

## MISSED OPPORTUNITIES IN EU LABOUR LAW: POSTED WORKERS' PROTECTION IN SUBCONTRACTING CHAINS

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### ABSTRACT<sup>1</sup>

*The paper explores the intricate relationship between business practices in subcontracting chains and the protection of posted workers' rights in the EU labour market. It provides a concise overview of the evolution of the EU legal framework for posted workers and the corresponding legislation, highlighting its deficiencies in providing comprehensive protection across subcontracting chains. Moreover, the paper focuses on two mechanisms in the existing EU legal framework: the liability scheme and the due diligence as the escape system. Firstly, the research examines the (in)sufficiency of the liability system introduced by the 2014 Enforcement Directive, comparing national implementations. It also criticises the missed opportunity to improve that scheme in PWD 18, highlighting the inadequacies of existing EU legal frameworks in protecting the rights of posted workers within subcontracting chains. Secondly, the paper examines additional lost opportunities to improve the due diligence system, a pivotal element in international, regional, and national discussions of corporate responsibility for rights violations. It analyses the potential for broader application of this mechanism within the scope of posted workers' legislation, rather than merely as a defence or escape mechanism, emphasising its importance for proactively selecting subcontractors and for compelling contractors to act in the best interests of posted*

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<sup>1</sup> Funded by the European Union – Next Generation EU. However, the views and opinions expressed are solely those of the author(s) and do not necessarily reflect those of the European Union or the European Commission. Neither the European Union nor the European Commission can be held responsible for them.

workers. An analysis of recent positive EU actions on human rights due diligence and subcontracting chains supplements the research. Consequently, through a comprehensive study and thoughtful consideration of the existing EU legal framework and analysing its loopholes, the paper aims to contribute valuable insights to the ongoing discourse on the EU's framework for safeguarding the rights of posted workers in subcontracting chains.

**Key words:** posted workers, subcontracting chains, chain liability, due diligence, PWD Enforcement Directive.

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## 1. INTRODUCTION

In the evolving business operations landscape, the relationship between corporations and human rights has been a subject of intense debate, since the global urge for business accountability hinges on recognising labour rights as human rights. Despite pressure from various stakeholders, some companies still resist improving working conditions to preserve competitive advantage.<sup>2</sup> One of the pivotal forms of business operation, subcontracting, now plays a crucial role in facilitating the free movement of services, fostering undistorted competition across all Member States. However, in addition to its benefits, this growing phenomenon poses challenges, especially for posted workers. The increased reliance on subcontracting, particularly in labour-intensive industries, raises concerns about the potential erosion of posted workers' rights in extensive subcontracting chains. This prompts apprehension of both the social and economic exploitation of posted workers' rights<sup>3</sup>, as contractors often lack direct legal and social responsibility for the workers at the end of the chain. Consequently, a fundamental question arises: How can the EU effectively promote and protect the rights of posted workers within subcontracting chains while ensuring compliance with both labour standards and economic freedoms?

Even though, from the quantitative standpoint, the posting of workers does not rank as the foremost concern for labour lawyers, albeit uncertain, and appears lower than that of the migrant workers in the EU, qualitatively speaking, the phenomenon of posting likely represents one of the most intricate challenges

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<sup>2</sup> Pagnattaro, M. A.: Labor rights are human rights: Sustainability initiatives and trade policy, in: Bird, R. C., Cahoy, D. R., Prekert, J. D. (eds.): *Law, Business and Human Rights: Bridging the Gap*, Cheltenham: Edward Elgar Publishing, 2014, pp. 143-171.

<sup>3</sup> The erosion of the rights of third countries' posted workers can be seen in the example of the case of the *Rive Gauche* building site. See more in: Cillo, R.: Mandatory mobility? The case of immigrant posted workers sent from Italy to Belgium in the construction sector. *International Migration*, 59(6) 2021, pp. 156-171.

across the entire social spectrum within the EU.<sup>4</sup> Therefore, to understand the ongoing debate on posted workers, it is important to examine the context of its evolution, beginning with the original proposal for the Posted Workers Directive (PWD) in August 1991.<sup>5</sup> The aim was to protect posted workers without placing an excessive burden on foreign companies providing cross-border services.<sup>6</sup> To achieve these objectives, the PWD<sup>7</sup> set out which national binding rules of the host Member State apply to posted workers. It also outlined a set of basic employment and labour conditions that service providers in the host Member State must respect, providing a solid basis for the minimum protection of workers.<sup>8</sup> However, the 2004 proposal, often referred to in the media as the 'Bolkenstein Directive'<sup>9</sup>, together with the EU's enlargement to twelve new Member States in 2004 and 2007, has highlighted the limited influence of the PWD.<sup>10</sup> The rise in wage differentials, which has increased the posting of workers, has also led companies to make greater attempts to defraud or circumvent the rules by exploiting opportunities among underpaid posted workers.<sup>11</sup> To counter this increasing trend, the Commission introduced a new instrument, the 2014 Enforcement Directive<sup>12</sup>, which aimed to combat fraud and circumvention in the context of posting. However, it was ultimately

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<sup>4</sup> Rocca, M.: *Posting of Workers and Collective Labour Law: There and Back Again. Between Internal Market and Fundamental Rights*, Cambridge: Cambridge University Press, 2015, p. 23.

<sup>5</sup> European Commission: *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, 1.8.1991.

