and shifts the burden of proof to already precarious workers⁹²¹.

Fourthly, fragmentation of solutions across Member States, particularly regarding the application of Article 12 of the Enforcement Directive, has resulted in unequal levels of

⁹¹⁵ See, for example: Heinen, Müller, Kessler, 2017, pp. 87-92.

⁹¹⁶ Bogoeski, 2017, pp. 15-16.

⁹¹⁷ Bogoeski, 2017, pp. 15-16.

⁹¹⁸ See, for example: Kyriazi, 2023, pp. 221-241.; Martinsen, 2015.; Maslauskaitė, 2014.

⁹¹⁹ See, for example: Sinander, 2025.

⁹²⁰ Houwerzijl, Peters, 2008, pp. 3, 37, 48.

⁹²¹ See: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System (‘the IMI Regulation’), COM/2019/426 final, 25th of September 2019.; Heinen, Müller, Kessler, 2017.; Bakermans, 2014.; Houwerzijl, Peters, 2008.

protection for posted workers in the EU. Differences in sectoral level, personal scope, procedural conditions, and the possibility of escaping liability lead to legal uncertainty and divergent solutions across EU Member States⁹²². It shows the need for functional, not only formal, harmonisation of the minimum standards.⁹²³

In that context, the final part of this research is directed on the question how the existing weaknesses turn to concrete legislative and policy responses. It starts from the presumption that the identified challenges are not isolated but systemic and require solutions that simultaneously incorporate normative analysis and enforcement, as the research did in previous chapters. Therefore, the further analysis will develop in two mutually interconnected directions.

The first direction is to consider amending the existing legislative framework that was the focus of the previous analysis: the 2014 Enforcement Directive. The aim of such an approach is not to fully abandon the existing system, but to strengthen its functionality where it has been shown to be insufficient to protect posted workers in subcontracting chains. In that sense, particular emphasis will be placed on a more precise definition of the liability system, reconsidering the usage of due diligence defence, and introducing clearer, more operable standards to reduce the scope for national fragmentation. The emphasis will be on how to make the existing provisions better applicable in a cross-border context, taking into account the real challenges posted workers face in subcontracting arrangements. Importantly, all the recommendations will be based on the comparative analysis and conclusions presented above in the research.

The second part of the analysis goes a step further and takes into account a broader, more horizontal legislative approach. It serves as an additional, secondary option to improve posted workers' rights in subcontracting arrangements, given the European Commission's lack of intent regarding the soon-to-be-amended posted workers legal framework and the missed

⁹²² See, in particular: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'). {SWD(2019) 337 final}. COM(2019) 426 final. Brussels, 25th September 2019.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. {SWD(2024) 320 final}. COM(2024) 320 final. Brussels, 30th April 2024.; Heinen, Müller, Kessler, 2017.

⁹²³ Bogoeski, 2017, pp. 15-16.

opportunity of PWD18⁹²⁴. In light of recent initiatives at the EU level⁹²⁵, especially the possibility of introducing a new general legislative framework for subcontracting chains and labour intermediaries during 2026, the question arose as to whether such a framework could represent a more imminent opportunity to improve the system that abuses workers' rights in subcontracting chains, which would also be applicable to posted workers. That is why particular attention will be paid to ensuring that the new legislative framework does not remain at the level of declaratory aims and fail to involve posted workers, but rather responds to the concrete forms of fraudulent practices identified in this research.

5.2. Potential Solution No. 1: Amendment of the PWD 2014 Enforcement Directive

This final analysis does not merely add to the discussion of existing normative solutions but is a necessary step toward questioning them in light of potential future legislative developments. Namely, further policy recommendations regarding the potential amendment of the posted workers' legal framework, particularly the Enforcement Directive, will first present the basic conclusions on the legislative deficiencies from the previous analysis, and then place them in the context of potential future legislative directions.

As shown above, the basic tension between the freedom to provide services and the protection of posted workers is structurally integrated into the EU legal framework and is not merely theoretical, but it manifests as a source of permanent legal and social uncertainty. Such tension is further deepened in the context of subcontracting chains, where the freedom of business is reflected in complex organisational arrangements that are often outside the scope of traditional labour law instruments⁹²⁶. Within the scope of identifying concrete market practices

⁹²⁴ See: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. {SWD(2024) 320 final}. COM(2024) 320 final. Brussels, 30th April 2024.

⁹²⁵ See, in particular: European Trade Union Confederation (2025) 'For an EU Directive on subcontracting and labour intermediation'. Resolution adopted at the Executive Committee meeting of 1-2 October 2025. [Online] (Available at: <https://www.etuc.org/sites/default/files/document/file/2025-10/EN%20-%20Adopted%20-%20Resolution%20for%20an%20EU%20Directive%20on%20subcontracting%20and%20labour%20intermediation%20and%20annexes.pdf>) (Accessed: 30 November 2025).; Draft Report on addressing subcontracting chains and the role of intermediaries in order to protect workers' rights (2025/2133(INI)), Committee on Employment and Social Affairs, Rapporteur: Johan Danielsson, 2025/2133(INI), 17 July 2025.

⁹²⁶ See, in particular: Cremers, 2014, pp. 1-5., EU Commission (2016) Commission Staff Working Document. Impact Assessment. Accompanying the proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

and national systems, showed that the existing posted workers regulatory framework, including the PWDs and the Enforcement Directive from 2014, failed to address this complexity in a way that would enable the effective protection of posted workers' rights⁹²⁷. Even though the Enforcement Directive formally introduced certain mechanisms, including the liability scheme in subcontracting arrangements, its current construction is minimal and fragmented⁹²⁸. Through the comparative analysis in the fourth chapter, it has been clearly shown that such an approach leads to significant differences between Member States, not only normatively but also in the real level of protection of workers. The German model, for example, showed that protection becomes effective only when such a liability is transferred to subjects in the chain who have real economic power and control⁹²⁹. The Austrian system additionally highlighted the importance of timely interventions in financial flows, especially in situations including cross-border structures and the letterbox companies⁹³⁰. The Dutch system showed that, through procedural rationality and clearly defined conditions, system functionality can be achieved⁹³¹.

