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Master Thesis International and European Public Law, European Track

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Abstract

The payment of the minimum wage of the host state to posted construction workers is often not paid out, which means that these workers often live in bad circumstances. This thesis focuses on possible options to enhance compliance to the posting of workers directive, more specifically on liability for wages. It has been questioned and confirmed that a liability within the EU is necessary, effective and politically feasible.

The research question is formulated as follows:
"does a chain liability ensure more effective enforcement than a direct liability for the payment of the minimum wage of the host state to the posted construction worker within the EU and to what extent is either liability more favorable for a Member State to implement?"

The research is both descriptive and explanatory and it contains a content analysis and a literature study. The research was done by critically examining opinions of stakeholders and scholars, thereby drawing conclusions as to the accuracy and value of these opinions.

The first part of the research question has been answered in the affirmative; a chain liability ensures more effective enforcement than a direct liability for the payment of the minimum wage of the host state to the posted construction worker within the EU. A chain liability is more favorable to the extent that the posted construction worker is able to hold more guarantors liable and because it has more preventive effect than a direct liability.

In addition to that, Member States are recommended to implement a chain liability;

- in which not only the posted construction worker is able to hold a contractor liable,
- which does not contain due diligence obligations and
- which also refers to flanking measures to counteract alternative strategies which circumvent the liability and flanking measures which enhance the preventive effect of the chain liability.

In addition, it seems essential to ensure that SMEs have a transitional period to prepare for the implementation of the liability.

Keywords: Posting of Workers Directive, Article 12 Draft Enforcement Directive, direct liability, chain liability, Arbeitnehmer-Entsendegesetz, Directive 2009/52/EC.

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Tilburg, April 2014

Tessa Bakermans

List of abbreviations

Abbreviation	Meaning
AEntG	Arbeitnehmer-Entsendegesetz (law on the posting of workers)
Article 12	First and Second Draft of Article 12
BAG	Bundesarbeitsgericht (Federal Labor Court)
BE	Business Europe
BGB	Bürgerliches Gesetzbuch (German Civil Code)
CJEU	Court of Justice of the European Union
Commission	European Commission
Draft Enforcement Directive	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
Directive 2009/52	Council Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country
EFBWW	European Federation of Building and Woodworkers
EMPL	Committee of the European Parliament on employment and social affairs
ETUC	European Trade Union Confederation
EP	European Parliament
EPSCO	Employment, Social Policy, Health and Consumer Affairs Council
EU	European Union
FIEC	European Construction Industry Federation
First Draft	First draft of Article 12 Draft Enforcement Directive
IG BAU	Industriegewerkschaft Bauen-Agrar-Umwelt
Member States	Member States of the European Union
NZA	Neue Zeitschrift für Arbeitsrecht
PWD	Directive 96/71/EC concerning the posting of workers in the framework of the provision of services
Second Draft	Second Draft of Article 12 Draft Enforcement Directive
SMEs	Small and medium sized enterprises
TCNs	Third-country nationals
UEAPME	European Association of Craft, Small and Medium-sized Enterprises
VOB/A	Vergabe- und Vertragsordnung für Bauleistungen, Teil A
ZDB	Zentralverband Deutsches Baugewerbe

Table of Contents

1 Introduction

1.1 Topic and importance of this research

This thesis focuses on possible options to enhance compliance to directive 96/71/EC concerning the posting of workers in the framework of the provision of services[1] (hereinafter: PWD). More specifically: compliance to the payment of wages to the posted worker.

The PWD was initiated in 1996, stipulating that certain employment conditions in the host state, among which the payment of the minimum wage, should be guaranteed to the posted worker. However, over the course of time, it has become apparent that these employment conditions are not effectively being enforced within the Member States of the European Union (hereinafter: Member State(s)).[2] The result is that posted workers, particularly posted construction workers, often seem to work and live in bad circumstances. They are not being paid the minimum wage of the host state and they are not enabled to live a decent life during the time they are posted abroad. You could even state that in some cases, they are being exploited.[3]

Therefore, a new proposal for an enforcement directive[4] was drawn up in 2012, (hereinafter: Draft Enforcement Directive). Article 12 of the Draft Enforcement Directive contains a direct liability. The first draft of this provision (hereinafter: First Draft) provides the posted worker in the construction sector the option to hold not only the employer liable, but also the contractor of which the employer is a direct subcontractor. On 10 December 2013, the European Council came to a new version of Article 12 (hereinafter: Second Draft)[5]. This so-called 'liability provision' should provide for increased chances to claim and obtain the minimum wage of the host state, but it is nowadays the topic of much debate within the European

[1] Council Directive (EC) 96/71 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1
[2] European Commission, 'Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty' COM (2006) 48 final 13
[3] FNV Bondgenoten, 'Europa Nieuws' (21 juni 2012) <http://www.fnv.nl/site/media/pdf/272013/21juni> (27 February 2014) 5; EFBWW, 'A new case of social dumping and exploitation by Atlanco Rimec' (2013) <http://www.efbww.org/default.asp?index=889&Language=EN> accessed 27 February 2014; A van Dongen and C Rosman, 'Poolse trukendoos op de bouwplaats' *Eindhovens Dagblad* (Eindhoven, 31 Augustus 2013) 10-11
[4] 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
[5] European Council, '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' (2012/0061 COD) 17611/13; the legislative developments are taken into account until 10 December 2013.

Union (hereinafter: EU). Many questions have been raised in respect to the effective enforcement of the direct liability within the EU[6].

With regard to a liability provision in force within the EU, a precedent has been set by Article 8 of Council Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals[7] (hereinafter: Directive 2009/52). Article 8 of Directive 2009/52 contains both a direct and a so-called chain liability.

A chain liability ensures that all subcontractors in the subcontracting chain may be held liable. It thus seems interesting to compare a direct liability to a chain liability on the effective enforcement of the payment of the minimum wage of the host state to the posted construction worker within the EU. This is also the case because Article 12 Draft Enforcement Directive contains not only a mandatory direct liability but also the option for Member States to implement a (more extensive) chain liability[8]. As a result, Member States will have the choice to opt for a chain instead of a direct liability. This thesis aims to guide Member States in their choice by comparing both liabilities.

With regard to the legal comparison made in this thesis, the Second Draft will serve as an example of a direct liability, because this liability is mandatory for Member States to implement. Both the First Draft and Article 8 of Directive 2009/52 will contribute to the discussion on and interpretation of the effective enforcement of the liability in the Second Draft. *§14 Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen* (*Arbeitnehmer-Entsendegesetz*, law on the posting of workers, hereinafter: *AEntG*) will serve as an example of a chain liability. This provision has been chosen because in research it is already deemed to be effective.[9]

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[6] ETUC, 'ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive' (26 April 2012) <http://www.etuc.org/a/9917> accessed 27 February 2014; Business Europe, 'Business Europe Position Paper – Enforcement of the Posting of Workers Directive' (25 May 2012) < http://www.businesseurope.eu/DocShareNoFrame/docs/5/ANOHIIFDNJFCECMOHBBOIICIPDWY9DBNT39LTE4Q/UNICE/docs/DLS/2012-00677-E.pdf> accessed 27 February 2014; IG BAU, 'Verschlechterung der EU-Durchsetzungsrichtlinie: IG BAU warnt vor Raubbau an Arbeiterrechten in der EU' (12 December 2013) <http://www.igbau.de/Verschlechterung_der_EU-Durchsetzungsrichtlinie_IG_BAU_warnt_vor_Raubbau_an_Arbeiterrechten_in_de...html> accessed 27 February 2014

[7] Council Directive (EC) 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24

[8] 2012/0061 COD 17611/13 (n 5), art 12(3)

[9] MS Houwerzijl and S Peters, *Liabilitiy in subcontracting processes in the European construction sector* (European Foundation for the improvement of Living and Working Conditions, 2008) <http://www.eurofound.europa.eu/pubdocs/2008/94/en/1/EF0894EN.pdf> accessed 27 February 2014

However, a prior inquiry on the necessity, effectiveness and political feasibility of a liability within the EU seems essential to show the importance of the comparison between a direct and a chain liability within the EU. Therefore, the following question will be posed in advance of the research question:

"to what extent is a liability within the EU necessary, effective and politically feasible?"

The answer to this question constitutes the basis for the research design formulated below.

1.2 Central research question

Does a chain liability ensure more effective enforcement than a direct liability for the payment of the minimum wage of the host state to the posted construction worker within the EU and to what extent is either liability more favorable for a Member State to implement?

In order to answer this research question, three sub questions will be posed:

1) To what extent does a direct liability effectively enforce the payment of the minimum wage of the host state to the posted construction worker?
2) To what extent does a chain liability effectively enforce the payment of the minimum wage of the host state to the posted construction worker?
3) To what extent would it be more favorable for a Member State to choose for either a direct or a chain liability?

In order to examine how a liability may ensure a more effective enforcement of the payment of wages of the host state to the posted construction worker, "more effective enforcement" needs to be defined. In the context of this thesis, this is defined as a higher chance of compliance with the payment of wages of the host state to the posted construction worker. A conclusion will be drawn as to what kind of liability would be more favorable for Member States to implement.

1.3 Framework of the research

This research builds on the outcome of three studies in the area of liability provisions in the national context.[10] These studies form the starting point of this thesis, as they outline (parts

[10] Houwerzijl and Peters (n 9), G Asshoff, *Liability in subcontracting processes in the European construction sector: Germany* (European Foundation for the Improvement of Living and Working Conditions, 2008); Y Jorens, S Peters and MS Houwerzijl, 'Study on the protection of workers' rights in subcontracting processes in the European Union (2012)' <http://ec.europa.eu/social/main.jsp?catId=471> accessed 27 February 2014

of) national liability systems of the European Member States and provide insight by either describing and/or comparing these national liability systems.

The 2008 study of Houwerzijl and Peters on liability in subcontracting processes in the European construction sector describes the liability provisions of eight Member States, while it distinguishes between direct liability and chain liability. It follows from that study that the German chain liability is regarded as an effective regulatory measure to ensure the payment of wages, holidays and social fund payments.[11] Also, this type of liability has existed since 1999 and thus, it is a reliable source in terms of functioning and efficiency over a longer period.

In 2012, an extensive study on the protection of workers' rights in subcontracting processes in the European Union was carried out, investigating the feasibility of a joint and several liability as a mechanism to protect workers' rights at EU level. The conclusion was drawn that a liability will render ineffective if it concerns a direct liability and that a chain liability might be a solution. But a chain liability may appear disproportionate as it may create extra administrative burdens.[12]

Even though the latter research shortly highlights the possibility of a chain liability within the EU, it does not entail a detailed study of a chain liability. That is what will be done in this thesis, as Article 12 Draft Enforcement Directive will be compared to the German chain liability to examine whether the latter would be a more effective tool for the protection of the minimum wage of the host state to the posted construction worker. This will be done on the basis of the opinions of stakeholders.

It needs to be noted that this examination is limited in the sense that it is not tenable empirical research but given the circumstances and goal of the research, other research methods are not possible. Yet the information obtained will be scrutinized critically, thus providing for proper research.

1.4 Definitions of key terminology used

Regarding direct and chain liability, it is of importance to define and distinguish between several actors which are involved in the subcontracting process. The study of Jorens, Peters and Houwerzijl on the protection of workers' rights in subcontracting processes in the

[11] Houwerzijl and Peters (n 9) 30-31
[12] Jorens, Peters and Houwerzijl (n 10) 42

European Union[13] entails a detailed overview of key terminology which is also particularly relevant for this thesis. Therefore, key terminology which is used in this thesis is for a major part derived from the latter study and taken up in Annex I.

The term ‘joint and several liability’ defines the liability in general; it gives the creditor the option to hold either one or more parties in the subcontracting chain liable. A direct liability and a chain liability are forms of joint and several liability. A direct liability concerns a liability of only the (sub) contractor of which the employer is a direct subcontractor and a chain liability covers the liability of the entire subcontracting chain.