<sup>6</sup> Van Nuffel, P.; Afanasjeva, S.: The Revised Posting of Workers Directive: Curbing or Ensuring Free Movement?, in: Cambien, N., Kochenov, D., Muir, E. (eds.): *European Citizenship under Stress: Social Justice, Brexit and Other Challenges*, Leiden & Boston: Brill Nijh, 2020, pp. 276-278.

<sup>7</sup> European Parliament and Council of the European Union: *Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, Official Journal of the European Union, L 18, 21.1.1997.

<sup>8</sup> Van Hoek, A., Houwerzijl, M.: 'Posting' and 'Posted Workers': The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive. *Cambridge Yearbook of European Legal Studies*, 14 2012, p. 419.

<sup>9</sup> European Parliament and Council of the European Union: *Directive 2006/123/EC of 12 December 2006 on services in the internal market*, Official Journal of the European Union, L 376, 27.12.2006.

<sup>10</sup> Van Hoek, A., Houwerzijl, M., *op. cit.*, p. 420.

<sup>11</sup> Van Nuffel, P., Afanasjeva, S., *op. cit.*, pp. 283-285.

<sup>12</sup> European Parliament and Council of the European Union: *Directive 2014/67/EU 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*

adopted in a watered-down form, leaving the fundamental aspects of the existing rules untouched.<sup>13</sup> Finally, increasing public concern that posting was being equated with ‘social dumping’ eventually forced politicians in host countries to recognise posting as an important issue. In response to this shift in political perceptions, the European institutions adopted Directive 2018/957 (hereinafter: PWD 18).<sup>14</sup> It aimed to protect posted workers during their assignments, aligning with the European Pillar of Social Rights<sup>15</sup> focus on framing social rights as fundamental. This coincided with the recent academic discussions over the possibility of classifying workers’ rights as fundamental rights<sup>16,17</sup>. In that context, the protection of the rights of posted workers in this publication is analysed not solely as a question of regulatory effectiveness but also as a normative question grounded in the EU legal framework. Namely, certain aspects of labour law have been recognised as basic rights under EU law, especially through the aforementioned European Pillar of Social Rights, which, in Article 31, guarantees the right to fair working conditions. Additionally, Pillar is highlighting the principles such as fair wages, safe and healthy working conditions and the protection of workers in non-standard forms of work, including cross-border situations such as the posting of workers. Consequently, the existing legal framework on posted workers and subcontracting in this publication is evaluated in terms of how effectively it provides real and efficient protection for posted workers in accordance with those normative standards. In that way, the analysis is not limited to formal harmonisation with the EU internal rules but also addresses whether, in practice, the level of protection corresponding to the status of workers’ rights as basic EU rights is being achieved.

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*administrative cooperation through the Internal Market Information System*, Official Journal of the European Union, L 159, 28.5.2014 (hereinafter: Enforcement Directive).

<sup>13</sup> Kyriazi, A.: Making and Breaking Coalitions for a more ‘Social Europe’: The Path Towards the Revision of the Posted Workers Directive, *European Journal of Industrial Relations*, 29(3) 2023, p. 228.

<sup>14</sup> Houwerzijl, M., Berntsen, L.: Posting of Workers: From a Blurred Notion Associated with ‘Cheap Labour’ to a Tool for ‘Fair Labour Mobility’?, in: Arnholtz, J.; Lillie, N. (eds.): *Posted Work in the European Union. The Political Economy of Free Movement*, New York: Routledge, 2020, p. 147.

<sup>15</sup> European Parliament, Council of the European Union and European Commission: *Inter-institutional Proclamation on the European Pillar of Social Rights*, Official Journal of the European Union, C 428, 13.12.2017.

<sup>16</sup> Collins, H.: Theories of Rights as Justifications for Labour Law, in: Davidov, G., Langille, B. (eds.): *The Idea of Labour Law*, Oxford: Oxford University Press, 2011, pp. 140-144.

<sup>17</sup> Bottero, M.: *Posting of Workers in EU Law: Challenges of Equality, Solidarity and Fair Competition*, Bulletin of Comparative Labour Relations, Alphen aan den Rijn: Kluwer Law International, 108 2021, p. 263.

However, it is worth noting that PWD 18 failed to address certain challenges associated with the insufficient protection of posted workers in subcontracting chains and deferred this question to the Commission's Report. Therefore, the Commission's proposed provision, which granted Member States the authority to require companies to subcontract exclusively to service providers offering workers the same level of employment protection as the main contractor, ultimately did not conclude the legislative process. Instead, the finalised PWD 18 addresses abuses in subcontracting situations only by imposing a general obligation on Member States to implement measures to ensure subcontracting liability, as outlined in Article 12 of the Enforcement Directive<sup>18</sup>.<sup>19</sup> Consequently, the Enforcement Directive remained the sole piece of legislation addressing this issue, albeit inadequately, prompting further examination.

In that sense, for the purpose of this publication, 'missed opportunities' are not used only in a rhetorical manner, but also as the analytical and normative concept. In that way, situations are addressed in which the EU legislator had at its disposal a realistic regulatory option to strengthen the protection of posted workers in subcontracting chains, but did not adopt measures to ensure a higher level of their protection. Identification of such missed opportunities is mainly based on the evaluation of the (insufficient) effectiveness of existing mechanisms for preventing violations of posted workers' rights in subcontracting arrangements, as well as on their structural limitations in the internal market context. In that sense, analysis focuses on the extent to which the system of liability and due diligence, as an escape mechanism, contributes to the real protection of posted workers, or, conversely, leaves room for rule circumvention.