SWD(2016) 53 final.; Wagner, Hassel, 2016, pp. 163-178.; European Trade Union Confederation, 2021.; Van Hoek, Houwerzijl, 2011.

⁹²⁷ See, in particular: Impact Assessment (SWD (2016) 52 final, SWD (2016) 53 final (summary)) of a Commission proposal for a directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM (2016) 128 final). Briefing. Initial Appraisal of a European Commission Impact Assessment. European Parliament, May 2016.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), {SWD(2019) 337 final}. COM(2019) 426 final, 25th September 2019.; Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2024) 320 final}, 30th April 2024.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. {SWD(2024) 320 final}. COM(2024) 320 final. Brussels, 30th April 2024.; Lasek-Markey, 2023.; Voss, Faioli, Lhernould, Iudicone, 2016.; Cremers, Houwerzijl, 2021. Andriescu, *et. al.*, 2024.

⁹²⁸ See: Article 12 of the Enforcement Directive.; Lasek-Markey, 2023, pp. 146-147.

⁹²⁹ See, in particular: Bogoeski, 2017.; Heinen, Müller, Kessler, 2017.; Kahmann, 2006.; Schlachter, 2010.; Fechner, 2021, pp. 105-126.; Cremers, Houwerzijl, 2021.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, Brussels, 30 April 2024.

⁹³⁰ See, in particular: Cremers, Houwerzijl, 2021.; Houwerzijl, Peters, 2008.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), COM/2019/426 final, 25th of September 2019.

⁹³¹ See, in particular: Heinen, Müller, Kessler, 2017.; Even, 2021, pp. 163-180.; Cremers, Houwerzijl, 2021.; Houwerzijl, Peters, 2008.; Van Hoek, Houwerzijl, 2011.; Kall, Lillie, 2017.

The Belgian system, despite its normative ambitiousness, showed limitations stemming from its complexity⁹³². The common feature of all those systems is that they resulted from concrete challenges, such as non-payment of wages, disappearance of employers, and the use of abusive structures.

It is important to highlight that these conclusions are not isolated but extend to the broader conclusions from the second chapter, which determine that formal harmonisation at the EU level does not guarantee materially equal protection. Exactly opposite, too much discretion left to Member States, even though politically understandable, in practice leads to fragmentation that allows market actors to choose the most beneficial regulatory environment. In such a system, the protection of workers becomes dependent on geolocation rather than on universally applicable standards, making it contrary to the EU's basic social aims. In that sense, this thesis advocates amending the posted workers legal framework, with the emphasis on the Enforcement Directive, on the basis of functional, rather than merely formal, harmonisation. It means establishing standards that are defined not solely by general aims but by concrete mechanisms that have proven effective in practice. Therefore, even though Article 12 of the Enforcement Directive represents a starting point for the protection of posted workers in subcontracting arrangements, its current construction, limited to the narrow scope and further weakened by the possibility of a due diligence defence, cannot address the complexity of modern subcontracting relationships.

The key reference point for this is the previously analysed Article 12 of the Enforcement Directive, which is the only provision in EU legislation that directly regulates liability in subcontracting arrangements in the context of the posting of workers. However, that provision also presents a fundamental challenge for the current system, since it sets a minimum standard and leaves the Member States broad discretion over the personal and material scope of liability. Such flexibility was politically 'understandable' at the time of its introduction⁹³³, as explained above, but in practice it led to fragmented solutions and significant differences in the actual levels of protection for posted workers across the EU. Besides, Article 12, in its basic scope, focuses on the construction sector and wage protection⁹³⁴, while modern forms of violations of

⁹³² Cremers, Houwerzijl, 2021.; Houwerzijl, Peters, 2008.; Kall, Lillie, 2017.; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, 30 April 2024.

⁹³³ See more in: Martinsen, 2015, pp. 205-206, 215-217.

⁹³⁴ See more in: Lasek-Markey, 2023, pp. 146-147.; European Federation of Building and Woodworkers, 2024.

posted workers' rights exist in other sectors that also rely on subcontracting and a mobile workforce⁹³⁵, and in relation to other workers' rights. It can be concluded that the provision functions as a beginner's framework, rather than as a mechanism that can, by itself, respond to modern forms of social dumping and complex cross-border structures that, in practice, weaken liability.

Consequently, it has been determined that the current EU legal framework, although it provides only minimal mechanisms to protect posted workers in subcontracting arrangements, does not, in practice, prevent fraud in that context. Specific challenge is that, in such arrangements, employment relations are often fragmented across several chain levels, with liability for paying wages and respecting working conditions systematically transferred to lower levels of the chain, which often disappear or are financially unstable. In that regard, the question of subcontracting liability is gaining significance⁹³⁶, as it has been shown to be one of the few mechanisms that can potentially secure the effective enforcement of the rights of workers⁹³⁷.

One of the key elements of the future reform of the Enforcement Directive, as shown in the comparative analysis, is to broaden the liability scheme. Such a measure should bring liability up the chain, at least to the main contractor, creating a so-called chain liability, and to a broad range of sectors. The argument for such an approach does not come from a pure desire for stricter rules, but from the concrete conclusions of this thesis. In situations involving, for example, letterbox companies, where the formal employer is often legally and financially unsustainable, limiting liability at the lowest levels of the chain makes enforcement of unpaid wages claims effectively unreachable. Similarly, in the context of agency work and complex intermediary structures, liability is systemically diluted, while in cases of bogus self-employment, the worker remains outside the scope of labour law protection. In all these circumstances, the only solution that ensures the effective enforcement of rights is the possibility of a direct claim against the subject that has real control over the economic process in the chain. Also, as the analysis showed, limiting the liability scheme's scope of application to the construction sector ignores the realities of the EU labour market, leaving posted workers in other sectors, particularly labour-intensive ones, without protection. That is why such an

⁹³⁵ As mentioned above. See for example: Lillie, Wagner, 2015, pp. 157-174.; Wagner, 2015, pp. 201-213.; Wagner, Hassel, 2016, pp. 163-178.

⁹³⁶ See, for example: European Trade Union Confederation, 2025.

⁹³⁷ See, for example: Houwerzijl, Peters, 2008.; Bogoeski, 2017.; Heinen, Müller, Kessler, 2017.; Cremers, Houwerzijl, 2021.

approach should be adopted and broadened to the whole economy, as the comparative national analysis showed to be the ‘best practice’.