A few last remarks with regard to the terminology used in this master thesis: there are two versions of Article 12 Draft Enforcement Directive, referred to as the First Draft and the Second Draft. They both entail a direct liability and they are rather similar. Therefore, when similar matters are discussed, they will be cited together as 'Article 12 Draft Enforcement Directive'. Logically, different matters will be discussed separately and cited as either the First Draft or the Second Draft. With this in mind, it must be noted that in general, the last version is viewed as the guiding version, meaning that the text of the Second Draft will be used in comparison with the chain liability. Moreover, when citing the Draft Enforcement Directive as a whole, the last version is referred to – in which the Second Draft is laid down.

[13] Ibid

2. Liability within the EU: necessity, effectiveness and political feasibility

This chapter contains an analysis of the necessity, effectiveness and political feasibility of a liability within the EU in relation to the protection of the payment of the minimum wage of the host state to the posted construction worker.

The necessity of a liability within the EU on the aforementioned topic will be discussed and reasons why it has been added to the Draft Enforcement Directive will be provided in paragraph 2.1. Moreover, the added value of a liability within the context of the Draft Enforcement Directive will become clear.

The effectiveness of a liability within the EU has already been outlined in the studies of Houwerzijl and Peters[14] and Jorens, Peters and Houwerzijl[15]. It will be reiterated shortly and elaborated upon in paragraph 2.2 in order to provide a basis for the comparison between the effective enforcement of a direct and a chain liability in chapter 3 to 5.

The political feasibility of a liability within the EU is the last matter analyzed in this chapter. Because the Draft Enforcement Directive is still in the legislative process, it seems of importance to include the political feasibility in this chapter (paragraph 2.3). The delicate political compromise provides more insight on the question how a liability within the EU is drafted and adapted during the legislative process. With this in mind, it seems easier to understand and read between the lines of the text of the Second Draft of Article 12 Draft Enforcement Directive. Moreover, the conclusion is drawn that the liability is politically feasible, which ensures the tenability of the research.

Paragraph 2.4 provides a conclusion on the necessity, effectiveness and political feasibility of a liability in the EU in relation to the protection of the payment of the minimum wage of the host state to the posted construction worker.

2.1 Liability within the EU: necessity

The situation of posted construction workers is already touched upon shortly in the introduction. Currently, many of them do not always receive their wage and the possibilities of claiming it are often limited.

[14] Houwerzijl and Peters (n 9)
[15] Jorens, Peters and Houwerzijl (n 10)

In 1996, the PWD came into force. This directive aims to improve the situation of posted (construction) workers. This was done by creating a key provision protecting the payment of the minimum rate of pay applicable in the host state for posted workers (Article 3 PWD). This provision is supported by three others articles, which see to the cooperation of information (Article 4), measures (Article 5) and jurisdiction (Article 6) in order to ensure good cooperation between Member States and that Article 3 is complied with.

Article 5 provides an obligation for Member States to ensure that Article 3 is complied with. However, this provision is very general in nature, stating that "(Member States) shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement obligations under this Directive"[16]. Already in the adoption stage of the PWD, it was doubted whether this provision was sufficient to incite Member States to enforce Article 3.[17] Therefore, additional measures were deemed necessary to ensure the effective enforcement of the minimum protection of posted construction workers.[18]

These additional measures have come in the form of the Draft Enforcement Directive, including a direct liability, laid down in Article 12. The Draft Enforcement Directive was created in March 2012[19] and although the idea for the draft received broad support[20], the responses to the direct liability were quite diverse[21].

With regard to the direct liability, the explanatory memorandum attached to the Draft Enforcement Directive explains that in order to counter the payment of posted (construction) workers below the minimum rate of pay, "adequate, effective and dissuasive measures are necessary in order to ensure the compliance of subcontractors with their legal and

[16] Posted Workers Directive (n 1) art 5
[17] MS Houwerzijl and T Wilkinson, 'The Effects of EU law on the Social and Economic Goals of Europe 2020: A Decision Theoretic Approach to Wage Liability Regimes in Modern Europe' (2013) 14 German Law Journal
[18] ISMERI EUROPA, 'Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services' (2012) < http://ec.europa.eu/social/main.jsp?catId=471> accessed 27 February 2014 7
[19] COM (2012) 131 final (n 4)
[20] Ibid 8
[21] Cf. the position of ETUC and BE: ETUC, 'Position on the Enforcement Directive of the Posting of Workers Directive – Adopted at the Executive Committee on 5-6 June 2012' (12 June 2012) <http://www.etuc.org/a/10037> accessed 27 February 2014; Business Europe, 'Difficulties with the enforcement of the Directive on the Posting of Workers – EP Conference' (22 March 2012) < http://www.businesseurope.eu/DocShareNoFrame/docs/1/CJPKKBDDDJCMPHJOMEIDPMAJPDWY9DBKWD9LTE4Q/UNICE/docs/DLS/2012-00410-E.pdf> accessed 27 February 2014

contractual obligations, particularly as regards workers' rights"[22]. Moreover, the Commission speaks of a comprehensive approach to enforcement which, according to the Commission, comes down to 'awareness raising (better information), state enforcement mechanisms (inspections and sanctions) and private law enforcement mechanisms (joint and several liability) [and] all aspects are important for a balanced approach. Weakening one of the aspects would imply strengthening other aspects of enforcement in order to achieve a similar result.'[23] An important conclusion may already be drawn from this: a liability may be needed within the EU, *but* other enforcement measures are necessary as well to ensure a complete enforcement system within the EU. Jorens, Peters and Houwerzijl draw a similar conclusion[24].

According to the European Parliament, the importance of a liability system lies in the fact that it provides a possibility to deal with the abuses taking place in the subcontracting and outsourcing of cross-border workers and that it would set up a "transparent and competitive internal market for all companies"[25]. Moreover, the European Parliament mentioned the preventive effect that a liability provision would create; hindering companies from doing business with 'illegal' subcontractors.[26] These arguments have been underpinned by Jorens, Peters and Houwerzijl who state the following: "Arguments considered in favor of the introduction of a system of (joint and several) liability relate to the fact that it is believed to have a positive impact on avoiding unfair competition by means of wage dumping, since it is deemed to make contractors more diligent and more careful when choosing subcontractors."[27]

Thus, it may be argued that a liability is necessary because together with other enforcement measures, it provides a complete enforcement system within the EU. The impact assessment which accompanies the proposal for Directive 2009/52 shows that similar arguments have played a role in the adoption process of the liability provision (Article 8) in Directive 2009/52.[28] According to the impact assessment, the combination of sanctions and preventive measures – the liability of Article 8 is included in the latter[29] – were to have

[22] COM (2012) 131 final (n 4) 19
[23] Ibid 20
[24] Jorens, Peters and Houwerzijl (n 10) 158
[25] European Parliament, 'Resolution on the social responsibility of subcontracting undertakings in production chains' 2008/2249(INI)
[26] Ibid
[27] Jorens, Peters and Houwerzijl (n 10) 158-159
[28] 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) 603
[29] Ibid 15-16

beneficial impacts on the policy objectives[30], but only together with the requirement for Member States to undertake "a particular level of enforcement activity", which was set at "the inspection of 10% of the registered companies in a Member State".[31]

Whether or not Article 8 of Directive 2009/52 has proven to be effective will be analyzed in paragraph 2.3. The effectiveness of a liability to enforce the payment of the minimum wage of the host state to the posted construction worker will be discussed in the following paragraph.

2.2 Liability within the EU: effectiveness

The claim that liability is an effective measure seems largely based on the studies of Houwerzijl and Peters[32] and Jorens, Peters and Houwerzijl[33] and the fact that such a measure is also laid down in Directive 2009/52[34]. Therefore, this analysis is limited to matters which might influence the effectiveness of a liability provision within the EU, as is recognized in these studies. It must be noted that these studies are partly based on interviews with stakeholders and as a result, analysis done on the effectiveness contains subjective elements.

The following matters will be taken into account when analyzing the effectiveness of a liability within the EU: the initiative to take judicial proceedings against a (sub) contractor, the employment status of the posted construction worker and the preventive effect of a liability.

Jorens, Peters and Houwerzijl state that "the effective impact of the [liability] rules is seriously hampered because it is up to the worker to commence proceedings in case of abuse of workers' rights in subcontracting chains."[35] They mention the following reasons to explain the latter: the abused foreign workers fear to lose their job and they are often ill-informed about their rights because there is a lack of reliable (legal) information, not available in their own language.[36] This shows that a liability which may only be invoked by the posted construction worker may not be the most effective liability.

[30] Ibid 39-40
[31] Ibid 34
[32] Houwerzijl and Peters (n 9)
[33] Jorens, Peters and Houwerzijl (n 10)
[34] Directive 2009/52 (n 7)
[35] Jorens, Peters and Houwerzijl (n 10) 101-102
[36] Ibid

Another statement of Jorens, Peters and Houwerzijl is that "the effectiveness (…) is also determined by the ease with which one can escape its application"[37]. There are already several strategies known by which the application of a liability within the EU can be circumvented[38], for example by changing the employment status of the posted construction worker[39]. This phenomenon is also known as bogus self-employment; the posted construction worker is hired as a self-employed person. As a result, the protective labor law rules do not have to be taken into account any longer. Because this strategy circumvents a liability, other enforcement measures need to be implemented in order to counteract bogus self-employment. Examples of these enforcement measures are article 3 Draft Enforcement Directive (factual elements of posting) and article 9 Draft Enforcement Directive (administrative requirements and control measures).[40]

Liability arrangements may also have a certain preventive effect, as already shortly highlighted in paragraph 2.1. The impact of this preventive effect depends on the type of liability (e.g. a direct or a chain liability); a chain liability has a higher preventive effect than a direct liability. Whereas the preventive effect of a direct liability is limited only to the (sub) contractor of which the employer is a direct subcontractor, the preventive effect of a chain liability is extended to the entire subcontracting chain, including the main contractor. It is expected that the main contractor and his (sub) contractors will become more careful in the selection of potential subcontractors. Because they will want to avoid liability, they "would act in their own self-interest and carefully choose their subcontractors and check up on them in the course of the contractual relationship".[41] Thus, the preventive effect of a liability increases its effectiveness – to a lesser extent when it concerns a direct liability and to a greater extent when it concerns a chain liability.

In general, Jorens, Peters and Houwerzijl presume that the effect of a liability, if transposed to the European level, is even more limited than at national level.[42] A possible explanation is that reaching a compromise on a liability within the EU is difficult because it needs to fit in the (political) schemes of 28 Member States. Therefore, concessions need to be made. Whether a liability within the EU is politically feasible will be discussed in the following paragraph.

[37] Jorens, Peters and Houwerzjil (n 10) 159
[38] Houwerzijl and Peters (n 9) 4; ISMERI EUROPA (n 18) 19; MS Houwerzijl and A van Hoek, 'Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union' (2011) 52, 56
[39] Jorens, Peters and Houwerzijl (n 10) 105
[40] The text of these provisions have been taken up in Annex II
[41] Jorens, Peters and Houwerzijl (n 10) 158
[42] Ibid 158

2.3 Liability within the EU: political feasibility

Article 12 is one of the most controversial provisions of the Draft Enforcement Directive, if not the most. Many divergent opinions exist on whether this Article should be strengthened, made voluntary or deleted in its entirety. The CJEU on the other hand was quite clear on the compatibility of a liability with the freedom to provide services within the EU. It ruled in the Wolff and Müller case that the German chain liability protected the employees of the foreign service provider and the national employees in general and therefore, the measure was lawful even though the purpose of the law was to protect small and medium-sized enterprises (hereinafter: SMEs) from cheap competition.[43]

Although this ruling provided clarity on how legislation on this topic should be shaped, there was still much debate in the European institutions, in a more or less east-west division.[44] Eastern European Member States largely wish to have the liability removed because it hampers the free movement of services. On the other hand, the Western European Member States are largely in favor of a (stronger) liability provision. It prevents unfair competition and protects the posted construction workers. In the current economic climate, the protection of the employment market might also be an important reason for Western European Member States to favor a strong liability within the EU.