## **2. POSTED WORKERS IN SUBCONTRACTING CHAINS AND POSSIBLE MECHANISMS FOR PREVENTING EXPLOITATION**

While posted workers can significantly enhance firms' competitiveness, internationalisation, and productivity, their inclusion in subcontracting chains also entails various risks. Indeed, subcontracting does not intrinsically represent an exploitative system.<sup>20</sup> However, it raises concerns when utilised as a cost-saving measure to exploit variations across countries, sectors, and workplaces, and to

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<sup>18</sup> PWD 18, par. n. 25.

<sup>19</sup> Bottero, M., *op. cit.*, p. 263.

<sup>20</sup> Deleu, T.: The Weakest Link – How Construction Workers are Exploited in Subcontracting Chains, in: *Subcontracting and Posted Workers in the EU*, Brussels: European Federation of Building and Woodworkers (EFBWW) & European Trade Union Confederation (ETUC), 2023.

adjust production levels in response to demand fluctuations.<sup>21</sup> Posted workers often find themselves in vulnerable positions, characterised by poor working conditions, including extended working hours, substandard wages relative to local standards, increased work intensity, and job instability.<sup>22</sup> Additionally, there's a risk of social dumping, wherein cheaper foreign labour displaces domestic workers, prompting authorities to compromise existing labour rights to mitigate unemployment concerns.<sup>23</sup> In particular, the construction sector is widely recognised for its challenges posed by intricate subcontracting arrangements, particularly in cross-border contexts.<sup>24</sup> Similarly, slaughterhouses, where the subcontracting model has been implicated in social rights violations, are reportedly characterised by a higher prevalence of subcontracting than other sectors.<sup>25</sup> In such cases, enforcing rights throughout subcontracting chains poses significant challenges.<sup>26</sup> In that regard, the authors consider two preventive mechanisms that can enhance the compliance of companies in subcontracting chains with labour rights standards across a broader range of sectors, particularly labour-intensive ones.

### 2.1. EXTENDED LIABILITY MECHANISM AS A MISSED CHANCE?

The distribution of responsibility for labour standards throughout the subcontracting chain is designed to improve working conditions and combat labour exploitation and forced labour.<sup>27</sup> In this regard, two concepts of (sub)contract-

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<sup>21</sup> Lillie, N., Wagner, I.: Subcontracting, insecurity and posted workers: evidence from construction, meat processing, and ship building, in: Drahoukoupil, J. (ed.): *The Outsourcing Challenge: Organizing Workers Across Fragmented Production Networks*, Brussels: European Trade Union Institute (ETUI), 2015, p. 163.

<sup>22</sup> Maslauskaitė, K.: *Posted Workers in the EU: State of Play and Regulatory Evolution*, Paris: Notre Europe – Jacques Delors Institute, 2014, pp. 3-4; Grimshaw, D., Rubery, J.: Inter-capital relations and the network organisation: redefining the work and employment nexus. *Cambridge Journal of Economics*, 29(6) 2005, pp. 1027-1051; Lillie, N., Wagner, I., *op. cit.*, p. 163.

<sup>23</sup> Maslauskaitė, K., *op. cit.*, p. 3-4.

<sup>24</sup> Cremers, J.: *In Search of Cheap Labour in Europe: Working and Living Conditions of Posted Workers*, Bruxelles: International Books, 2011, p. 16.

<sup>25</sup> Robin-Olivier, S.: Posting of Workers in the European Union: An Exploitative Labour System. *European Law Open*, 1(3) 2022, pp. 683-684.

<sup>26</sup> See more in: Wagner, I.; Shire, K.: Labour Subcontracting in Cross-Border Labour Markets: A Comparison of Rule Evasion in Germany and Japan, in: Arnholtz, J.; Lillie, N. (eds.): *Posted Work in the European Union. The Political Economy of Free Movement*, New York: Routledge, 2020. p. 196.

<sup>27</sup> Corbanese, V., Rosas, G.: *Policies to Prevent and Tackle Labour Exploitation and Forced Labour in Europe*, Brussels: International Labour Organization, 2021, p. 19.

tors' liability can be differentiated: (direct) joint and several liability and chain liability. The first occurs when a subcontractor fails to meet wage, tax, or social fund obligations for the (posted) workers, thereby potentially shifting the contractor's full debt burden.<sup>28</sup> The second concept, chain liability, extends joint and several liability across the entire chain or a substantial portion of it, including that of the principal contractor. If a legal system holds all links in the subcontracting chain potentially liable, the term 'full chain liability' is used.<sup>29</sup>

Evolutionarily, the escalation of concerns about exploitation in subcontracting chains has prompted heightened attention to the rights of posted workers engaged in these chains. This is particularly evident in the inadequacy of the preventive mechanisms outlined in the PWD 96, which have proven insufficient to curb instances of social dumping. Consequently, with the proposal of joint and several liability, the initiative to improve preventive measures by holding (sub)contractors accountable for the welfare of posted workers has emerged as a viable solution. The Court of Justice of the EU's judgements have played a pivotal role in shaping this discourse, notably exemplified in the case of *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix*.<sup>30, 31</sup> The Court explained that this arrangement benefits posted workers since it adds another party, typically financially more solvent, alongside the employer, who is primarily responsible for ensuring that workers receive at least the minimum wage. This additional party shares joint liability with the employer, providing additional assurance to workers.<sup>32</sup> Therefore, the CJEU cases have confirmed the compliance of the joint and several liability system with European law and have encouraged consideration of its introduction at the European level. Consequently, this question has gained its primary legal emphasis in the 2014 PWD Enforcement Directive, particularly in Article 12, which addresses cross-border liabilities for wage payments within subcontracting chains.<sup>33</sup> Although trade unions advocated for a chain liability regulation in the Directive,

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<sup>28</sup> Heinen, A., Müller, A., Kessler, B.: *Liability in Subcontracting Chains: National Rules and the Need for a European Framework*, Brussels: European Trade Union Institute (ETUI), 2017, p. 21.