An additional aspect of this challenge is the analysis of the due diligence defence, which is critically reviewed in this thesis as one of the key weak elements of the existing system. Even though its purpose is formally directed toward encouraging responsible business, in practice, it often serves as a mechanism for avoiding liability. As shown, the lack of unique criteria at the EU level is allowing Member States to set minimum or formalistic standards, which reduces the system's effectiveness in checking documentation and in the real control of working conditions. In that way, the burden of proof is again shifted to the worker, which, especially in cross-border contexts, is almost insurmountable. Accordingly, this thesis argues that due diligence cannot be understood as a defence mechanism that allows liability to be avoided, but rather as a complementary instrument with a preventive function that does not derogate from the basic logic of the liability system.

These conclusions were further confirmed by the European Commission's 2024 report on the implementation of the PWD18⁹³⁸. Even though the Commission recognised certain challenges and identified ‘good practices’, the thesis showed that this approach is not ambitious enough in the face of the everyday challenges identified through the analysis. Especially problematic is that the key mechanisms, such as broadening liability or strengthening transparency, are still treated as optional rather than as necessary elements of the system. In that way, the opportunity to achieve real harmonisation of standards and to eliminate structural weaknesses in the existing framework is missed. Also, it is important to emphasise that, in the last decade, there has been a gap in comprehensive research that would, in this way, connect the question of the applicable legal framework, liability in subcontracting chains, the due diligence defence mechanism, and the possibility of chain limitation in the context of the posting of workers. Such an interconnection constitutes the scientific contribution of this thesis, as it enables analysis of the challenge not only through individual mechanisms but also through their interactions and cumulative effects.

The role of social partners, as analysed in the thesis through their contributions and arguments regarding potential solutions, further confirms the complexity of the future reform.

⁹³⁸ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application and implementation of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM/2024/320 final, Brussels, 30 April 2024.

Even though there is no full consensus on the optimum model, national systems' experiences show that the most stable solutions are those developed through their participation. However, that process cannot replace the need for a clear normative framework on the EU level that would set the boundaries within which the social dialogue can be developed.

Finally, the conclusions of this thesis lead to the same argument: the existing system, based on minimal standards and the broad discretion of Member States, is insufficient to ensure the effective protection of posted workers in complex subcontracting chains. Therefore, the amendment of the EU legal framework needs to go beyond partial adjustments and focus on creating a system that responds to real challenges and the power imbalances in the EU labour market.

In that regard, it is necessary to first amend Article 12 of the Enforcement Directive so that the current minimal liability model is replaced by an obligatory, harmonised, and broader standard at the EU level. As explained in Chapter 4, a liability scheme limited to one level above the direct employer does not reflect the actual forms of subcontracting relationships, especially in labour-intensive sectors and in situations involving long and non-transparent chains.

Specifically, based on the 'best practices' determined in the comparative overview, the amended Article 12 should clearly prescribe that, in cases of non-payment of wages, the breach of minimal working conditions or other basic rights of posted workers, liability can be broadened throughout the whole chain at least until the main contractor, with the possibility of the direct claim of the workers against that subject. Such a solution is mainly a result of the German system⁹³⁹. It showed itself as successful in eliminating the main barrier to enforcement, which is the need to prove the guilt or knowledge of the subjects up the chain, and is responding to the challenges identified through the analysis of letterbox companies as disappearing subcontractors.

At the same time, Article 12 also needs to involve the precise situations in which such a broad liability would be activated. In that sense, at the Directive level, it is necessary to incorporate objective triggers already identified in the comparative analysis⁹⁴⁰. Those would include, for example, non-payment of wages over a certain period, insolvency or disappearance

⁹³⁹ Arbeitnehmer-Entsendegesetz (AentG 2013) - Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen vom 20.04.2009. (BGBl. I S. 799), das zuletzt durch Artikel 8 des Gesetzes vom 22. Dezember 2025 (BGBl. 2025 I Nr. 369) geändert worden ist. § 14 Haftung des Auftraggebers.

⁹⁴⁰ See more in: Heinen, Müller, Kessler, 2017, pp. 87-92.

of the subject, non-enforceability of a court decision, or the determination that a letterbox company exists in the chain. In that way, legal certainty would be improved, but it would also prevent the protection of posted workers' rights from depending on lengthy and unpredictable court procedures, which are one of the main barriers to effective legal enforcement.

Additionally, the obligation should be extended to all sectors, not only the construction sector, as in Germany⁹⁴¹ and the Netherlands⁹⁴².

Furthermore, it is necessary to intervene in Article 12 to not allow a due diligence defence to be used as a mechanism for release from liability. As detailed in Chapter 4.3.1, the current construction of the Directive leaves Member States with broad discretion in defining such an institute. Therefore, the Directive should clearly state that the due diligence defence cannot be used to avoid liability, especially regarding basic working conditions, particularly the right to wages. Alternatively, if it were to stay, it needs to be strictly limited to predefined, objective, and cumulative conditions that include not only a formal check of documentation but also consistent control of actual working conditions.

However, beyond amending Article 12 itself, the Directive should include new provisions to ensure the preconditions for its effective enforcement. First of all, it introduces an obligatory minimum standard of transparency in subcontracting chains. Mainly on the basis of the analysis of the Austrian⁹⁴³ and the Dutch⁹⁴⁴ systems, the Directive should introduce an obligation that all the subjects in the chain, especially the main contractor, secure full and accurate information on all the involved subcontractors and workers, including their identity, duration of the arrangement, working conditions, and pay checks. Non-compliance with it should have direct legal consequences, including stricter liability and a shift in the burden of proof from the worker to the subjects controlling the chain.

⁹⁴¹ Mindestlohngesetz (MiLoG 2015) – Gesetz zur Regelung eines allgemeinen Mindestlohns vom 11.08.2014. (BGBl. I S. 1348), das zuletzt durch Artikel 2 des Gesetzes vom 22. Dezember 2025 (BGBl. 2025 I Nr. 369) geändert worden ist.