As already mentioned in the introduction, Article 8 Directive 2009/52 has set precedence in this regard, containing both a direct and a chain liability which see to the illegal employment of third-country nationals (hereinafter: TCNs). However, the latter liability is mitigated because of the necessary political compromises.

Paragraph 8(2) Directive 2009/52 states that before the chain liability takes effect, *all* (sub) contractors must have known about the employment of the illegally staying TCNs. Several issues render this paragraph rather ineffective as a liability arrangement. Firstly, if there is a long subcontracting chain, it becomes practically impossible to have this knowledge as a (sub) contractor further up the chain. Secondly, proving that a (sub) contractor had knowledge of the employment of the illegally staying TCNs is very difficult to prove in court. Thirdly, paragraph 8(3) contains a due diligence option, which gives Member States a certain margin of appreciation in implementing the liability. As a result, it can be argued that the chain liability of Article 8 of Directive 2009/52 is a dead letter and its effect is limited.

[43] C-60/03 *Wolff and Müller v Pereira* [2004] ECR I-9553 [43]
[44] European Parliament, 'Committee meeting EMPL 21.02.2013' (2013) < http://www.europarl.europa.eu/ep-live/en/committees/video?event=20130221-0900-COMMITTEE-EMPL> accessed 27 February 2014

An argument confirming political difficulties with the liability is that it appears that only few Member States have transposed the Directive. In 2013, only 8 Member States had implemented Directive 2009/52.[45]

The political feasibility issue is also visible in the Second Draft of the Draft Enforcement Directive. A few examples: in addition to a mandatory direct liability, the provision also contains a voluntary direct liability and instead of the mandatory direct liability other appropriate enforcement measures may be taken. The provision contains a due diligence paragraph and Member States may provide for more stringent rules. These compromises have consequences for the effective enforcement of Article 12. The Draft Enforcement Directive is currently only in the first reading and the political compromise is labelled very ambiguous.[46]

On the other hand, there seems to be a strong political will to adopt the Draft Enforcement Directive as Member States seem to become aware of the severity of the situation of posted construction workers.[47] Moreover, the European elections for the European Parliament are coming up (May 2014). This might have a positive influence on the negotiations between the European Council and the European Parliament on the Draft Enforcement Directive because the Members of the European Parliament are more willing to adapt in the light of the elections. It is thus quite conceivable that agreement will be reached on Article 12 of the Draft Enforcement Directive and a liability within the EU on this topic seems politically feasible.

2.4 Conclusion

A liability measure is deemed necessary within the EU because it suppresses abuse and together with other flanking measures, a liability will take a comprehensive approach to enforcement of the payment of the minimum wage of the host state to the posted construction worker. All aspects are important for a balanced approach; next to a liability other enforcement measures are necessary to ensure a complete enforcement system within the EU. Similar arguments have played a role in the adoption process of Article 8 of Directive 2009/52.

[45] Jorens, Peters and Houwerzijl (n 10) 147; L Asscher, 'Verslag van de Raad Werkgelegenheid en Sociaal Beleid d.d. 9 december 2013' (2013) <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/12/19/verslag-van-de-raad-werkgelegenheid-en-sociaal-beleid-d-d-9-december-2013.html> accessed 27 February 2014

[46] EFBWW, 'EPSCO agreement on the Enforcement Directive' (2013) < http://www.efbww.org/default.asp?Index=899&Language=EN> accessed 27 February 2014

[47] Taking the Netherlands as an example: L Asscher, 'Verslag van de Raad Werkgelegenheid en Sociaal Beleid d.d. 9 december 2013' (2013) (n 45)

The analysis of the effectiveness of a liability within the EU is largely based on the study of Jorens, Peters and Houwerzijl. In that regard, the initiative to take judicial proceedings against a (sub) contractor, the employment status of the posted construction worker and the preventive effect of a liability have been taken into account to analyze the effectiveness of a liability within the EU.

It follows from the analysis on the effectiveness that if a liability may only be invoked by the posted construction worker, the effectiveness of the liability is hampered because foreign workers fear to lose their job and they are often ill-informed about their rights. Moreover, there are several strategies known which by which the application of a liability can be circumvented, e.g. by changing the employment status of the posted construction worker. This is also known as bogus self-employment. Other enforcement measures need to be implemented in order to counteract this.

In addition, liability arrangements have a certain preventive effect, depending on the type of liability (e.g. direct or chain liability). The preventive effect increases the effectiveness of the liability because the main contractor and (sub) contractors in general prefer to avoid liability and therefore carefully choose their subcontractors and check up on then in the course of the contractual relationship.

With regard to the political feasibility of a liability provision, the political situation regarding Article 12 Draft Enforcement Directive is explanatory. Although the CJEU ruled in the Wolff and Müller case that the German chain liability was lawful, within other EU institutions there is a more or less east-west division. Eastern European Member States are mostly against a liability, whereas Western European Member States are mostly in favor of a liability.

The necessary political compromises which are thus made are also visible in Article 8 of Directive 2009/52, which contains both a direct and a (mitigated) chain liability and has set precedence in this regard. It has been argued that the chain liability is a dead letter. The political difficulties with this provision are confirmed by the few Member States which have currently transposed the Directive. Political difficulties are also visible in the Second Draft of the Draft Enforcement Directive. Similarly, this has consequences for the effective enforcement of this provision.

Although the political compromise is labelled ambiguous, there seems to be a strong political will to adopt the Draft Enforcement Directive. The upcoming elections for the European Parliament might also positively influence future political compromises. It is thus conceivable

that agreement will be reached on Article 12 of the Draft Enforcement Directive and a liability within the EU on this topic seems politically feasible.

3. Direct Liability: Second Draft of Article 12

This chapter analyzes whether the First and/or the Second Draft of Article 12 may be an effective tool to enforce the payment of the minimum wage of the host state to the posted construction worker.

Paragraph 3.1 provides the definition and an interpretation of the direct liability as laid down in the Second Draft. The interpretation of the direct liability covers observations on four matters: the substantive scope of the liability, the minimum wage, the type of liability and the due diligence paragraph. Moreover, these four matters are similarly discussed for Article 8 of Directive 2009/52[48].

The preamble of the Draft Enforcement Directive and the context of Article 12 are discussed and interpreted in paragraph 3.2. Moreover, in order to compare, the context of Article 8 Directive 2009/52 is shortly outlined as well.

In paragraph 3.3, the effective enforcement of the direct liability in the Second Draft is examined on three matters, being the type of liability, the due diligence paragraph and the disadvantages for small and medium-sized enterprises (hereinafter: SME's). This is done on the basis of the opinions of the social partners, scholars and other stakeholders.[49] Moreover, the Second Draft is compared to Article 8 of Directive 2009/52 on the three matters mentioned above.

In paragraph 3.4, a conclusion is drawn as to whether or not the direct liability in the Second Draft effectively enforces the payment of the minimum wage of the host state to the posted construction worker.

3.1 Definition

The Second Draft defines the direct liability as follows:

> *" (…)*
>
> *2. As regards the activities mentioned in the Annex to Directive 96/71/EC,* ***Member States shall provide*** *for measures ensuring that in subcontracting chains,* ***posted***

[48] Directive 2009/52 (n 7)
[49] Some opinions are still based on the First Draft, as there is more literature available on that text. However, these opinions are only taken into account where the text of the First Draft equals the Second Draft. Therefore, reference is sometimes made to Article 12, instead of First or Second Draft.

workers can hold *the contractor of which the employer is a direct subcontractor* ***liable****, in addition to or in place of the employer, for the respect of the posted workers' rights referred to in paragraph 1 of the Article.*

(…)

3. (…)
Member States may in the cases referred to in paragraphs 1, ***2*** *and 3 provide that a contractor that has taken* ***due diligence obligations*** *as defined by national law shall not be liable.*

(…)"[50]

3.1.1 Interpretation

Substantive scope of the liability

The scope of the liability is limited to construction activities which are mentioned in the Annex of the PWD.[51] This goes back to the national context and discussions before the PWD. Prior to the creation of the PWD, posting of workers was already quite 'common' in the construction sector.[52] In the beginning of the nineties, it was determined in Belgium that many companies in the construction- and metal industry made improper use of posting in order to circumvent social security rules of the country in which the construction or metal workers were posted.[53] It thus became apparent that a certain employment protection for posted construction workers was needed. This was also proclaimed by two of the social partners in the construction industry (the European Federation of Building and Woodworkers, hereinafter: EFBWW and the European Construction Industry Federation, hereinafter: FIEC) which started lobbying actively at European level for an unconditional application of the state of employment principle[54], also known as the host state principle. In 1991, the Commission published the proposal for the PWD including the host state principle[55].

[50] 2012/0061 (COD) 17611/13 (n 5) art 12(2)
[51] These activities include "all building work relation to the construction, repair, upkeep, alteration or demolition of buildings and in particular the following work: excavation, earthmoving, actual building work, assembly and dismantling of prefabricated elements, fitting out or installation, alterations, renovation, repairs, dismantling, demolition, maintenance, upkeep, painting and cleaning work and improvements.
[52] MS Houwerzijl, *De Detacheringsrichtlijn – over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (Europese Monografieën, Kluwer, Deventer 2004) 65-67, 81
[53] Ibid 67
[54] Ibid 94-95
[55] Ibid 85

Article 3 of the PWD, containing the terms and conditions of employment which need to be ensured to the posted worker, does already make the distinction between the construction sector and all other sectors. Whereas for all sectors, the terms and conditions of employment need to be laid down by law, regulation or administrative provision, for the construction sector, these terms and conditions may also be laid down by collective agreements (hereinafter: CA) or arbitration awards.

By limiting the scope of the liability in the Second Draft to the (construction) activities mentioned in the PWD, the same line has been followed in the Draft Enforcement Directive. This is a logical step since it has appeared that non-payment of posted workers often occurs in the construction sector.[56]

Minimum wage

Paragraph 1 of the Second Draft defines the matters for which a (sub) contractor can be held liable. Relevant for this thesis is that it includes "any outstanding net remuneration corresponding to the minimum rates of pay"[57]. This is tantamount to the minimum wage of the host state, also in accordance with Article 3 PWD. The minimum rate of pay depends on what is decided in national laws or collective agreements. At the same time however, a Member State is not obliged to institute a minimum wage. The preamble of the Draft Enforcement Directive speaks of an important role for the trade unions in this context, as the social partners may determine the different levels of the applicable minimum rates of pay for posted workers.[58]

There has been some discussion in the European Parliament concerning the minimum wage, as some MEPs favored changing the minimum wage of the host state to the minimum wage of the home state[59] - thereby in essence favoring the internal market. Several demonstrations have taken place all over Europe to protest against a possible reintroduction of this 'Frankenstein principle' or the proposals to (re-)introduce the country of origin principle.[60] In the current Draft Enforcement Directive, the minimum wage of the host state is maintained.

[56] A van Dongen and C Rosman, 'Poolse trukendoos op de bouwplaats' (n 3)
[57] 2012/0061 (COD) 17611/13 (n 5) art 12(1)
[58] Cf. C-268/06 *Impact* [2008] ECR I-02483 [123], [129]
[59] European Parliament 'Committee meeting EMPL 21.02.2013' (n 44)
[60] EFBWW, 'National manifestations by several EFBWW affiliates on 15 May on the worrying development regarding the Enforcement Directive' (2012) <http://www.efbww.org/default.asp?Index=876&Language=EN> accessed 27 February 2014

Direct liability

According to the text, the direct liability is a liability only for the contractor of which the employer is a direct subcontractor. However in practice, a direct liability may not provide enough protection as it seems easy to circumvent this type of liability by creating a longer subcontracting chain. The result is that the main contractor is no longer directly liable for the payment of the minimum wage of the host state to the posted construction worker. If the added (sub) contractor will disappear after the period of posting has passed, it will become impossible to receive the wage for the posted construction worker. The following figure clarifies this situation in which there is more than one (sub) contractor.