<sup>29</sup> *Ibid.*, pp. 21-22.

<sup>30</sup> Court of Justice of the European Union (Second Chamber): Case C-60/03, *Wolff & Müller GmbH & Co. KG v. José Filipe Pereira Félix*, ECLI:EU:C:2004:610, 12.10.2004. (hereinafter: *Wolff & Müller Judgement*).

<sup>31</sup> Jorens, Y.: *Cross-border EU Employment and its Enforcement: An Analysis of the Labour and Social Security Law Aspects and a Quest for Solutions*, Cham: Springer Nature Switzerland AG, 2022, pp. 421-422.

<sup>32</sup> *Wolff & Müller Judgement*, par. 40.

<sup>33</sup> Enforcement Directive.

the mentioned provision specifically addressed only direct joint and several liability.<sup>34</sup>

Hence, while the 2014 Enforcement Directive has improved the addressing of subcontracting liability and the protection of the rights of posted workers, compared with PWD 96, practical implications indicate that issues in these areas persist. One of the main challenges in this regard has been linked to Article 12, as not all Member States have exercised the option to broaden the scope of application beyond the required minimum liability regime.<sup>35</sup> According to the Report on the application and implementation of the Enforcement Directive, EU countries, except those that applied the other appropriate measures according to Article 12(6)<sup>36</sup>, have enforced a minimum requirement holding direct contractors in the construction sector liable if subcontractors fail to pay wages meeting the minimum wage and social security contributions. Nine Member States<sup>37</sup> have confined this liability to construction, the rest have extended it to various sectors, and eleven Member States<sup>38</sup> have applied this scheme to the entire economy. In most Member States, liability rests with the direct contractor while in ten countries<sup>39</sup> that liability is broadened to the entities that are not directly contracted by the employer. Austria permits the latter only when multiple tiers are used to evade legal obligations, whereas Lithuania and Sweden limit liability to the main contractor in construction projects. Furthermore, posted workers in most Member States can claim their total wages or overtime compensation from the contractor. Thirteen Member States<sup>40</sup> allow the former, while three<sup>41</sup> allow the latter. France has included employer-pro-

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<sup>34</sup> Lillie, N., Wagner, I., *op. cit.*, p. 162.

<sup>35</sup> Lasek-Markey, M.: *Law, Precarious Labour, and Posted Workers: A Sociolegal Study on Posted Work in the EU*, New York: Routledge, Taylor & Francis Group, 2023, pp. 146-147.

<sup>36</sup> Article 12(6) of the Enforcement Directive: 'Instead of the liability rules referred to in paragraph 2, Member States may take other appropriate enforcement measures, in accordance with Union and national law and/or practice, which enable, in a direct subcontracting relationship, effective and proportionate sanctions against the contractor, to tackle fraud and abuse in situations when workers have difficulties in obtaining their rights.'

<sup>37</sup> Croatia, Estonia, Finland, Ireland, Lithuania, Poland, Romania, Sweden, and the UK. Note: the UK, as a former Member State, is also included in the Commission's Report on this list, as it was conducted before Brexit.

<sup>38</sup> France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, and Spain.

<sup>39</sup> Austria, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Slovenia, Spain, and Sweden.

<sup>40</sup> Austria, Belgium, Estonia, France, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Slovenia, Spain and Sweden.

<sup>41</sup> Croatia, the Czech Republic, and Slovakia.

vided housing in its considerations, and Luxembourg has extended liability to all monetary claims arising from employment within the contractor's service provision framework. However, except in Austria, all countries limit the contractor's liability to the amount arranged in the subcontracting agreement.<sup>42</sup> Finally, as noted, several countries have implemented additional measures. In Denmark, the Labour Market Fund for Posted Workers compensates workers covered by Danish collective agreements for unpaid wages. Employers and Danish service recipients contribute to the fund, which seeks reimbursement from the employer's home country. In Finland, if a posted worker is not paid the minimum wage, the worker notifies the builder or general contractor, who then requests a wage report from the posting undertaking. Non-compliance leads to sanctions but not direct liability for unpaid remuneration.<sup>43</sup> Additionally, in Luxembourg, when the inspectorate notifies the principal contractor in writing of non-payment of wages to a worker, the principal contractor must promptly ensure that the subcontractor rectifies the violation.<sup>44</sup>

Finally, the question arises as to which approach is most effective for safeguarding posted workers' rights in subcontracting chains, and whether further improvements are warranted in EU legislation. It's worth noting that the liability system plays a crucial role in deterring wage dumping and encourages contractors to exercise greater caution when selecting subcontractors. This is because, to avoid liability, main contractors are prompted to conduct thorough evaluations of their subcontractors before entering into contractual arrangements.<sup>45</sup> Therefore, when examining the decision to introduce direct joint and several liability rather than chain liability, and to confine it solely to the construction sector within the Enforcement Directive, it is essential to critically evaluate whether this is the most suitable approach. As previously

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<sup>42</sup> European Commission: *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) No 1024/2012 on Administrative Cooperation through the Internal Market Information System*, COM(2019) 426 final, Brussels, 25.9.2019, (hereinafter: Report on the application and implementation of the Enforcement Directive) p. 16.