⁹⁴² Wet aanpak schijnconstructies, Staatsblad 2015, 233, as amended, in force since 1 July 2015, with amendments entering into force on 1 January 2016 and 1 January 2017 (Available at: <https://wetten.overheid.nl/BWBR0036706/2017-07-01>) (Accessed: 5 December 2025).

⁹⁴³ See particularly: § 10, Chapter 2, Bundesgesetz, mit dem ein Gesetz zur Bekämpfung von Lohn- und Sozialdumping erlassen wird (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSD-BG) StF: BGBl. I Nr. 44/2016 (NR: GP XXV RV 1111 AB 1133 S.128. BR: AB 9590 S.854.) (Available at: <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555&FassungVom=2023-12-22>) (Accessed: 20 December 2025).

⁹⁴⁴ See: Heinen, Müller, Kessler, 2017, pp. 87-92.

Additionally, the Directive should include provisions that allow and encourage preventive interventions in financial flows, especially in cross-border situations. Even though such a mechanism is not currently in the Directive, the analysis of the Austrian model showed its key role in preventing the disappearance of finances before the worker can enforce their rights⁹⁴⁵. At the EU level, it could operate by temporarily retaining wages or requiring financial guarantees in clearly defined risk situations, with respect to the proportionality principle.

Finally, although this thesis approached the idea of limiting the levels of the subcontracting chain with caution, the analysis in Chapter 4 and current discussions at the EU level indicate that such a mechanism requires further research. Such a system could be opened to the labour-intensive sectors, with predefined criteria and the participation of social partners. In that way, the unified model wouldn't be imposed on Member States, but it would allow Member States to introduce such mechanisms without legal uncertainty regarding basic freedoms. However, the balance between the workers' protection and business freedoms should be preserved.

The proposed amendments do not represent a step away from the existing system, rather, they are a necessary evolution in the direction that aligns with market practices and the structural challenges identified in the previous analysis. Consequently, this thesis, by connecting analysis of the theoretical basis, abusive practices, national schemes, and potential solutions, contributes to the existing legal discourse and offers directions for the development of the specific aspect of the posting of workers' legal framework.

5.3. Potential Solution No. 2: New General EU Legal Framework

On the 9th of April 2025, the European Trade Union Confederation (ETUC) and the European Federation of Building and Woodworkers (EFBWW) warned of the serious challenges posed by long, non-transparent subcontracting chains and invited the EU institutions to respond. The focus was on preventing widespread violation of workers' rights and systemic fraud. As possible solutions, they suggested both an explicit limit on the number of levels in the chain and stronger corporate liability for working conditions and respect for rights throughout

⁹⁴⁵ As could be seen in the example of the Judgment of the Court (Grand Chamber) of 13 November 2018. *Čepelnik d.o.o. v Michael Vavti*. Case C-33/17. ECLI:EU:C:2018:896.; See also: Cremers, Houwerzijl, 2021, p. 21.

the chain. The aim of the suggestions was not to abolish subcontracting per se, but to establish a framework in which business flexibility does not come at the expense of workers' rights and fair working conditions.⁹⁴⁶

In October 2025, the ETUC, in its Resolution, once again highlighted that the absence of a European framework for subcontracting and labour intermediation leaves a broad range of workers, including posted workers, without effective protection. In such conditions, social dumping, letterbox companies, and complex structures with blurred liability are more easily developed. Therefore, they advocated strong, coherent European legislation that would encourage direct employment, ensure equal treatment and respect for workers' rights, and secure effective enforcement and clear liability across all sectors and Member States. At the same time, they highlight that the legislation must recognise that subcontracting practices differ across sectors and ensure equal and robust protection against violations of workers' rights, regardless of the formal contractual relationships between the companies involved.⁹⁴⁷ This Resolution clearly reflects the long-standing request of the European trade union movement for the introduction of an obligatory EU framework to limit violations associated with subcontracting arrangements. It is a result of long-term advocacy by trade unions against the negative consequences of long, opaque subcontracting chains, which are a source of violations of workers' rights, as they enable companies to avoid liability for working conditions, collective agreements, and occupational health and safety.⁹⁴⁸ ETUC highlighted that it is a key to determine the responsibility in the chain and to secure the real protection of workers, in order to align with the European Pillar of Social Rights.⁹⁴⁹ Therefore, at the core of the trade unions' advocacy is the need to introduce chain liability to prevent the systemic transfer of liability and to secure genuine respect for workers' rights.⁹⁵⁰

In response to the trade unions' advocacy, the European Employers' Institute published a study that also recognises several preventive mechanisms in subcontracting arrangements:

⁹⁴⁶ European Trade Union Confederation (2025) 'Simplification: EU must limit subcontracting and promote direct employment'. Press release. 9 April 2025. [Online] (Accessed: 15 September 2025).

⁹⁴⁷ European Trade Union Confederation (2025) 'For an EU Directive on subcontracting and labour intermediation'. Resolution adopted at the Executive Committee meeting of 1-2 October 2025. [Online] (Accessed: 30 November 2025).

⁹⁴⁸ European Trade Union Confederation (2025) 'For an EU Directive on subcontracting and labour intermediation'. Resolution adopted at the Executive Committee meeting of 1-2 October 2025. [Online] (Accessed: 30 November 2025).

⁹⁴⁹ Theodori, 2025.

⁹⁵⁰ European Trade Union Confederation (2025) 'For an EU Directive on subcontracting and labour intermediation'. Resolution adopted at the Executive Committee meeting of 1-2 October 2025. [Online] (Accessed: 30 November 2025).

liability, equal treatment of workers, and reporting and transparency obligations.⁹⁵¹ However, they are emphasising that each mechanism that could limit subcontracting must be carefully established to avoid imposing an unjustifiable burden on the EU's fundamental market freedoms. Since subcontracting is a result of the freedom of contract and represents one of the ways companies exercise their right to conduct business according to Article 16 of the EU Charter⁹⁵², and since the freedom to provide services and the freedom of establishment are the key pillars of the internal market, any limitation on business practices must be clearly justified.⁹⁵³ In the discussion, it is also emphasised that subcontracting enables small companies to participate in and compete in the market. If those practices were unreasonably restricted, it could distort competition, as priority would be given to larger firms that can organise their operations without subcontractors.⁹⁵⁴ In that regard, the Institute stated that restricting the levels of subcontracting chains would represent an unprecedented solution in the EU, whereas liability systems already exist in some jurisdictions and are applicable, as analysed above. Compared with the strict regulation of chain length, liability allows companies to use subcontractors while retaining responsibility for working conditions throughout the chain. In this way, as they stated, this mechanism combines the flexibility of conducting business with workers' protection without imposing strict limits on subcontracting levels.⁹⁵⁵