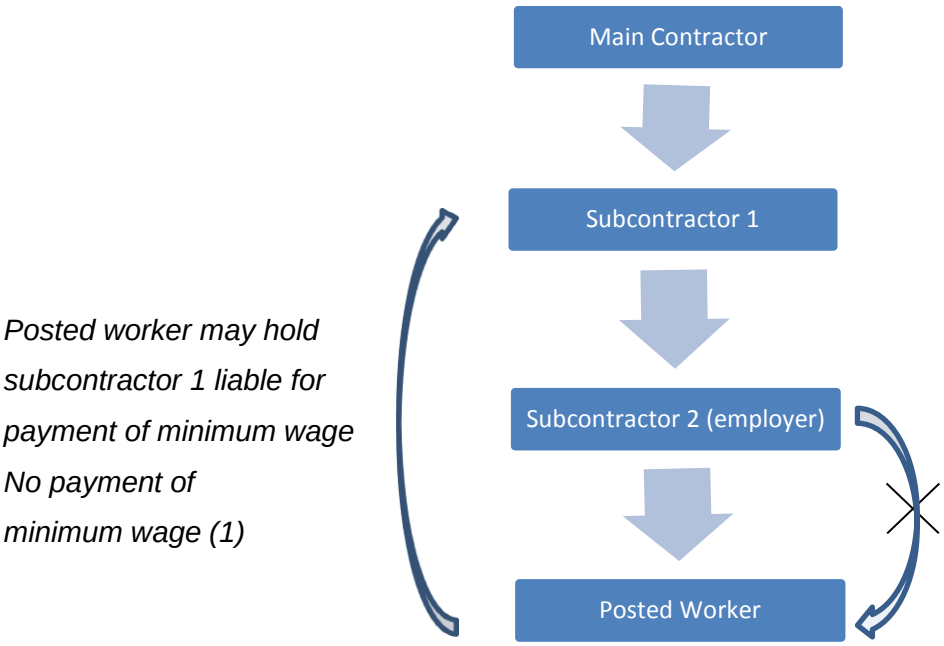

Figure 1:
Direct Liability in a subcontracting chain, Second Draft of Article 12 Draft Enforcement Directive

This provision implies that if the chain of subcontractors contains more than one subcontractor, the main contractor escapes the direct liability as laid down in the Second Draft. It would then still be possible to escape a direct liability for the payment of the minimum wage as this provision only sees to the liability of *one* layer of the subcontracting chain. This approach is also taken by Malmberg and Johansson, stating that “other

contractors – higher up in the contract chain – are not covered by the mandatory system prescribed by the proposal"[61]. I agree with this interpretation.

However, there are also other opinions about how this provision should be classified. Industriegewerkschaft Bauen-Agrar-Umwelt, a German Trade Union (hereinafter: IG BAU), states that if it is impossible to obtain the wage from the contractor of which the employer is the direct subcontractor, it is then possible to hold the next (sub) contractor in line liable – each one after another if the wage is not yet paid. This opinion is discussed more elaborately in paragraph 3.3.1.

The Second Draft is similar to the First Draft in the sense that they both contain a direct liability. There are however also several differences with regard to this direct liability. For example, the First Draft states that the liability is only applicable in posting situations covered by Article 1(3) PWD and the liability must be on a non-discriminatory basis with regard to the protection of the equivalent rights of employees of direct subcontractors established in the Member State.[62] These conditions are not mentioned in paragraph 2 of the Second Draft.

Moreover, in the First Draft an obligatory liability is laid down also for the back payments or refund of taxes or social security contributions unduly withheld from the salary.[63] In paragraph 2 of the Second Draft, this obligation is removed, together with the obligation for Member States to ensure that also common funds or institutions of social partners may hold the (sub) contractor liable. The removal of the latter two obligations in the text of the Second Draft shows that the direct liability in the Second Draft is more favorable for (sub) contractors in comparison to the First Draft. The former obligations are now left to the discretion of the Member States.

Due diligence

The Second Draft contains a due diligence option, which makes it possible for a contractor to show that he has done everything he was expected to do under the circumstances. The First Draft contains a more limited due diligence paragraph providing several preferences showing how this due diligence could be implemented in national legislation.[64] The Second Draft only provides the opportunity to implement a due diligence provision in national legislation. It thus facilitates Member States' preference to shape a possible due diligence provision without

[61] J Malmberg and C Johansson, 'The Commissions Posting Package' [Swedish Institute for European Policy Studies] (2012) 2012 European Policy Analysis <http://www.sieps.se/sites/default/files/2012_8epa.pdf> accessed 27 February 2014
[62] COM (2012) 131 final (n 4)
[63] Ibid
[64] The text of paragraph 12(2) of the First Draft is taken up in Annex II

guidance at EU level. While there is no uniform definition of due diligence, this might have the (severe) consequence that Member States have a wide margin of appreciation. On the other hand, this is a logical step in light of the political sensitivity of this provision. Yet the due diligence obligation might cause problems with the effectiveness of a direct liability, once it becomes a ground for exoneration of the liability. This will be discussed in paragraph 3.3 in more detail.

The following paragraph compares the Second Draft with Article 8 Directive 2009/52 on similar topics.

3.1.2 Second Draft vs. Article 8 Directive 2009/52

Substantive scope of the liability

The substantive scope of the liability laid down in Article 8 of Directive 2009/52 was already discussed in the proposal for Directive 2009/52, which mentioned that the illegal employment of TCNs was widespread in, among others, the construction sector[65], yet Article 8 of that directive does not limit the liability to this sector – the liability thus covers all sectors. Both liability provisions are therefore applicable to the construction sector. This makes it not only easier to compare both liabilities; it is also relevant in practice, particularly for the position of both the illegally employed TCN and the posted construction worker. This will be elaborated upon further in this subparagraph.

Minimum wage

Article 8 Directive 2009/52 refers to Article 6(1)(a) of Directive 2009/52, which mentions that the employer may be held liable to pay back at least the minimum wage of the host state to the illegal employed TCN, "unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages"[66]. It follows from this wording that in Directive 2009/52 a claim for a minimum wage is not unconditional and may be disputed. Such an exception is not present in the Second Draft.

Direct and chain liability

The main difference between the direct liability of the Second Draft and the direct and chain liability of Article 8 Directive 2009/52 is the type of liability. The chain liability of Article 8 of Directive 2009/52 implies a stronger protection for the illegally employed TCN as a chain

[65] European Commission, 'Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals' COM (2007) 249 final 2
[66] Directive 2009/52/EC (n 7) art 6(1)(a)

liability provides for the liability of more guarantors, yet the effect of this particular chain liability is mitigated, as explained in paragraph 2.3.

However, the difference in type of both liabilities enhances the unequal position of both the illegally employed TCNs and the posted construction workers because the level of protection differs.

With regard to the unequal position, I am of the opinion that the illegally employed TCNs already have a slightly better position compared to posted construction workers. Illegally employed TCNs often do get paid because they work over a longer period for the same employer and the employer will have to pay the wage. Posted construction workers often work temporarily for an employer and after the period of posting, it is easier for an employer to sever the ties and not pay the wage of the posted construction workers at all.

Moreover, the chain liability in Directive 2009/52 remains a stronger liability in nature which essentially gives the illegally employed TCNs a better position than posted construction workers – regardless of the mitigated effect. In my view, it is of importance that the type of both liabilities is similar in order to reduce the inequality in protection between both groups. Reducing the inequality between both groups is needed to ensure that one group will not be pushed off the market and to ensure minimum working conditions for both groups. For that reason, an argument in favor of a chain liability is that it resembles the liability in Directive 2009/52.

Due diligence

The differences in the due diligence paragraphs of the Second Draft and Article 8 Directive 2009/52 will be discussed in paragraph 3.3.2.

3.2 Second Draft of Article 12 in context

3.2.1 A background sketch: the preamble

The preamble of the Draft Enforcement Directive shows that the purpose of this measure is to "(…) prevent, avoid and combat circumvention and/or abuse of the applicable rules by companies taking improper or fraudulent advantage of the freedom to provide services enshrined in the Treaty and/or the application of the PWD, the implementation and monitoring of the notion of posting should be improved".[67]

[67] 2012/0061 (COD) 17611/13 Preamble [4]

In that regard, adequate and effective implementation and enforcement are considered to be key elements in protecting the rights of posted workers.[68] As to the effective protection of posted construction workers, subcontracting chains are considered to be a matter of particular concern, according to the preamble to the Draft Enforcement Directive.[69] Yet the preamble does not seem to be in accordance with the text of the Second Draft, while the *obligation* to implement a direct liability does not emerge from the text of the preamble. The context of the Second Draft might explain the latter; this will be analyzed in the following paragraph.

3.2.2 Context of the Second Draft of Article 12

The Draft Enforcement Directive as created on 10 December 2013 barely provides for any supporting provisions increasing the effect of the liability in the Second Draft. The only provision in this respect which could indirectly increase the effect of the direct liability is article 11. Article 17 on penalties is also interesting in that regard but because it does not contain a reference to or from the Second Draft, penalties are only applicable to employers.

Article 11 Draft Enforcement Directive contains the obligation for Member States to ensure effective mechanisms for posted (construction) workers to lodge complaints against their employers directly, as well as the rights to institute judicial or administrative proceedings. Moreover, it facilitates back-payments of any due entitlements resulting from the contractual relationship between the employer and the posted (construction) worker. These entitlements are specified as any outstanding net remuneration, any back-payments or refund of taxes or social security contributions unduly withheld from his/her salary and a refund of excessive costs, in relation to net remuneration or to the quality of the accommodation, withheld or deducted from wages for accommodation provided by the employer. However, there is no reference from or to the Second Draft, which shows that (sub) contractors are not bound to this provision. On the other hand, it may be stated that there is a certain indirect effect because the effective mechanisms for instituting judicial proceedings against employers will most likely also be available when it concerns judicial proceedings against a (sub) contractor. Moreover, this right may also be deduced from Article 6 of the PWD which does not contain a reference to whom judicial proceedings may be instituted.

Article 17 Draft Enforcement Directive states that Member States have the obligation to lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to the Draft Enforcement Directive and that Member States shall take all

[68] Ibid Preamble [10]
[69] Ibid Preamble [24]

the necessary measures to ensure that they are implemented and complied with. The penalties need to be effective, proportionate and dissuasive. However, these penalties only apply to employers. As a result, (sub) contractors do not have to fear these penalties.

Furthermore, the Second Draft contains several other paragraphs not discussed yet but worth mentioning in the context of the Draft Enforcement Directive. Paragraph 1 provides a voluntary direct liability for all sectors not mentioned in the Annex to the PWD. Paragraph 3a comprehends an alternative measure for the mandatory direct liability in paragraph 2 which has to provide effective and proportionate sanctions against the contractor in a direct subcontracting relationship if workers have difficulties in obtaining their rights.

EFBWW has interpreted paragraph 3a of the Second Draft as resulting in no mandatory direct liability at all.[70] Partly, the EFBWW has a valid argument as there might be Member States which will seize this paragraph in order not to implement a direct liability. On the other hand, Member States will have to implement another enforcement measure providing for similar results with regard to – among other things – the payment of the minimum wage of the host state to the posted worker. Nevertheless, it seems plausible that Member States which do not have any liabilities at national level yet, will implement the direct liability of the Second Draft because they will have to implement the direct liability of Article 8 Directive 2009/52 anyway. Therefore, not much attention is paid to article 3a of the Second Draft in this master thesis.

3.2.3 Context of Article 8 Directive 2009/52

Article 8 Directive 2009/52 refers to two other provisions: Article 5 and 6 of Directive 2009/52. The subcontractor of which the employer is a direct subcontractor can be held liable for the payment of financial sanctions (Article 5) and back payments to be made by the employer (Article 6).