<sup>43</sup> *Ibid.*, p. 17.

<sup>44</sup> European Labour Authority: *Construction sector: issues in information provision, enforcement of labour mobility law, social security coordination regulations, and cooperation between Member States*, Luxembourg: European Labour Authority, 2023, p. 42.

<sup>45</sup> Jorens, Y., Peters, S., Houwerzijl, M.: *Study on the protection of workers' rights in subcontracting processes in the European Union*, Project DG EMPL/B2-VC/2011/0015, Ghent, 2012, p. 158.

noted, many Member States have adopted the basic framework for safeguarding the rights of posted workers in subcontracting chains by adhering to the core principles set out in the Enforcement Directive. Therefore, although the Directive introduced liability as a commendable preventive measure for upholding workers' rights, compared with relevant directives such as PWD 96 and PWD 18, it still left loopholes in ensuring adequate protection for posted workers within subcontracting chains by allowing Member States to determine minimum safeguarding requirements. According to the Commission's report, trade unions found that the extension of the liability system in several countries, in the form of full chain liability or with a broader scope than the construction sector, has had a positive impact on the safeguarding of posted workers' rights in subcontracting chains in the EU.<sup>46</sup> However, chain liability, as such, differs across the Member States that have introduced it. For example, in the German construction sector, liability can be extended to all subcontractors within the construction chain. This practice enables workers to recover unpaid wages and/or social security contributions when companies declare bankruptcy and cease operations. Additionally, it compels primary contractors to consider their subcontractors' reputations and implement monitoring measures.<sup>47</sup> Despite some studies indicating a low success rate in enforcing the rights of posted workers through chain liability in German courts, proponents argue that this mechanism still offers a lifeline for posted workers to recover their wages or contributions<sup>48</sup>.

Moreover, in scenarios involving letter-of-credit companies or employer bankruptcy, it may be the sole viable avenue for wage enforcement.<sup>49</sup> Therefore, chain liability generally has a greater preventive effect than direct joint and several liability, as indicated by the previous, mainly empirical, research<sup>50</sup>.

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<sup>46</sup> Report on the application and implementation of the Enforcement Directive, p. 16.

<sup>47</sup> Lillie, N., Wagner, I., *op. cit.*, p. 162.

<sup>48</sup> See more about the effectiveness of the German liability scheme: Bogoeski, V.: *Chain liability as a mechanism for strengthening the rights of posted workers: The German chain liability model*, The project 'Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)', VS/2016/0222, 2016; Heinen, A., Müller, A., Kessler, B., *op. cit.*; Fechner, H.: Posting of workers before German courts, *in*: Rasnača, Z., Bernaciak, M. (eds.) *Posting of workers before national courts*, Brussels: European Trade Union Institute (ETUI), 2021, pp. 105-126.

<sup>49</sup> Bogoeski, V., *op. cit.*, p. 15.

<sup>50</sup> See, for example: Jorens, Y., Peters, S., Houwerzijl, M., *op. cit.*; Bogoeski, V., *op. cit.*; Heinen, A., Müller, A., Kessler, B., *op. cit.*; Report on the application and implementation of the Enforcement Directive; Cremers, J., Jouwerzijl, M., *op. cit.*; Kall, K., Lillie, N.: *Protection of Posted Workers in the European Union: Findings and Policy Recommendations Based on Existing Research*, PROMO Briefing Paper, Project "Protecting Mobility through Improving

While direct liability affects only the immediate subcontractor of the employer, chain liability extends its preventive impact throughout the entire subcontracting chain, potentially reaching the main contractor and, in some cases, the investor. This broader scope is anticipated to encourage greater caution in the selection of subcontractors by both main contractors and their subcontractors.<sup>51</sup> Additionally, chain liability is significantly more effective as a preventive measure against fraudulent self-employment infiltrating the chain.<sup>52</sup>

Importantly, this analysis does not address whether chain liability may be considered a disproportionate measure for bona fide undertakings.<sup>53</sup> Nevertheless, the question of the proportionality of such measures requires at least a basic analysis in light of the CJEU case law on the freedom to provide services. According to long-established case law, measures that can limit that freedom need to be justified by a legitimate aim, appropriate for its accomplishment, and cannot override what is necessary for its achievement. In cases such as *Viking*<sup>54</sup> and *Laval*<sup>55</sup>, the Court emphasised the need to strike a balance between economic freedoms and the protection of workers, while in *Wolff and Müller*, it explicitly stated that systems of liability in subcontracting arrangements can be justified precisely to protect workers<sup>56</sup>. In that sense, a broader scope of liability, such as the chain model, could be considered proportionate if they contribute to the effective protection of workers in complex subcontracting arrangements, especially where the narrower models do not provide sufficient protection.