The same opinion was shared by CLECAT, which also emphasised that the EU should not resort to uniform, strict restrictions on subcontracting that would apply across all sectors and situations. Instead, they advocate a data-driven approach that enables effective value subcontracting and leaves room for small and medium-sized enterprises to remain competitive. Special emphasis is placed on logistics, which often enables the provision of specialised services in neglected areas. Rather than introducing new legislation, they advocate stronger enforcement of existing regulations, potentially including the posted workers legal framework. Social dialogue is crucial, as solutions should be developed in partnership with social partners.

⁹⁵¹ Sinander, 2025, p. 17.

⁹⁵² Sinander, 2025, p. 4.

⁹⁵³ Sinander, 2025, p. 14.

⁹⁵⁴ Sinander, 2025, p. 4.; See also: European Association for Forwarding, Transport, Logistics and Custom Services (2025) 'Comments on the EP Draft EMPL Report "Addressing subcontracting chains and the role of intermediaries in order to protect workers' rights" – 2025/2133(INI)'. September 2025. [Online] (Accessed: 20 September 2025).

⁹⁵⁵ Sinander, 2025, p. 17.

Finally, although there is clear support for combating fraudulent practices, they emphasise that such measures should not call into question the legality and legitimacy of business models.⁹⁵⁶

Furthermore, the European Parliament's Committee on Employment and Social Affairs (hereinafter: EMPL) voted on 3rd of December 2025 on the main proposals for the regulation of subcontracting, based on Danielsson's Draft Report on addressing subcontracting chains and the role of intermediaries to protect workers' rights (2025/2133(INI))⁹⁵⁷. The Draft Reports' requests have been framed to advocate the introduction of preventive measures, followed by control measures and sanctions. First, as preventive measures, the Report called for a comprehensive European strategy to combat violations of workers' rights, particularly the misuse of subcontracting and intermediaries. It also advocated for the Directive to address these challenges and emphasised the need for a general legal framework to limit subcontracting and establish chain liability. It requested an outline of measures to regulate the roles and responsibilities of intermediaries in their activities, including temporary work agencies. Also, the European Commission was invited to present the general rule limiting subcontracting to a maximum of two tiers under the main contractor, particularly in high-risk sectors designated by the Member States. As highlighted, promoting direct employment in risk sectors is needed, as is the principle of equal pay for equal work. They also called for regulating intermediaries to ensure they are subject to registration and licensing systems, and for prohibiting any fees or costs that labour intermediaries charge workers. Finally, they advocated for legal clarity in the rules of the EU's internal market, without precluding Member States from introducing national legislation. Secondly, as control measures, the Report called for strengthening the European Labour Authority's mandate. Also, a legislative initiative was requested to require Member States to ensure a minimum adequate capacity of labour inspectorates across all high-risk sectors. Finally, the request was to introduce the European Social Security Pass (ESSPASS) to improve digital enforcement of social rights and enable real-time information exchange. Thirdly, regarding sanctions, the Commission was asked to draw on prior experience and mandate that EU financing programs incorporate European labour standards. Also, the automatic mutual recognition of prohibitions on business between Member States was

⁹⁵⁶ European Association for Forwarding, Transport, Logistics and Custom Services (2025) 'Comments on the EP Draft EMPL Report "Addressing subcontracting chains and the role of intermediaries in order to protect workers' rights" – 2025/2133(INI)'. September 2025. [Online] (Accessed: 20 November 2025).

⁹⁵⁷ See: Draft Report on addressing subcontracting chains and the role of intermediaries in order to protect workers' rights (2025/2133(INI)), Committee on Employment and Social Affairs, Rapporteur: Johan Danielsson, 2025/2133(INI), 17 July 2025.

advocated to prevent those under prohibition in one country from simply registering a company in another Member State.⁹⁵⁸

EMPL finally voted on these propositions, approving measures to establish a binding legal framework to prevent abusive subcontracting, improve transparency, and hold companies in the subcontracting system potentially liable.⁹⁵⁹ However, despite the trade unions' requests, the proposal to limit subcontracting chains to a specified number of levels was defeated. As mentioned above, it was primarily based on the Norwegian example of limiting the use of subcontractors in public procurement⁹⁶⁰ and sparked intense debate. While trade unions argued that it would help prevent systemic abuses, employers' organisations opposed it, saying that such limits would kill European industries and benefit only larger companies with the capacity to internalise tasks.

Despite the lack of a favourable vote on limiting the level of chain, approval of the other aspects of the Draft Report could be seen as a long-awaited step toward improving workers' positions in subcontracting arrangements. Also, trade union organisations considered this small victory an impactful political message to the European Commission, urging it to propose the Directive on Subcontracting and Labour Intermediaries as part of the broader Quality Jobs Roadmap and Act⁹⁶¹.⁹⁶² The following process included European Parliament members, who had the opportunity to further advocate for a comprehensive EU response to challenges in

⁹⁵⁸ Draft Report on addressing subcontracting chains and the role of intermediaries in order to protect workers' rights (2025/2133(INI)), Committee on Employment and Social Affairs, Rapporteur: Johan Danielsson, 2025/2133(INI), 17 July 2025.

⁹⁵⁹ See: Legislative Observatory, European Parliament, Addressing subcontracting chains and the role of intermediaries in order to protect workers' rights, 2025/2133(INI) [Online] (Accessed on: 28 December 2025).

⁹⁶⁰ See: Blinkenberg, 2025.