Article 5 of Directive 2009/52, provides the obligation for the employer to pay a financial sanction depending on the amount of illegal TCNs employed, the purpose of the employer and extent to which there are exploitative working conditions involved. This may create an important incentive not to employ illegal TCN's. The Second Draft does not contain financial sanctions in addition to the liability provision.

[70] EFBWW, 'EPSCO agreement on the Enforcement Directive' (n 46)

These financial sanctions have to be of an effective, proportionate and dissuasive nature[71] and they must be implemented in a way that the height of the sanction depends on the number of illegally employed TCNs, whether the employer is a natural person or not and if there are exploitative working conditions involved.[72] Moreover, the subcontractor may be held liable to pay the costs of return of the illegally employed TCNs instead of the employer.

Article 8 refers to Article 6 on three points. Firstly, the subcontractor can be held liable for two back payments to be made by the employer (including any outstanding remuneration and costs arising from sending back payments to the country to which the TCN has (been) returned). Secondly, in order to apply the former, Member States need to ensure that illegally employed TCNs have the option to introduce a claim or have the competent authority start proceedings to recover outstanding remuneration. Thirdly, to enforce the liability for back payments, an employment relationship of at least three months duration is presumed, unless among other things, the employer or the employee can prove otherwise.

It may thus be concluded that there is a significant difference in supporting measures between the Second Draft and Article 8 Directive 2009/52. This will be discussed in more detail in the following paragraph, in which it will be examined whether Article 12 Draft Enforcement Directive is an effective tool to enforce payment of the minimum wage of the host state.

3.3 Article 12 Draft Enforcement Directive: effective enforcement?

This paragraph analyzes the view of the social partners, other stakeholders and scholars on the Draft Enforcement Directive. These are problematized and discussed per topic. On this basis, a conclusion will be drawn on the accuracy of their opinions.

3.3.1 Direct liability

ETUC argues that the liability should become a mandatory chain liability, which would make all subcontractors and the main contractor liable for the compliance of all subcontractors in order to strengthen the liability.[73]

[71] On effective, proportionate and dissuasive sanctions: Chalmers and others, *European Union Law* (2nd edn, Cambridge University 2010) 224-225
[72] This follows from the text of Article 5 of Directive 2009/52.
[73] ETUC 'Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive' (n 6); ETUC, 'EU governments must end social dumping – ETUC calls on ministers to enforce posted workers' rights' (2013) <http://www.etuc.org/a/11805> accessed 27 February 2014; B Ségol, 'Letter to EPSCO Ministers' <http://www.sindikat-zsss.si/attachments/article/1108/Pismo_EKS_MinistromZaDelo_EU_DirektivaNapoteniDelavci_06122013.pdf> accessed 27 February 2014

In its' statements, ETUC does not explain in great detail why it favors a chain liability over a direct liability, but solely mentions reasons of evading labor standards and working conditions "by creating extremely complex networks of subcontractors"[74]. IG BAU explains the consequences of the direct liability as follows: "*muss sich der Arbeiter auf eine Kette von Klagen einstellen, die genauso lang ist wie die der Subunternehmer. Das heißt er muss erst die Firma auf Lohn verklagen, bei der er beschäftigt war. Weil sich betrügerische Firmen aber regelmäßig in die Pleite flüchten, geht er leer aus.*

Um an sein Geld zu kommen, soll er laut Änderung dann den nächsten Subunternehmer verklagen und so fort bis er nach Jahren endlich bei dem meist zahlungsfähigen Generalunternehmer angekommen ist. „Sollte sich dieser Irrwitz durchsetzen, kann sich der Staat schon mal nach vielen neuen Arbeitsrechtlern umsehen. Dann kommen auf die Gerichte so viele Prozesse zu, dass die bisherigen Arbeitsrichter in der Klageflut untergehen"[75].

IG BAU highlights two issues in this statement; first the consequence for the posted construction worker that receiving wage may become nearly impossible because of the sole liability of the contractor of which the employer is a subcontractor. This would be the case once there are several malicious subcontractors 'inserted' in the subcontracting chain, which all need to be sued - one after the other – by which retrieving the wage becomes an impossible mission. Second, IG BAU foresees a subsequent result; a 'flood of actions' will arise before national labor court(s) because each subcontractor needs to be held liable separately.

Although I am not convinced by the interpretation of IG BAU[76] (and thus I assume that the foreseen result will not take place), in the end, the result for the posted construction worker is more or less the same. The current direct liability of Article 12 is circumvented easily by adding other subcontractors to the subcontracting chain. As a result, the direct liability becomes useless. This is either because there is no other way by which the wage can be obtained or because the long subcontracting chain makes it impossible to receive it.

One can conclude from these different opinions that there is the lack of clarity for the posted construction worker. Is it possible to sue the next (sub) contractor in line if the wage cannot be obtained from the first contractor? It becomes more and more clear that the direct liability

[74] ETUC, 'Position on the Enforcement Directive of the Posting of Workers Directive – Adopted at the Executive Committee on 5-6 June 2012' (n 21)
[75] IG BAU, 'IG BAU warnt vor dorhender Prozessflut bei Arbeitsgerichten' (2013) <http://www.igbau.de/IG_BAU_warnt_vor_drohender_Prozessflut_bei_Arbeitsgerichten.html> accessed on 27 February 2014
[76] See also paragraph 3.1

needs to be amended thoroughly in order to clarify and improve the situation for the posted construction worker.

The next paragraph discusses the importance of a due diligence paragraph in a liability provision.

3.3.2 Due diligence

Concerning the direct liability provision of Article 12, ETUC is critical about the due diligence paragraph, stating that it 'undermines' the liability[77]. ETUC underpins its critical stand towards this paragraph by stating that there is no European definition of due diligence[78]. This would lead to many different interpretations of the due diligence at the national level which will, in turn, might lead to national provisions which might be very easy to circumvent. As a result, it may be assumed that ETUC is afraid that the due diligence option will cause the direct liability to become an inadequate measure to ensure the minimum wage to the posted construction worker.

Is this fear justifiable? It is indeed correct that there is no EU wide definition of due diligence[79], but will this lead to an inadequate use of the direct liability? In a sense, yes, this is possible. Different interpretations among Member States will almost certainly be the result of the absence of an EU-wide definition and because Member States have a wide margin of appreciation. Thus, it is left to the discretion of the Member State how to deal with the due diligence paragraph.

If a Member State prefers to have a more open and competitive market and if competitiveness is seen as more important than the protection of the posted construction worker, rules will be set in order to meet the due diligence criteria easily. The result will then be that the direct liability significantly loses its effect in protecting the minimum wage of the posted construction worker. This is even more the case when the due diligence obligations become a ground for exoneration of the liability.

Another interesting question in this respect is then, would it make a difference if there would be a definition of due diligence at EU level? In other words: if due diligence would be defined at EU level in the context of posted (construction) workers, would that make a difference for

[77] ETUC, 'Position on the Enforcement Directive of the Posting of Workers Directive – Adopted at the Executive Committee on 5-6 June 2012' (n 21); ETUC 'Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive' (n 6)
[78] ETUC 'Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive' (n 6)
[79] No reference to a definition can be found in the TEU or TFEU, neither in the case law of the CJEU.

the direct liability provision? It seems logical to answer this with a more positive stance. If Article 12 would contain a due diligence paragraph which leaves no room for different interpretations, this might have a positive influence on the possibility of inserting a due diligence option within a direct liability provision at EU level. Yet further studies are required before decisive statements can be made about this.

However, it may be clear that it is: a) hardly impossible to create a due diligence definition at EU level in this context because of much diverging opinions of the Member States and b) it is still questionable whether this would function correctly in all Member States. Thus, it may be argued that ETUC definitely took the correct stance to state that the due diligence option should be removed from the direct liability provision.

Not only the social partners are critical towards the due diligence paragraph of Article 12, this is also the case in the literature. Govaert and van Beers advocate the following on the due diligence option: "(it) leads to irrelevant administrative burden and is in that regard a less suitable measure"[80]. Instead, they propose a voluntary measure ensuring that the (sub) contractor fulfills the "required care" ('vereiste zorg') but cannot be held liable. Whether or not this is indeed a suitable measure to protect the minimum wage of the posted construction worker, is highly questionable because it remains very permissive in nature.[81] However, the suitability of such a measure merits further study.

Despite the critical remarks heard from both ETUC and in the literature, there are two indications which plea in favor of a due diligence. Firstly, Jorens, Peters and Houwerzijl draw the conclusion from the Wolff and Müller case that due diligence obligations are not disproportionate if the liability "clearly adds to the protection of workers"[82].

Secondly, Article 8 Directive 2009/52 also contains a due diligence option. Noticeable is that in comparison with Article 12 Draft Enforcement Directive, the Second Draft is much more similar to Article 8 Directive 2009/52 than the First Draft with regard to the due diligence paragraph. Whereas the First Draft contains restrictions by determining that a due diligence needs to be transparent, non-discriminatory and proportionate, the Second Draft only provides for a due diligence. Yet there is still a difference between Article 8 Directive 2009/52

[80] M Govaert and A van Beers, 'Handhaving detacheringsrichtlijn; hoe te ontkomen aan ketenaansprakelijkheid?' (2013) 68 Tijdschrift voor Recht en Arbeid

[81] Ibid. The author of this master thesis is of the opinion that it is not a suitable measure. If this recipients' liability is made voluntary, the initial goal of protecting the minimum wage will be missed entirely for the reason that this is not a comprehensive enforcement measure and as a result, the protection of the minimum wage will still be lacking. On the other hand, such a liability might be more interesting to apply at European level with regard to the protection of the minimum wage for posted construction workers if it is made obligatory.

[82] Jorens, Peters and Houwerzijl (n 10) 42

and the Second Draft, being that the due diligence in Article 8 Directive 2009/52 is mandatory, while in the Second Draft it is voluntary.

Jorens, Peters and Houwerzijl mention Article 8 Directive 2009/52 as an example to show that due diligence as a ground for exoneration raises several questions because this provision is implemented differently in the Member States. They question among other things whether an initial due diligence will be sufficient or will it be necessary for a contractor to constantly monitor his subcontractors during the whole collaboration?[83]

Moreover, they also refer to a due diligence option in the context of an unconditional chain liability system in which due diligence obligations might be disproportionate for bona fide undertakings. In addition, they argue that due diligence obligations may not cause a client or contractor to exempt liability "when he knows a contractor or subcontractor violates his workers' rights and mandatory rules protecting workers' rights"[84]. At the same time they also realize that it is questionable how such existing knowledge or even intent on the part of the client or contractor could be proved. Based on the foregoing, they conclude that a joint and several liability also has some drawbacks.

Although this firm conclusion should not be disputed, the option of a liability within the EU should not be rejected immediately either. It might be interesting to examine the option of a (chain) liability without due diligence obligations but with extra flanking measures to protect bona fide undertakings. This solution will be discussed in chapter four in more detail.

The following paragraph explores the disadvantages of a direct liability for SMEs.

3.3.3 Disadvantages for SMEs

The European Association of Craft, Small and Medium-sized Enterprises (hereinafter: UEAPME)[85] and Business Europe (hereinafter: BE)[86] are against Article 12. BE in particular, which has come up with many reasons and arguments in favor of deleting the direct liability.