Finally, given the multifaceted nature of posting as a conflict issue, subcontracting liability alone cannot fully address its complexities. Nonetheless, exploring its potential as a mechanism to bolster the rights of posted workers is worthwhile.<sup>57</sup> Hence, given PWD 18's failure to improve the liability framework as a preventive measure to safeguard the rights of posted workers within

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Labour Rights Enforcement in Europe (PROMO)", VS/2016/0222, Helsinki: University of Helsinki, 2017.

<sup>51</sup> Jorens, Y., Peters, S., Houwerzijl, M., *op. cit.*, p. 158.

<sup>52</sup> Jorens, Y., *op. cit.*, p. 425.

<sup>53</sup> Jorens, Y., Peters, S., Houwerzijl, M., *op. cit.*, p. 163.

<sup>54</sup> Court of Justice of the European Union (Grand Chamber): Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, ECLI:EU:C:2007:772, 11.12.2007.

<sup>55</sup> Court of Justice of the European Union (Grand Chamber): Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, 18.12.2007.

<sup>56</sup> See: *Wolff & Müller* Judgement, par. 40.

<sup>57</sup> Bogoeski, V., *op. cit.*, p. 15.

subcontracting chains, it falls upon the EU legislator to reassess the ongoing discourse on this matter.

In this regard, it is worth emphasising that the opportunity to improve the rights of posted workers in subcontracting arrangements may not have been entirely missed, as another opportunity arose with the announcements of the ambitious Quality Jobs Act<sup>58</sup>, which should also include improvements to subcontracting legislation. Based on advocacy by trade union organisations to the European Commission<sup>59</sup>, it should also include provisions introducing obligatory chain liability. If that legislation is successful, it would directly affect the position of posted workers in subcontracting arrangements by providing additional safeguards for asserting their rights. However, it is still too early to predict what the final version of the legislation will contain, and it will be a subject of further research.

## *2.2. DUE DILIGENCE ESCAPE SYSTEM: ANOTHER LOOPHOLE OF THE EU LEGAL FRAMEWORK?*

If we focus on the EU legal framework on due diligence, there has been a noticeable surge in discussions in the past couple of years. Particularly, in the scope of posting of workers, attention is drawn to the previously mentioned Article 12(5) of the Enforcement Directive<sup>60</sup>, which offered Member States the option to establish a ‘due diligence escape clause’. This clause stipulates that a contractor fulfilling due diligence obligations as outlined in national legislation should not be held liable. The Directive refrains from prescribing specific criteria, leaving discretion to Member States. These criteria may encompass various measures adopted by the contractor, such as documenting compliance with administrative requirements and implementing control mechanisms to ensure effective monitoring of adherence to applicable regulations concerning the posting of workers.<sup>61</sup> According to the Commission’s Report, sixteen

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<sup>58</sup> See: European Commission: *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, 4.12.2025.

<sup>59</sup> European Commission: *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*. Consultation Document, C(2025) 9944 final, Brussels, 4.12.2025.

<sup>60</sup> Article 12(5) of the Enforcement Directive: ‘Member States may in the cases referred to in paragraphs 1, 2 and 4 provide that a contractor that has undertaken due diligence obligations as defined by national law shall not be liable.’

<sup>61</sup> Cremers, J., Jouwerzijl, M., *op. cit.*, p. 15.

Member States<sup>62</sup> have implemented the option of due diligence as an escape mechanism. In most cases, this takes the form of a comprehensive, case-by-case evaluation of the contractor's diligence. Twelve Member States<sup>63</sup> have established explicit criteria that outline the contractor's obligations to monitor and/or encourage subcontractor compliance, as mandated by law. The level of detail varies, ranging from a broad indication in Poland to an extensive list of criteria in Croatia<sup>64</sup>. Additionally, Italian legislation specifically outlines due diligence requirements solely for the road transport sector.<sup>65</sup> It is important to note that the principle of due diligence, as outlined in the UN Guiding Principles on Business and Human Rights<sup>66</sup> and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy<sup>67</sup>, subsequently integrated into the OECD Guidelines for Multinational Enterprises<sup>68</sup> that has been extended to other areas, such as labour rights, in its 2011 revision, serve as the cornerstone of today's global landscape. According to these frameworks, due diligence entails the obligation to 'identify, prevent, mitigate,

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<sup>62</sup> Cyprus, the Czech Republic, Estonia, Greece, Ireland, the Netherlands, Poland and the UK. Note: the UK, as a former Member State, has also been included in the Commission's Report within this particular list, since it was conducted before the Brexit.

<sup>63</sup> Austria, Belgium, Croatia, the Czech Republic, France, Hungary, Luxembourg, the Netherlands, Poland, Romania, Slovakia and Spain.

<sup>64</sup> *See more in:* Narodne novine: *Zakon o upućivanju radnika u Republiku Hrvatsku i prekograničnoj provedbi odluka o novčanoj kazni*, Zagreb: Narodne novine d.d., 128/2020, 114/2022, Article 31(5).

<sup>65</sup> Report on the application and implementation of the Enforcement Directive, p. 17.

<sup>66</sup> United Nations, Office of the High Commissioner for Human Rights (OHCHR): *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, New York & Geneva: United Nations, 2011; The UNGPs represents 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:* Márquez Carrasco, C.: The United Nations Guiding Principles on Business and Human Rights: what contribution are the National Action Plans making?, in: Marx, A., et al. (eds.): *Research Handbook on Global Governance, Business and Human Rights. Research Handbooks on Globalisation and the Law series*, Cheltenham: Edward Elgar Publishing, 2022, pp. 76-99.