⁹⁶¹ 'On 4 December 2025, the Commission published the Quality Jobs Roadmap, a flagship initiative to promote quality jobs across the European Union. The Roadmap sets out a comprehensive approach to improving working conditions and job transitions for workers and the self-employed, while remaining competitive in a fast-changing global context. Improving job quality across the EU relies in particular on effective systems of social dialogue and collective bargaining. This is why the Commission has worked closely with social partners in designing the Roadmap and remains committed to working hand in hand with them throughout its follow-up. As a key deliverable, and to complement the actions in the Roadmap and strengthen their impact, the Commission will propose a Quality Jobs Act (...)' See: European Commission (2025) 'Quality Jobs Roadmap highlights key role of social partners and social dialogue in shaping future-proof jobs' [Online] (Accessed: 20 December 2025). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Quality Jobs Roadmap, COM(2025)944 final, Brussels, 4th of December 2025.; Consultation Document, First-phase consultation of social partners under Article 154 TFEU on possible direction of EU action to improve working conditions, health and safety at work and implementation of workers' rights – Quality Jobs Act, C(2025)9944 final, Brussels, 4th of December 2025.

⁹⁶² European Trade Union Confederation (2025) 'For an EU Directive on subcontracting and labour intermediation. Resolution adopted at the Executive Committee meeting of 1-2 October 2025' [Online] (Accessed: 15 December 2025).

subcontracting arrangements⁹⁶³. Namely, the European Parliament's Resolution of 12 February 2026 on addressing subcontracting chains and the role of intermediaries in protecting workers' rights (2025/2133(INI)) confirmed the importance of these discussions. In it, the Parliament called upon the European Commission and Member States to strengthen enforcement of the existing legal framework, increase transparency in subcontracting chains, and clarify the possibilities for introducing national measures to prevent fraudulent practices. Special attention was given to the system of joint and several liability, which ensures that the main contractors can be held liable for working conditions throughout the entire chain. At the same time, the need for stronger enforcement mechanisms has been emphasised.⁹⁶⁴

However, the question arose as to how this new legislation, if finalised, would affect specific aspects of the EU labour market, such as posted workers in subcontracting arrangements. As previous studies have addressed, posted workers in such arrangements are considered a particularly precarious segment of the EU's mobile workforce. The legislation in this area currently focuses on the Enforcement Directive, which sought to address the challenges related to this phenomenon by introducing obligatory joint and several liability for unpaid wages in the construction sector, with a voluntary due diligence escape clause and the option for Member States to broaden the scope of the liability system and introduce other measures. Importantly, as analysed, chain liability has been established in only a few Member States, where national trade unions have advocated it as an effective mechanism to prevent abuses, and loopholes in due diligence have often been used to enable companies to avoid liability.

Therefore, since the European Commission did not use the opportunity to address this challenge through the PWD18 legislation, the question is whether it can be 'fixed' with the Directive on Subcontracting and Labour Intermediaries. Based on the Directive model from trade union organisations⁹⁶⁵, the Draft Report⁹⁶⁶, the EMPL Committee's conclusions⁹⁶⁷, and

⁹⁶³ European Parliament (2026) 'Addressing subcontracting chains and the role of intermediaries in order to protect workers' rights' [Online] (Accessed: 10 February 2026).

⁹⁶⁴ European Parliament resolution of 12 February 2026 on addressing subcontracting chains and the role of intermediaries in order to protect workers' rights (2025/2133(INI)), 12 February 2026, Strasbourg.

⁹⁶⁵ European Federation of Food, Agriculture, and Tourism Trade Unions (2025) 'Proposal for a Directive laying down specific rules for fair working conditions with respect to subcontracting chains and labour market intermediaries' [Online] (Accessed: 17 December 2025).

⁹⁶⁶ Draft Report on addressing subcontracting chains and the role of intermediaries in order to protect workers' rights (2025/2133(INI)), Committee on Employment and Social Affairs, Rapporteur: Johan Danielsson, 2025/2133(INI), 17 July 2025.

⁹⁶⁷ See: Legislative Observatory, European Parliament, Addressing subcontracting chains and the role of intermediaries in order to protect workers' rights, 2025/2133(INI) [Online] (Accessed on: 28 December 2025).

the 2026 European Parliament's Resolution⁹⁶⁸, new legislation would likely directly affect posted workers in subcontracting arrangements. For example, since the legislation supporters seek chain liability, it would enable posted workers to hold the main contractor liable for unpaid wages or social contributions arising from, for example, a letterbox company, further down the chain. Therefore, in this case, the initiated Directive would close important loopholes in the EU posting of workers legal framework by strengthening enforcement mechanisms and could serve as a complementary tool to address the challenges faced by posted workers in subcontracting arrangements. However, for such a legal framework to be applicable to, and effectively protect posted workers while preserving the functioning of the internal market, its design needs to be careful and based on experiences identified as functional, as in the comparative analysis above.

Namely, it is necessary that such a comprehensive legal framework, which would systemically regulate subcontracting chains, directly involve posted workers and address its legal loopholes in its design. As mentioned, where the European Commission does not currently intend to revise the existing posting of workers legal framework, which leaves posted workers in subcontracting chains insufficiently protected, improving their protection in a more timely manner can be achieved only through a new proposed general instrument. In that sense, such a framework should be conceptualised as a horizontal framework applicable to all sectors, with the possibility of introducing targeted measures in sectors where the risk of violations of workers' rights is especially high. At the same time, it should clearly involve cross-border situations and be consistent with the existing functional provisions on the posting of workers. To avoid this group of mobile workers falling outside the new legislation's scope, clear involvement in its framework is a necessary precondition for its effectiveness. This should include explicit links to the PWDs acquis, ensuring that subcontracting rules reinforce, rather than bypass, the minimum employment standards applicable in the host Member State.⁹⁶⁹

Additionally, in a focus on such legislative development, as emphasised by the European Parliament's Resolution, there should be a clear establishment of an effective liability scheme. The future general legal framework should provide for a system of joint and several liability that would hold the main contractor liable for working conditions throughout the entire chain, or the so-called chain liability. Such a system, as seen in the comparative overview, is recognised in the posted workers scope in multiple Member States, and at the same time, the

⁹⁶⁸ European Parliament resolution of 12 February 2026 on addressing subcontracting chains and the role of intermediaries in order to protect workers' rights (2025/2133(INI)), 12 February 2026, Strasbourg.

⁹⁶⁹ See: Konjević, 2026.