One of the arguments[87] of BE concerns the substantial costs made by small and medium-sized enterprises (hereinafter: SMEs). BE argues that if a contractor becomes directly liable, this will be disproportionate for SMEs for the reason that they are not able to deal with the

[83] Jorens, Peters and Houwerzijl (n 10) 163
[84] Ibid
[85] UEAPME, 'Position on the 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' (12 July 2012) <http://www.ueapme.com/IMG/pdf/UEAPME_pp_posting_enforcement_directive_final_120712.pdf> accessed 27 February 2014
[86] Business Europe, 'Position Paper – Enforcement of the Posting of Workers Directive (2012) (n 6)
[87] All arguments BE mentioned against Article 12, are laid down in: ibid

administrative obligations which are related to such a liability system.[88] In turn, this will result in losing out on their business, which might cause them to breach the rules.[89]

Although the reasoning of BE is in principle correct, it is questionable whether this will really be the case once this measure comes into force. Taking a look at this issue from another perspective, the consequences for SMEs might not be as severe as BE is trying to let everyone believe. The consequences might be mitigated by, for example, the fact that if a direct liability is adopted, it will still take quite some time before this measure comes into force and SMEs will have considerable time to adapt to the circumstances and to prepare. If they know what they are to expect, it will become easier for them to cope with the new regulations.

Moreover, there are certain Member States which have already implemented Article 8 Directive 2009/52 meaning that (sub) contractors already have to deal with administrative obligations in order to check whether their subcontractor as an employer does not employ illegal TCNs.

In addition, it is even argued that (chain) liability rules are beneficial to SMEs[90]: "Without these rules mala fide (principal) contractors are free to profit from (too) low costs of work to the detriment of particular SME subcontractors and their employees (…). This applies especially to SMEs with a weak negotiating position as subcontractor, since they do compete on efficiency and low costs instead of innovative or modern technologies".[91]

The following citation shows that similar conditions occurred in Ireland:

> "(…) the SME representatives (…) highlighted a growing perception (and frustration) amongst small subcontractors (particularly in the construction sector) that they are being undercut in tendering processes by undertakings from outside the jurisdiction that are not fully compliant with Irish labor rules. Besides, the SME employers' representatives complained that the penalties for non-compliance are not sufficiently deterrent, particularly in the case of large principal contractors, where offenders simply 'pay up and move on'. There are no barriers, for example, to such

[88] Ibid
[89] Ibid
[90] Jorens, Peters and Houwerzijl (n 10) 133-134
[91] Ibid. Conclusions of the panel discussion during a conference organised by the Institute of the Research on the Market Economy, 21 May 2011, Poland; among the participants were the Polish Minister of Labour and Social Policy, Members of Parliament, representatives of local authorities, employers' organisations and a member of the EC.

> undertakings tendering for, and being awarded, future state contracts or no extra responsibilities placed upon them to ensure compliance in the future. For such undertakings, many informants suggested, the danger of engaging non-compliant subcontractors (or being less than thorough in checking the subcontractors engaged) does not sufficiently register as being a 'risk factor' that warrants adequate attention."[92]

Thus, the disadvantages of a liability for SMEs may be mitigated by either the time there is to adapt to the measure or because undertakings already live up to similar administrative obligations. In addition, (chain) liability arrangements are also mentioned as beneficial for SMEs for the reason that foreign companies not complying with national labor rules will no longer undercut SMEs in tendering processes.

3.3.4 Second Draft vs. Article 8 Directive 2009/52

The differences between the Second Draft and Article 8 Directive 2009/52 have been set out in the previous paragraphs and based on that, the following may be stated:

Firstly, the direct liability of Article 8 Directive 2009/52 has (better) flanking measures in the form of financial sanctions and back payments. There are no measures laid down in the Draft Enforcement Directive which support the Second Draft.

Secondly, there is a difference regarding the due diligence in Article 8 Directive 2009/52 and in the Second Draft. The former is mandatory while the latter is voluntary. Because it concerns a direct liability instead of a chain liability, the disproportionality of the obligations for bona fide undertakings is smaller than when it concerns a liability. On the other hand, because these obligations might exempt the (sub) contractor from the liability, this might infringe on the rights of the posted construction worker. Therefore, a due diligence measure should not be part of a direct liability provision and in that regard, voluntary due diligence obligations are better than the mandatory due diligence obligations of Article 8 Directive 2009/52.

3.4 Conclusion

With this chapter it has been tried to provide an overview on Article 12 Draft Enforcement Directive in which the definition, interpretation of the definition and the context were discussed. Based on the foregoing and the opinions of stakeholders, a conclusion will been

[92] Jorens, Peters and Houwerzijl (n 10) 133-134

drawn on the question whether or not Article 12 Draft Enforcement Directive is an effective tool to enforce the payment of the minimum wage to the posted construction worker.

It has been concluded that Article 12 Draft Enforcement Directive must be interpreted as the possibility for the posted construction worker to hold only the (sub) contractor liable of which the employer is a direct subcontractor. This results in the inability to hold any other contractor liable, even if the contractor which has been held liable fails to pay the minimum wage of the host state.

Regarding the question whether or not Article 12 of the Draft Enforcement Directive provides for effective enforcement, the following conclusion may be drawn: the direct liability as laid down in Article 12 of the Draft Enforcement Directive needs to be amended as a whole. This is concluded because the text leaves room for different interpretations which results in a lack of clarity for the posted construction worker. Moreover, the direct liability is easily circumvented by adding other (sub) contractors to the subcontracting chain. This leads to the impossibility for the posted construction worker to obtain his or her wage.

More specifically to the content of the direct liability, the due diligence paragraph needs to be deleted. The absence of a European definition of due diligence will lead to many different interpretations at the national level. Because Member States have a certain margin of appreciation in this regard, the due diligence criteria might be easily met which influences the effectiveness of the liability when the due diligence also becomes a ground for exoneration of the liability. Due diligence may not cause exemption of the liability.

With regard to the disadvantages for SMEs, the argument of disproportionate administrative obligations has been mentioned. These administrative obligations might however be mitigated by either the time there is to adapt to the measure or because undertakings already live up to similar administrative obligations. In addition, (chain) liability arrangements are also mentioned as beneficial for SMEs for the reason that foreign companies not complying with national labor rules will no longer undercut SMEs in tendering processes.

In comparison to Article 8 of Directive 2009/52, Article 12 of the Draft Enforcement Directive lacks flanking measures which strengthen the effect of the liability.

In sum, the direct liability of Article 12 Draft Enforcement Directive is deemed not to be an effective tool to enforce the payment of the minimum wage of the host state to the posted construction worker. There is a lack of clarity for posted construction workers, the direct

liability is easily circumvented, the due diligence paragraph needs to be deleted as it may cause exemption of the liability and the Draft Enforcement Directive lacks flanking measures which strengthen the effect of the liability. On the other hand, the disadvantages for SMEs are deemed to be mitigated.

4. Chain liability: § 14 AEntG

This chapter analyzes whether the chain liability in §14 AEntG may be an effective tool to enforce the payment of the minimum wage of the host state to the posted construction worker.

Paragraph 4.1 provides the definition and an interpretation of the chain liability as laid down in §14 AEntG. The interpretation of the chain liability covers observations on several matters: the substantive and territorial scope, the preventive effect, due diligence, and the minimum wage.

The AEntG and the context of §14 are discussed and interpreted in paragraph 4.2. The context of §14 covers mainly the flanking measures laid down in the AEntG.

In paragraph 4.3, the effective enforcement of the chain liability in §14 is examined on three matters, being type of liability, the due diligence paragraph and the disadvantages for SMEs. This is done on the basis of the opinions of the social partners, scholars and other stakeholders.

In paragraph 3.4, a conclusion is drawn as to whether or not the chain liability in §14 effectively enforces the payment of the minimum wage of the host state to the posted construction worker.

4.1 Chain liability defined

The chain liability as laid down in §14 and §15 AEntG is defined as follows:

"§14: Haftung des Auftraggebers
Ein Unternehmer, der einen anderen Unternehmer mit der Erbringung von Werk- oder Dienstleistungen beauftragt, haftet für die Verpflichtungen dieses Unternehmers, eines Nachunternehmers oder eines von dem Unternehmer oder einem Nachunternehmer beauftragten Verleihers zur Zahlung des Mindestentgelts an Arbeitnehmer oder Arbeitnehmerinnen (…)"[93].

This chain liability is one in which all contractors who outsource work or services to undertakings can be held liable for the non-payment of the minimum wage to the workers of their subcontractors. In other words, the main contractor is liable for all its subcontractors;

[93] AEntG §14

even for subcontractors of his subcontractors. Subcontractors of the main contractor are also liable for their own subcontractors.

This situation is clarified in figure 2, in which a subcontracting chain is depicted.

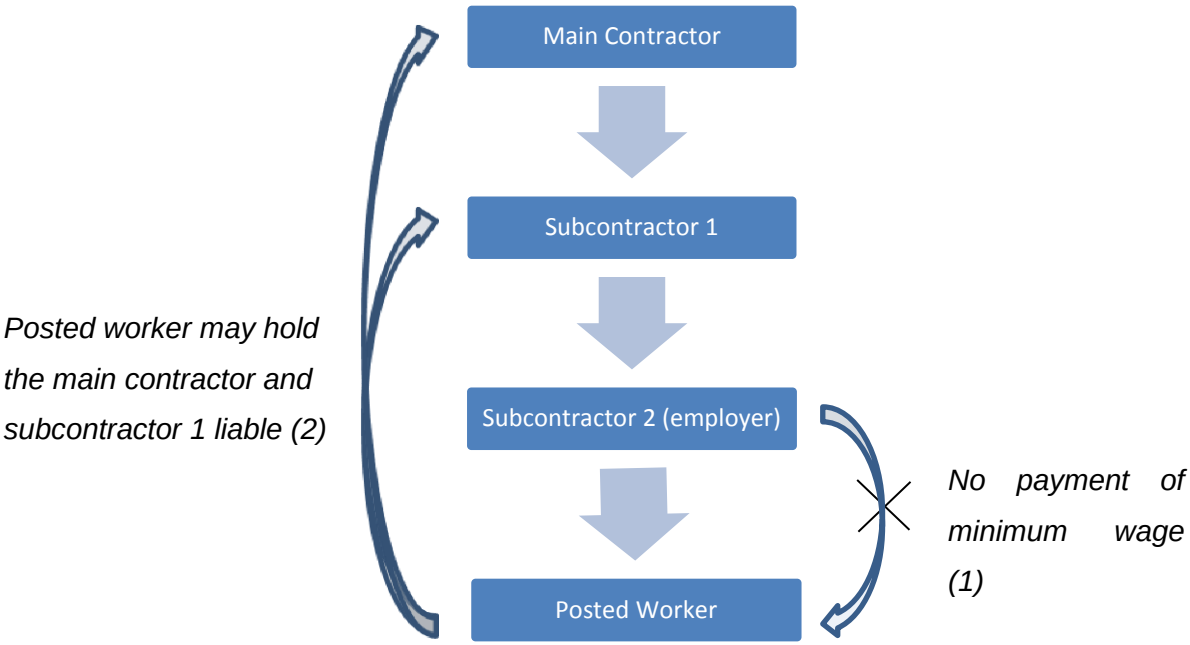

Figure 2
Chain liability, § 14 AEntG

Although at first sight, this figure seems similar to that of Article 12 Draft Enforcement Directive, there are some important differences. The chain liability makes it possible that every (sub-) contractor can be held liable for all of its subcontractors. This means that in figure 1, the main contractor is liable for the payment obligations subcontractor 1 and subcontractor 1 (employer). Moreover, also subcontractor 1 can be held liable for payment obligations of subcontractor 2. As a result, it is possible for the posted construction worker[94] to hold every contractor in the subcontracting chain liable, which increases the chance for the posted construction worker to receive the German minimum wage as they are able to choose from whom they claim payment of the wage[95]. Logically, this will be the (sub-) contractor which is the most creditworthy.

[94] It follows from §4 that the AEntG is applicable to - amongst others - the construction industry and related branches.
[95] Asshoff (n 10) 10

4.1.1 Interpretation

The AEntG has been altered several times over the years. The chain liability is now laid down in §14 AEntG. The entire text of these paragraph will be interpreted below[96].