<sup>67</sup> International Labour Organization (ILO): *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, Geneva: International Labour Office, 2006. See also the latest version of the ILO Declaration in that regard: International Labour Organization (ILO): *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 6th ed., Geneva: International Labour Office, 2022.

<sup>68</sup> Organisation for Economic Co-operation and Development (OECD): *OECD Guidelines for Multinational Enterprises, 2011 Edition*, Paris: OECD Publishing, 2011. *See also the latest version of the OECD Guidelines in that regard:* Organisation for Economic Co-operation and Development (OECD): *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, Paris: OECD Publishing, 2023.

and account for' negative corporate impacts on human rights (and other areas), with the scope expanding to encompass other domains of responsible business conduct.<sup>69</sup> Therefore, legislation on due diligence should require undertakings to demonstrate their commitment to preventing, detecting, and addressing labour exploitation and forced labour within their operations and across their supply chains. These regulations should foster a mutually beneficial environment by reducing the likelihood of exploitative practices within the supply chain, thereby safeguarding enterprises' reputations with their customers<sup>70</sup>. Simultaneously, they deter contractors from engaging in such practices.<sup>71</sup>

Nevertheless, the question arises whether the option to exclude liability under the due diligence option in the Enforcement Directive undermines its intended purposes by diluting the provisions on joint and several liability.<sup>72</sup> A notable example of a 'good practice' is found in Germany, where contractors are held responsible for any lapses in wage and social fund payments, without the option to invoke an escape clause. This ensures accountability even when due diligence has been undertaken.<sup>73</sup> Namely, the mutual exclusion between due diligence obligations and joint and several liabilities should be avoided, as liability should not be contingent upon companies' negligence. Indeed, the regulations on joint and several liability are designed to hold the company that benefits from services provided by contractors and subcontractors accountable, thereby bolstering the protection of workers' rights and ensuring compliance with social security obligations.<sup>74</sup> In any case, it is essential to emphasise that a client or contractor should never be able to escape liability when they are aware of violations of workers' rights by a contractor or subcontractor, as well as of mandatory regulations safeguarding those rights.<sup>75</sup>

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<sup>69</sup> Cremers, J., Jouwerzijl, M.: *Subcontracting and Social Liability*, Brussels: European Trade Union Confederation, 2021, p. 14.

<sup>70</sup> See more about the importance of the prevention of exploitation practices on enterprises' reputation in the example of the global impact of the Rana Plaza case: Jacobs, B. W., Singhal, V. R.: The effect of the Rana Plaza disaster on shareholder wealth of retailers: Implications for sourcing strategies and supply chain governance. *Journal of Operations Management*, 49 2017, pp. 52-66; Koenig, P., Poncet, S.: The effects of the Rana Plaza collapse on the sourcing choices of French importers. *Journal of International Economics*, 137 2022, pp. 1-31.

<sup>71</sup> Corbanese, V., Rosas, G., *op. cit.*, p. 21; See also: Mares, R.: "Respect" human rights: Concept and convergence, in: Bird, R., C., Cahoy, D. R., Prenkert, J. D. (eds.): *Law, Business and Human Rights: Bridging the Gap*, Cheltenham: Edward Elgar Publishing, 2014, p. 4.

<sup>72</sup> Jorens, Y., *op. cit.*, p. 425.

<sup>73</sup> Borelli, S.: *Subcontracting: Exploitation by Design. Tackling the Business Model for Social Dumping*. Brussels: The Left in the European Parliament, 2022, p. 21.

<sup>74</sup> *Ibid.*

<sup>75</sup> Jorens, Y., *op. cit.*, p. 426.

That example was just one of the cases demonstrating that the existing EU legal framework on corporate due diligence in subcontracting chains has been found insufficiently comprehensive. This deficiency was primarily attributed to the reliance on voluntary measures, which have proven ineffective at prompting substantial changes in how businesses address their social and related impacts. Within this context, while there has been growing discourse among Member States regarding the incorporation of the UN Guiding Principles on Business and Human Rights due diligence standards into legally binding regulations, only one in three businesses in the EU has implemented due diligence processes that adequately consider all human rights impacts.<sup>76</sup> This need is particularly evident in light of certain EU companies being linked to human rights issues, including forced labour, child labour, inadequate workplace safety standards, and worker exploitation. Hence, the call for proper EU legislation on corporate due diligence has become imperative in promoting respect for human rights. Such legislation would also help establish a fair, competitive environment for companies within the Union and prevent fragmentation caused by individual Member States pursuing independent policies.<sup>77</sup> Consequently, the focal point of the EU discussions on due diligence arose in the spring of 2020, with EU Commissioner for Justice Didier Reynders expressing the Commission's intention to introduce mandatory rules concerning corporate human rights (and environmental) responsibilities.<sup>78</sup> This Directive was intended to bolster the European Pillar of Social Rights by advocating for fair working conditions as fundamental rights. It aimed to enhance worker protection within the Union, complementing the existing social framework, and combating abuses both domestically and transnationally across Member States.<sup>79</sup> However, concerns have been raised about its narrow personal scope, which excludes approximately 99% of EU small and medium-sized enterprises (SMEs), including micro companies, because the due diligence mechanisms would impose disproportionate financial and administrative burdens on them.<sup>80</sup> Consequently, the question is whether the scope overlooks many harmful business operations, as the size of the workforce and annual turnover may not accurately reflect how

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<sup>76</sup> Cremers, J., Jouwerzijl, M., *op. cit.*, p. 16.