EU institutions have been advocating it as a ‘good practice’. Its particular value is that it prevents shifting business risk onto workers, who are mainly at the bottom of the chain, and encourages subjects at the top of the chain to choose their contractual partners more carefully. For posted workers, that would be of particular value, as it would allow them to claim unpaid wages or social contributions from subjects with real economic power, even in complex cross-border situations involving intermediaries or letterbox companies. At the same time, it is important to use the due diligence defence system not as a means of avoiding liability, but as an instrument to encourage responsible business behaviour.⁹⁷⁰

Also, such a new general legislative framework should be backed up with strong corresponding control and enforcement mechanisms. The author agrees with the Danielssons Draft Report, indicating that without effective controls and sanctions, even the good normative solutions, including chain liability, are stagnating and having no real effect. It includes strengthening labour inspections and cross-border cooperation, particularly in information exchange and joint action against fraudulent practices.⁹⁷¹

Finally, it remains to be seen how future discussions of this potential legal framework addressing subcontracting and labour intermediaries will evolve, and in which direction the EU legislator will move. Hopefully, the EU will find a solution that addresses the urgent need to protect the workers involved in these complex arrangements, including posted workers, while supporting business development that is not based on violations of workers’ rights.

5.4. Conclusion

The final evaluation of this thesis starts from the basic presumption that continues throughout the research: modern forms of subcontracting, especially in cross-border contexts, are no longer merely an organisational market instrument but have become a structural challenge at the heart of labour law. The tensions between the freedom to provide services and the protection of posted workers, which is already deeply integrated into the EU legal framework, are taking a concrete, highlighted shape in the context of complex subcontracting chains. In that sense, even in the earlier chapters, it has been shown that the EU's legal

⁹⁷⁰ See: Konjević, 2026.

⁹⁷¹ See: Konjević, 2026.

framework is based on a fragile balance between economic freedoms and social protection, but only through analysis of subcontracting chains does it become clear how far that balance is shifted in practice. What, at the principal level, seems like a compromise is, in reality, often turned into a space where liability slides down the chain, leaving the worker at the bottom without a real possibility of enforcing their rights. In such arrangements, it is becoming clear that formal legal solutions, as normatively sophisticated as they are, are not always able to respond to the real patterns of market behaviour. Therefore, this research showed that the formal harmonisation of minimal standards, without ensuring their effective enforcement, does not lead to material equality. On the contrary, such an approach can encourage regulatory arbitrage among Member States and allow market actors to exploit differences in national systems. In that way, the space for fraudulent practices opens up, such as social dumping, the use of letterbox companies, the misuse of temporary work agencies, and bogus self-employment.

Consequently, in this final evaluation, it is necessary to start from one that may be uncomfortable but is necessary: the challenge is not, in fact, that the rules do not exist, but that they are often conceived in a way that allows their circumvention. Namely, analysis conducted in this thesis showed that the existing legal framework for posted workers is limited in its ability to effectively address the complexity of subcontracting relationships. Although certain mechanisms were introduced in the 2014 Enforcement Directive to strengthen protection, they were not enhanced in 2018. For example, liability in subcontracting chains remains minimalistic and fragmented, and, at a high level, left to the discretion of Member States. Such an approach was probably politically necessary at the time of its introduction, but more than a decade later, it is clear that this flexibility became one of the main reasons for the system's weaknesses. The consequence of such an approach is not only normative varieties but also a real discrepancy in the level of protection of posted workers in the EU. In that way, the protection of workers is, contrary to the EU's basic social aims, *de facto* dependent on geographical location rather than on universal standards.

As a result, in this research, the primary solution advocated is not the full abandonment of the existing legal framework but its serious, structural reform. The reason for such an approach is not only its legal nature, but also its practicality. The system for posting workers already exists, has been developed through case law and legislation, and is deeply integrated into the functioning of the EU's internal market. The attempt to replace it with the new instrument would not only raise new legal questions but also potentially lead to further fragmentation if undertaken without caution. In that sense, the author's opinion was that

amending the Enforcement Directive, as complex as it would be, represents the more efficient way to improve the protection of posted workers in subcontracting chains in the EU. This recommendation did not stem from institutional opportunism but from the research itself. Comparative analysis of the national systems showed that solutions already exist and, in certain contexts, have demonstrated their effectiveness. The German model, for example, clearly shows that protection becomes real only when liability is directed toward those with real economic power, or the more solvent subject in the chain. The Austrian system reminds us that time plays an important role and that intervention must precede the disappearance of sources. The Dutch system shows how important it is for the rules to be processed clearly and precisely. Those experiences do not call for a new normative world, but rather for the existing legal framework to be built in ways that take into account what has already been proven functional.

In that context, the amendment to the Enforcement Directive should not be understood as technical harmonisation but as a paradigm shift. The key question is no longer if there should be liability in subcontracting chains, but how to shape it so that it actually works. It includes, above all, the shift toward real chain liability, which allows the posted worker to approach the subject with the capacity to bear the burden of the obligation. Such an approach is not radical but a logical consequence of the findings of this research on the functioning of modern subcontracting relationships.

It is equally important to question the institutions established as protective mechanisms, which, in practice, have the opposite effect. The due diligence defence system is the best example of such ambivalence. In theory, it should have encouraged responsible business behaviour, but in practice, it is often based solely on the formal tick-boxing of conditions that allow liability to be avoided. This research showed that the challenge is not only in the idea of due diligence defence, but also in how it is normatively set, without clear criteria and without a real connection to material consequences for the workers. That is why the recommendations clarify that its role in the future legal framework needs to be redefined not as a way out of liability, but as a tool that enhances and strengthens it. If such a system cannot be achieved, the due diligence defence should be left out as the discretion mechanism for Member States.