§14 reads as follows:
"Ein Unternehmer, der einen anderen Unternehmer mit der Erbringung von Werk- oder Dienstleistungen beauftragt, haftet für die Verpflichtungen dieses Unternehmers, eines Nachunternehmers oder eines von dem Unternehmer oder einem Nachunternehmer beauftragten Verleihers zur Zahlung des Mindestentgelts an Arbeitnehmer oder Arbeitnehmerinnen oder zur Zahlung von Beiträgen an eine gemeinsame Einrichtung der Tarifvertragsparteien nach § 8 wie ein Bürge, der auf die Einrede der Vorausklage verzichtet hat. Das Mindestentgelt im Sinne des Satzes 1 umfasst nur den Betrag, der nach Abzug der Steuern und der Beiträge zur Sozialversicherung und zur Arbeitsförderung oder entsprechender Aufwendungen zur sozialen Sicherung an Arbeitnehmer oder Arbeitnehmerinnen auszuzahlen ist (Nettoentgelt)."

It follows from this provision that it is an unconditional chain liability; it is not necessary to bring an action before the court, before the liability can be established. The liability is also present before court proceedings take place.[97]

The AEntG including §14, is applicable to not only the construction sector but also to several other sectors, such as the postal services and security services[98]. The scope of application of the entire law has been widened several times over the years. As a result, it can be stated that the liability has been strengthened over time as it has been applied to more and more sectors.

The territorial scope of this provision is not clarified in §14 AEntG but the legislative history provides more insight: in 1998, the AEntG was amended to change the situation which several German courts had created by ruling that German untertakings were not within the scope of application. As a result, after the amendment of the AEntG, the entire law, including also the new §1 a (currently §14 AEntG) applied to not only foreign contractors, but also to

[96] It must be noted that there is not much literature found about §14 and 15. Therefore, sometimes references refer to literature based on §1 a, the provision in which the liability was laid down previously.
[97] Asshoff (n 10) 24
[98] AEntG §4

German undertakings[99] – if they fall within the scope of §14 AEntG. The current Arbeitnehmer-Entsendegesetz states that it applies throughout the country and that it also covers foreign contractors when they are active in Germany.[100] As a result, the AEntG will promote the high quality of execution of the work and services, which will become the competition-related parameters instead of the lowest price.[101]

§14 AEntG is also explained by Schlachter in the '*Erfurter Kommentar zum Arbeitsrecht'* and she makes a few important remarks regarding the German chain liability. First of all, she states that the legislative purpose of the Article is to provide an incentive for undertakings to work only with subcontractors which 'behave correctly'[102] or, in order words: which pay the German minimum wage or only work with subcontractors which do so. Moreover, if the minimum wage is not respected, the client may not accept the offer.[103]

Secondly, 'Unternehmer' (contractor) as laid down in §14 AEntG must be interpreted as meaning the main contractor and all other contractors which provide work or services to others.[104] This is different from §14 Bürgerliches Gesetzbuch (hereinafter: BGB) in which the definition of 'Unternehmer' is laid down.[105] This was decided upon by the Bundesarbeitsgericht (Federal Labor Court, hereinafter: BAG) after the Wolf and Müller case.[106] According to §14 BGB an 'Unternehmer' can also mean a construction worker who works as an entrepreneur. However, the BAG has clearly wanted to avoid that these workers will also be held liable. Nevertheless, the scope of application of this law has been widened over the years. As a result, §14 AEntG applies at least when the construction worker can be qualified as a contractor in the sense of an undertaking, even when the undertaking is not subject to the minimum wage of the collective agreement.[107] Self-evidently, the subcontractors which appoint other subcontractors to carry out work or services are also seen as main contractor.

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[99] PW Strick, 'Das neue Arbeitnehmer-Entsendegesetz (AEntG), Anwendbarkeit der Entscheidung OLG Düsseldorf' (1999) Baurecht 713
[100] AEntG §2, Asshoff (n 10) 24
[101] M Schlachter, 'Arbeitnehmer-Entsendegesetz' in Müller-Glöge and others *Erfurter Kommentar zum Arbeitsrecht*' (Verlag C.H. Beck München, 2011)
[102] M Schlachter, 'Erfurter Kommentar zum Arbeitsrecht' (2013) <http://beck-online.beck.de/default.aspx?vpath=bibdata/komm/ErfKoArbR_13/AEntG/cont/ErfKoArbR.AEntG.p14%2Ehtm> accessed 27 February 2014
[103] Ibid
[104] K Tillmanns,'Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen (Arbeitnehmer-Entsendegesetz – AEntG)' in Henssler (ed) *Arbeitsrecht Kommentar* (Dr. Otto Schmidt, 2010) 16
[105] Ibid. According to §14 BGB an 'Unternehmer' can also mean a self-employed construction worker.
[106] 5 AZR 617/01 (A) Bundesarbeitsgericht, *Beschluss vom 6. 11. 2002* Neue Zeitschrift für Arbeitsrecht 2003 490
[107] M Schlachter, 'Erfurter Kommentar zum Arbeitsrecht' (n 102)

Thirdly, Schlachter has pointed out that the main contractor cannot justify oneself by stating that he has not been aware of it nor that he was not able to prevent it. Therefore, it is always possible to hold the main contractor liable. Several German (labor) courts have ruled on this matter that such an interpretation is in line with established case law, because this rule furthers the effective enforcement and therefore, it is a necessary, proportionate and suitable measure.[108]

On the other hand, according to Harbrecht, there are ways in which the contractors, as contracting parties, agree upon the division of the liability for certain risks that occur during the execution of the construction project.[109] In this respect, he mentions that this should only be possible for parts of the statutory legislation which are not indispensable, that both contracting parties must have agreed to it and it must be arranged in a balanced and justifiable manner.[110]

Lastly, the second sentence states that the liability claim may not go beyond the minimum wage pursuant to §8. This is still the case, even if the posted construction worker has a right to claim a higher compensation in the specific case.[111] Deckers argued on § 1 a AEntG that it is not clear what is exactly meant with 'minimum wage' in the sense of that provision.[112] He agrees with Schlachter that the minimum wage of §1 a AEntG is not similar to the amount of money that the employer has agreed upon with the posted construction worker and it is thus not contractually substantiated. The guarantor is only held to pay the minimum wage following from collective agreements.

Compared to Article 12 of the Draft Enforcement Directive, this liability is formulated the other way around (conf. from top to bottom instead of from bottom to top in the subcontracting chain). Whereas Article 12 only sees to the liability of the (sub-) contractor of which the employer is the direct subcontractor, this liability is based on the undertaking which outsources its work or services to other undertakings (subcontractors). As a result, the scope of application of §14 AEntG is much broader.

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[108] Ibid
[109] PW Strick, 'Das neue Arbeitnehmer-Entsendegesetz (AEntG), Anwendbarkeit der Entscheidung OLG Düsseldorf' (n 99)
[110] Ibid
[111] M Schlachter, 'Erfurter Kommentar zum Arbeitsrecht' (n 102); K Tillmanns,'Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäβig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen (Arbeitnehmer-Entsendegesetz – AEntG)' (n 104) 16
[112] S Deckers, 'Der Mindestentgeltbegriff in § 1a AEntG (2008) <http://beck-online.beck.de/default.aspx?typ=reference&y=300&z=NZA&b=2008&s=321> accessed 27 February 2014

4.2 §14 AEntG in context

4.2.1 A background sketch: the AEntG

The liability provision in the AEntG came into force in 1999, in order to combat the fraudulent use of subcontracting chains in the construction sector as §1a AEntG (old).[113] §1 AEntG states that the goal of this law is to ensure effective and fair competition.[114] It follows from the Wolff and Müller case that "inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay (…) such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services (…)"[115]. As a result, the assurance of fair competition is driven by the protection of posted (construction) workers. Moreover, in 1996 the *Gesetzesbegründung* already mentioned the reduction of unemployment.[116] Seen in the current economic circumstances, this reason is all the more relevant.

Germany already has 14 years of experience (as of 1999) with this particular type of liability. As a result, there is much to say about its efficiency as an enforcement measure, and its use in practice. This will be done on the basis of the opinions of stakeholders and scholars. However, the provision itself needs to be placed in its' own context first, in order to provide a better understanding of the functioning of the liability.

4.2.2 Context of §14 AEntG[117]

There are three important remarks to make in this regard. Firstly, §14 AEntG is related to several other provisions, which support the preventive effect of §14 AEntG. Three important provisions are §15, §18 and §23. §23(2) AEntG states that if the contractors appoints a subcontractor of which he (should) know(s) that he is not providing the working conditions (including the minimum wage) to his workers, the contractor may be fined. This also applies to the next subcontractors in line, for which the first contractor also needs to take due care. This is a penal regulation and stands apart from the contract between the main contractor and the subcontractor. If this regulation is violated, a fine may be instituted which amounts 500.000 Euros. Due care is taken, once the main contractor has obtained written

[113] Houwerzijl and Peters (n 9) 11-12
[114] AEntG §1
[115] Wolff and Müller v Pereira (n 43) [41]
[116] K Tillmanns,'Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen (Arbeitnehmer-Entsendegesetz – AEntG)' (n 104)
[117] If not referred to otherwise, this entire paragraph is drawn from Asshoff (n 10) 11-12

confirmation from its subcontractor that it will apply the employment conditions following from §2 and 3 AEntG and it will require the same from other subcontractors as well.

Yet by establishing a penal regulation which is effectuated by a fine, a deterrent effect is created for contractors who are thinking of doing business with *malafide* (foreign) subcontractors. Such a provision provides for an extra impetus to only do business with trustworthy subcontractors which pay the minimum wage to their posted construction workers.

§15 AEntG provides the option for the posted construction worker to institute proceedings before the German labor Court of the obligations of §14 AEntG if either the employer or the subcontractor has not paid the German minimum wage.

§18 AEntG contains a notification requirement for the employer established abroad. This encompasses that at the beginning of the posting, a request needs to be sent to the competent public authority containing essential information about the posted construction worker.[118]

Secondly, §14 AEntG entails the obligation to create and enforce a minimum wage. Before the AEntG, Germany had not installed any minimum wage at all. With the coming into force of the AEntG, minimum wages were established (only in collective agreements[119]) to which (sub) contractors are obligated to pay. A German national (federal) minimum wage is currently the topic of debate now that the Bundesrat already has decided in favor and coalition partners have agreed on introducing a minimum wage.[120]

Thirdly, with regard to §14 AEntG, there are some options for contractors to take some security measures in case a subcontractor appears to be malafide. These options concern for example the possibility to check whether a subcontractor is registered with the Association for the Prequalification of Construction Companies. This register is publicly accessible and has a legal basis in Article 8 No. 3(2) Vergabe- und Vertragsordnung für Bauleistungen, Teil A (hereinafter: VOB/A). However, this is only possible for public clients.

[118] AEntG §18
[119] W Koberski and others, *Arbeitnehmer-Entsendegesetz – Mindestarbeitsbedingungengesetz* (C.H. Beck München, 2011) 168 [25]
[120] Nederlandse Omroep Stichting, 'Ook Duitsland krijgt minimumloon' <http://nos.nl/artikel/576581-ook-duitsland-krijgt-minimumloon.html> accessed 27 February 2014

Moreover, there are also several self-regulatory instruments. It is for example possible that the main contractor does not pay the amount of money which is equal to the wage to the subcontractor, as a security measure.[121] Another option is that the client and the main contractor agree that the subcontractor must provide evidence that the minimum wage is paid. This may include for example the submission of a payroll or a declaration from workers stating that they have received their (minimum) wage.[122] If included in the agreement, this might also lead to the payment of damages by the subcontractor if he has not complied with the obligation to provide evidence[123]. Nevertheless, all these measures do not limit the liability of the main contractor in any way.

Now that §14 AEntG and its context have been outlined, it will be analyzed whether this chain liability effectively enforces the German minimum wage to the posted construction worker. The analysis is based on the opinions of the social partners, other stakeholders and scholars.

4.3 §14 AEntG: effective enforcement?[124]

This paragraph entails the opinions of the social partners, other stakeholders and scholars, which are again problematized and analyzed. Conclusions are drawn on the accuracy of their opinions.