<sup>77</sup> European Commission: *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM(2022) 71 final, Brussels, 23.2.2022 (hereinafter: Proposal of the Directive on Corporate Sustainability Due Diligence), p. 2.

<sup>78</sup> Cremers, J., Jouwerzijl, M., *op. cit.*, p. 16.

<sup>79</sup> Proposal of the Directive on Corporate Sustainability Due Diligence, p. 9.

<sup>80</sup> Proposal of the Directive on Corporate Sustainability Due Diligence, p. 13; See also: Velluti, S.: Labour standards in global garment supply chains and the proposed EU corporate sustainability due diligence directive. *European Labour Law Journal*, 15(4) 2024, pp. 21-22.

a company affects workers' lives.<sup>81</sup> Therefore, despite its substantial benefits, the persistent exclusion of the majority of companies from its scope created a significant loophole, prompting inquiries into the Directive's intended purpose and potential implications. Additionally, the Omnibus package, which has caused considerable tension and debate and is changing CSDD<sup>82</sup> and CSRD<sup>83</sup>, clearly departs from the EU's initially ambitious approach to sustainable and responsible corporate management. Although the formal structure has remained unchanged, its effectiveness in preventing infringements of labour rights and in securing cooperative responsibility has changed substantially. Instruments of in-depth human rights analysis should have encouraged European companies to assume greater accountability, transparency, and ethical conduct. Instead, it is more likely how that potential will remain unused. The effects of these loopholes are the most visible among groups of workers who have already been structurally exposed to the increased risk, including posted workers in complex subcontracting arrangements. Not only does the new legislative framework not address the challenges faced by that group of mobile workers and does not improve the existing posting-of-workers legislative framework, but it also opens up concerns about the general European approach, since it raises the question of whether market competition based on the erosion of labour rights is consistent with European values. If the EU wants to stay in coherence with its values, the decrease in labour standards shouldn't become an acceptable compromise.

### 3. CONCLUSION

Despite the long tradition of challenges arising from the posting of workers in subcontracting arrangements, the EU has not yet recognised the urgent need to change the existing system to protect them. Although the previous legislative initiatives have established a basis for preventing their exploitation, they remain inadequate, leaving significant loopholes, as evidenced by reports on the implementation of the Enforcement Directive and the amended Posting of Workers Directive.

Specifically, the 2014 Enforcement Directive introduced a direct and several liability scheme in subcontracting arrangements. Still, it made them obligatory

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<sup>81</sup> European Coalition for Corporate Justice (ECCJ): *Dangerous Gaps Undermine EU Commission's New Legislation on Sustainable Supply Chains*, 23.2.2022.

<sup>82</sup> Proposal of the Directive on Corporate Sustainability Due Diligence; Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence (Corporate Sustainability Due Diligence Directive – CSDDD), *Official Journal of the European Union*, L, 2024/1760, 5.7.2024.

<sup>83</sup> Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 as regards corporate sustainability reporting (Corporate Sustainability Reporting Directive – CSRD), *Official Journal of the European Union*, L 322, 16.12.2022, pp. 15-80.

only for the construction sector and limited to wages, which was a good, but not sufficient, first step toward shaping the scope of protection for posted workers in such arrangements. Namely, (full) chain liability, distributes responsibility throughout subcontracting chains, incentivising companies to closely monitor their contractors and suppliers. However, the narrow scope has left a significant number of posted workers in other labour-intensive sectors without adequate protection, placing the responsibility to national legislators to broaden the scope. In the authors' view, the loophole could have been remedied by amending the Posted Workers Directive in 2018, which incorporated proposals from some stakeholders regarding the challenges of subcontracting. Still, it was ultimately omitted due to disagreement. Finally, the authors identify another potential opportunity to improve the position of posted workers in complex subcontracting arrangements under the Quality Jobs Act. This will be further discussed in 2026 and should incorporate the Directive on subcontracting, which could directly affect the rights of posted workers as well. However, given the complex interrelation with business freedom in the EU, it is likely to be challenging for the EU to strike a balance between workers' rights and the protection of undertakings. Importantly, due to the proven and long-standing tradition of breaching the rights of (posted) workers in subcontracting arrangements, it should be a priority to prevent those abusive practices. Additionally, the authors discussed another related loophole in the posting-of-workers legislative framework, which introduced a due diligence escape clause. Although due diligence is an effective mechanism for pre-screening subcontractors, it cannot be used to weaken the liability system in the context of posted workers in subcontracting arrangements. The unharmonized and undetailed due diligence requirements have created opportunities for subcontractors to escape liability, further making the position of posted workers precarious. Therefore, the authors argue that the current system under the Enforcement Directive is insufficient to prevent abusive practices in subcontracting arrangements and should be revised. Consequently, where the existing legal framework is unable to secure the effective protection of posted workers in subcontracting arrangements, the question arose of its harmonisation with the fundamental rights of EU law. In that way, this problematique is not only remaining at the level of normative effectiveness, but it is getting into the coherence of the European legal system and its social values.

Finally, both the liability scheme and the due diligence preventive mechanisms are effective means of safeguarding the rights of posted workers within subcontracting chains. However, they must operate in symbiosis rather than in a trade-off relationship, as currently depicted in the prevailing legal framework. Therefore, there is a long way to go in enhancing both mechanisms at the EU level, starting with their more comprehensive incorporation into the legal protection of posted workers.

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