Furthermore, the special layer of the policy recommendations raises the question of why, despite all of the above, the possibility of new legislation was even considered. The response is not that such a legal framework would be better, but rather that the political reality has been clarified in the research. Namely, the European Commission is currently not showing readiness for the upcoming reform of the posted workers legal framework. In such circumstances, the

discussion of the new horizontal instrument for the regulation of subcontracting and intermediaries is moving beyond a theoretical possibility, it has become a potential channel through which at least part of the identified challenges can be addressed. However, that is why this research is taking a careful, almost reserved attitude toward that option. A new legislative framework can represent both an opportunity and a risk. If it is not thoroughly considered, there is a real danger that it would further fragment the system, or that the questions already regulated in the scope of posting workers wouldn't be sufficiently integrated. It is particularly problematic that such initiatives come from different political and interest groups, which do not always share a common understanding of their aims. In that sense, the new framework can be useful for posted workers in subcontracting chains, if it recognises the specificity of their position and is not limited to only declarative solutions.

Therefore, the final chapter did not offer simple answers but sought to establish a realistic framework for discussing future legislative development. If it is based on the conclusions of this research, it is clear that the effective protection of posted workers in subcontracting chains does not depend solely on the number of provisions or legislation, but on their ability to take into account the real relationships of power on the EU labour market. In that sense, the reform of the existing legislative framework is not only desirable but necessary. A new legislative framework can be an addition, but a replacement for such a reform.

In light of such conclusions, it is necessary to look back at the hypotheses on which this research was based. Its evaluation represents not only the formal finalisation of the analytical framework but also confirms the internal coherence of the results obtained.

First, an affirmative hypothesis according to which the existing legal framework of the EU does not provide a sufficient level of protection of posted workers in complex subcontracting arrangements, which this research has confirmed. Analyses showed that the normative structure, even though developed and multilayered, does not follow the dynamics of the market relationships in which liability is being fragmented across multiple levels of contractual relationships. In those situations, there is a mismatch between formally granted rights and their actual enforceability. In that way, the protection of posted workers is determined by the position within the chain and the applicable normative framework, rather than by universally legislatively declared effective protection standards.

The negative hypothesis has also been confirmed. The introduction of obligatory joint and several liability in the construction sector, with the possibility of invoking the due diligence

defence under the 2014 Enforcement Directive, proved insufficient to effectively protect posted workers in complex subcontracting structures. Research showed that such a solution, with a wide scope of discretion for Member States, led to the exclusion of the most solvent subjects in the chain and of multiple labour-intensive sectors from the liability scheme. However, the comparative national analysis showed that the system can be efficient if differently structured.

The null hypothesis, which states that there is no significant difference in the protection standards for posted workers, whether or not they are included in subcontracting arrangements, has been rejected by this research. On the contrary, the analysis clearly showed that the complexity of subcontracting chains, especially in the transnational context, significantly contributes to the decline in the level of protection for posted workers. As the chain is longer and more fragmented, control mechanisms are weaker, and workers' ability to enforce their rights is limited.

In that regard, the analysed variables additionally confirmed the mentioned conclusions. The type of liability has been shown to be a key factor, with models that include chain liability offering greater protection than limited joint and several liability. The number of levels in the chain directly reduces effective protection, while the transnational component further complicates enforcement due to differing national regimes. Sectoral context cannot, on its own, compensate for the system's structural weakness, while the accessibility and effectiveness of enforcement mechanisms remain significant factors in determining whether the normative protection will have a real effect.

Finally, maybe the most important contribution of this research is that it showed the challenge cannot be understood or solved if viewed in isolation, through individual institutes or sectors. Only when the theoretical basis, legal framework, market practices and comparative analysis are combined does it become clear where the system functions and where it lags behind. In an area lacking recent, comprehensive research, this thesis aims to create space for a deeper understanding and thorough discussion. The topic of posted workers in subcontracting chains has long been on the edge of scientific interest, as it is self-evident or has already been sufficiently addressed. This thesis shows the opposite; it is one of the key challenges of the contemporary EU labour market, requiring a new level of analysis and normative reflection. It has put this topic back at the centre of the discussion and tried to see it in its full complexity. Therefore, a comprehensive analysis in this research is creating space for thoughtful, well-founded changes that will not remain at the level of declarations but will have a real impact on the lives of those for whom labour law exists in the first place.

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Annex 2: Supervisor's Evaluation of the Doctoral Dissertation

The doctoral research presented in this dissertation addresses the scientifically relevant and relatively neglected area of labour exploitation of posted workers, especially through the prism of subcontracting analyzed both in academic literature and in relation to normative approaches at the European level. Based on relevant and very extensive literature and with a methodological approach that is appropriate for the social sciences and especially the scientific field of law, this research provides new, scientifically based and original insights. Moreover, the applied scientific methods and analytical approach to the researched phenomenon provide insight into the differences between the normative architecture and the actual reality in a European and comparative perspective. In my role as supervisor, I am free to conclude that Tena Konjević's doctoral dissertation meets all the standards that are usually required at this level of education. For the academic and professional public, this dissertation will undoubtedly be a relevant reading with a series of critical and scientifically based recommendations, but also a basis for future research into the exploitation of workers in the broader sense of the word and through a critical evaluation of the European legal framework subject to normative changes and practical implementation that often bypasses solutions designed for the effective protection of (posted) workers' rights, inter alia as human rights.



Prof. Dr. Mario Vinković, Ph.D.

Annex 3: Statement in Accordance with the Provisions of the Regulation and the Guidelines of the University

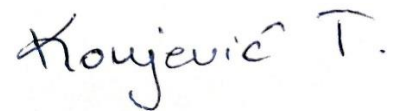
In accordance with the provisions of the Regulation on the Use of Artificial Intelligence of the University of Miskolc and the Guidelines for the Use of Artificial Intelligence of the Deák Ferenc Doctoral School of Law, I, undersigned Tena Konjević (name), declare that I have used artificial intelligence in my doctoral dissertation and thesis booklets.

In the case of the use of artificial intelligence (hereinafter: AI), I declare the following:

1. The name of the AI tool used: Grammarly Grammar Check Pro
2. The URL and the version number of the AI tool used: <https://www.grammarly.com/grammar-check>
3. The exact date of production of the generated content (year, month, day): 2025-2026
4. The purpose and extent of use: Language proofreading throughout the thesis.

I acknowledge that according to the Guidelines for the Use of Artificial Intelligence of the Deák Ferenc Doctoral School of Law, „*The use of AI is prohibited for the formulation of theses, research results, conclusions, inferences and analyses. Any thesis or paper prepared in this way is not admissible.*”

Miskolc, 4th of May 2026



signature