In earlier research, it has been established that the German liability regulation is deemed effective, even though not all stakeholders are pleased with the current state of the law.[125] The German employers organizations, (Zentralverband Deutsches Baugewerbe, hereinafter: ZDB) and Hauptverband der Deutschen Bauindustrie (hereinafter: HDB) are not pleased with it.

In this context, ZDB stated in 2003, in a position paper regarding future plans, that the liability of §14 AEntG should be a liability only in a direct contractual relationship[126] and that there should be an option to be excluded from the liability for the main contractor.[127] It is thus

[121] K Tillmanns,'Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen (Arbeitnehmer-Entsendegesetz – AEntG)' (n 104)
[122] Koberski and others (n 119) 174 [56]
[123] Ibid 174 [57]
[124] If not referred to otherwise, this entire paragraph is drawn from Asshoff (n 10) 17-18
[125] Houwerzijl and Peters (n 9) 31
[126] Cf. Article 12 Draft Enforcement Directive
[127] ZDB, 'Positionspapier zur Zukunftssicherung der Deutschen Bauwirftschaft' (2003) <http://www.zdb.de/zdb.nsf/C226A117BA2753FBC1256D1800459B2A/$File/2003-04-01_Positionspapier_ZukunftssichgBauwirtschaft.pdf> accessed 27 February 2014

interesting to see that they opt for a liability which is much like Article 12 Draft Enforcement Directive.

4.3.1 Chain liability

§14 AEntG is a chain liability. As mentioned, ZDB argues that it should be a direct liability instead.[128] This sees to the fact that a direct liability limits the amount of guarantors which may be held liable for payment of the German minimum wage to the posted construction worker. On the other hand, the liability of more than one (guarantor - if a long subcontracting chain is present - is also regarded as an advantage as it increases chances for the posted construction worker to obtain the wage he is entitled to. This is an advantage in particular, when it concerns *malafide* companies which are trying to evade paying the German minimum wage to the posted construction worker. In this regard, the chain liability has two advantages; first, because there is a chain liability, the posted construction worker is always able to receive the wage he is entitled to as all contractors in the subcontracting chain may be held liable, and second, because a chain liability also provides for a certain deterrent effect, all subcontractors will examine carefully with which companies they will do business with. In Germany, this is known as the so called "*Plausibilitätsprüfung*"[129]. As a result, *malafide* companies should not be able to survive.

4.3.2 Due diligence

Currently §14 AEntG does not contain a due diligence or other options to exclude a liability for certain guarantors in the subcontracting chain. The self-regulatory measures discussed in 4.2.2 are only measures to diminish the chance of being held liable. Exclusion of the liability is not possible. It may thus be qualified as a no-fault or strict liability. In the literature, much critique was expressed on this point, until the Bundesverfassungsgericht (hereinafter: BVerfG) ruled that such a liability was proportional.[130] The main point of critique was that a contractor could be held liable even if 'due diligence' had been undertaken.[131] In this regard, ZDB and HDB suggested that that the liability of the guarantor should depend on fault and negligence[132].

IG BAU states in this regard that precisely because there is no option to exclude the liability, it is such an effective liability. This ensures much more interest in the German legislation and ways to make sure the law is observed, also by subcontractors. Moreover, they argue that

[128] ZDB, 'Positionspapier zur Zukunftssicherung der Deutschen Bauwirftschaft' (n 127)
[129] Koberski and others (n 119) 173 [49]
[130] Koberski and others (n 119) 165 [9], [10]
[131] Ibid 165 [10]
[132] Asshoff (n 10) 18

because it is not possible to escape this liability, it provides for more flexibility while it is not necessary to produce many documents proving that they cannot be held liable. On the other hand, it is completely the responsibility of the undertaking – based on their own risk assessment – with which subcontractors they do business and whether they monitor their subcontractors. In any case, this liability provides an effective incentive for the main contractor to ensure that its subcontractors abide by the law.[133]

4.3.3 Disadvantages for SMEs

ZDB and HDB have heavily criticized the liability of §14 AEntG and ZDB even suggested deleting this provision.[134] The reason to delete this provision is similar to what has been argued in the context of Article 12 Draft Enforcement Directive, namely the disadvantages for SMEs.

The costs of a liability for SMEs are (indirectly) mentioned by HDB, as they argue that this "causes an incalculable risk for private institutions"[135]. The reason why HDB does not mention this disadvantage for SMEs in particular might be because there are also quite a few advantages of a chain liability for SMEs. Koberski reiterates the German Parliament in this regard, which states that "*profitieren sollten (…) vor allem seriöse Klein- und Mittelbetriebe, die die Arbeitsbedingungen nach dem AEntG einhalten und deswegen in der Vergangenheit aus Kostengründen von den Unternehmern bei der Auftragsvergabe nicht berücksichtigt wurden. Die seriösität der potentiellen Vertragspartner werde für den Unternehmer deutlich an Attraktivität gewinnen, weil sich durch einen seriösen Vertragspartner für ihn das Risiko einer Inanspruchnahme mindere*"[136].

The German Parliament states that a chain liability is beneficial for SMEs complying with the payment of the German minimum wage, for the reason that they are no longer undercut by foreign companies but rather seen as a reputable contractor which reduces the risk on a claim. This is reinforced by the primary aim of the AEntG concerning rather the protection of the SMEs than the protection of posted construction workers.[137]

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[133] Ibid 18
[134] ZDB, 'Geschäftsbericht 2001' (2001) <http://www.zdb.de/zdb.nsf/A22D353B069E256FC1256D2400465C08/$File/ZDB%20Geschaeftsbericht%202001.pdf> accessed 27 February 2014
[135] Asshoff (n 10) 18
[136] Koberski and others (n 119) 163 [4]; Plenarprotokoll 14/14 des Deutschen Bundestag vom 10. Dezember 1998, 868 D
[137] Koberski and others (n 119) 166 [13]

Moreover, this measure provides for an incentive to only work with (sub) contractors which act correctly.[138] If the contractor gets an offer which is too low to include minimum wages, the contractor may not accept the offer.[139] It was also argued in favor of a chain liability that it is questionable whether this correct behavior of the (main) contractor can be guaranteed by means of contracts, because it concerns a serious responsibility and there is often a lack of authority of the main contractor.[140] A chain liability is therefore a suitable measure.

4.4 Conclusion

With this chapter it has been tried to provide an overview on §14 AEntG in which the definition, interpretation of the definition and the context were discussed. Based on the foregoing and the opinions of stakeholders, a conclusion will been drawn on the question whether or not §14 AEntG is an effective tool to enforce the payment of the minimum wage to the posted construction worker.

The German *Generalunternehmerhaftung* of §14 AEntG must be interpreted as the possibility for the posted construction worker to hold all guarantors liable, including the main contractor. This results in the option for the posted construction worker to always hold a guarantor liable when the employer does not pay the German minimum wage.

Regarding the question whether or not §14 AEntG provides for effective enforcement, the following conclusion may be drawn: the chain liability as laid down in §14 AEntG is deemed to provide for effective enforcement of the payment of the minimum wage of the host state to the posted construction worker.

The latter conclusion is based on the fact that all guarantors may be held liable, which increases the chance for the posted construction worker to receive his or her remuneration. Moreover, together with other flanking measures, e.g. the notification requirement for the employer which is established abroad, the chain liability has a preventive effect while it provides an incentive for undertakings to only work with (sub) contractors which pay the German minimum wage. Only contractors qualified as entrepreneurs who do not appoint other subcontractors are excluded.

[138] M Schlachter, 'Arbeitnehmer-Entsendegesetz' in Müller-Glöge and others (n 101) 231, AEntG
[139] M Schlachter, 'Arbeitnehmer-Entsendegesetz' in Müller-Glöge and others (n 101) 231-232, AEntG. Also: cf. §23(2) AEntG
[140] T Harbrecht, 'Die Auswirkungen der Einführung des § 1a Arbeitnehmer-Entsendegesetz (AEntG)' (1999) Baurecht 1376

The liability concerns a no-fault liability, which means that there is no due diligence option, not even for the main contractor. On the other hand, there are certain self-regulatory instruments by which guarantors can diminish the chance of being held liable. However, these self-regulatory instruments do not exclude a guarantor from the liability.

In addition to this, the type of liability, being a chain liability, brings about many advantages, also for SMEs, e.g. they are no longer undercut by foreign companies but they are rather seen as a reputable contractor which reduces the risk on a claim.

In sum, it may be stated that the chain liability is deemed to effectively enforce the payment of the German minimum wage to the posted construction worker because of the foregoing arguments.

5. Conclusion

This chapter contains a short recapitulation of the outcome of the sub question prior to the research question and the outcome of the first two sub questions. These questions have been answered in the previous chapters. On the basis of these answers, a comparison is made between the effective enforcement of Article 12 Draft Enforcement Directive and §14 AEntG. Based on this comparison, the research question will be answered, including an answer to the last sub question. In the answer, the necessity, effectiveness and political feasibility of a liability within the EU will be taken into account as well. To conclude this master thesis, recommendations for Member States will be provided on the implementation of a liability which provides posted construction workers effective enforcement of the payment of the minimum wage of the host state.

5.1 Recapitulation

This paragraph contains the answer to the question posed in advance of the research question and the first two sub questions which are part of the research question.

1. “To what extent is a liability within the EU necessary, effective and politically feasible?”

A liability measure is deemed necessary within the EU because it suppresses abuse and together with other flanking measures, such as better information, inspections and sanctions, a liability will take a comprehensive approach to enforcement of the payment of the minimum wage of the host state to the posted construction worker. All aspects are important for a balanced approach; next to a liability other enforcement measures are necessary to ensure a complete enforcement system within the EU. Similar arguments have played a role in the adoption process of Article 8 of Directive 2009/52.

The analysis of the effectiveness of a liability within the EU is largely based on the study of Jorens, Peters and Houwerzijl. In that regard, the initiative to take judicial proceedings against a (sub) contractor, the employment status of the posted construction worker and the preventive effect of a liability have been taken into account to analyze the effectiveness of a liability within the EU.

It follows from the analysis on the effectiveness that if a liability may only be invoked by the posted construction worker, the effectiveness of the liability is hampered because foreign workers fear to lose their job and they are often ill-informed about their rights. Moreover,

there are several strategies known which by which the application of a liability can be circumvented, e.g. by changing the employment status of the posted construction worker. Other enforcement measures need to be implemented in order to counteract this.

In addition, liability arrangements have a certain preventive effect, depending on the type of liability (e.g. direct or chain liability). The preventive effect increases the effectiveness of the liability because the main contractor and (sub) contractors in general prefer to avoid liability and therefore carefully choose their subcontractors and check up on then in the course of the contractual relationship.

With regard to the political feasibility of a liability provision, the political situation regarding Article 12 Draft Enforcement Directive is explanatory. Although the CJEU ruled in the Wolff and Müller case that the German chain liability was lawful, within other EU institutions there is a more or less east-west division. Eastern European Member States are mostly against a liability, whereas Western European Member States are mostly in favor of a liability.

The necessary political compromises which are thus made are also visible in Article 8 of Directive 2009/52, which contains both a direct and a (mitigated) chain liability and has set precedence in this regard. It has been argued that the chain liability is a dead letter. The political difficulties with this provision are confirmed by the few Member States which have currently transposed the Directive. Political difficulties are also visible in the Second Draft of the Draft Enforcement Directive. Similarly, this has consequences for the effective enforcement of this provision.

Although the political compromise is labelled very ambiguous, there seems to be a strong political will to adopt the Draft Enforcement Directive. The upcoming European elections for the European Parliament might also positively influence on future political compromises. It is thus quite conceivable that agreement will be reached on Article 12 of the Draft Enforcement Directive and a liability within the EU on this topic seems politically feasible.

2. “To what extent does a direct liability effectively enforce the payment of the minimum wage of the host state to the posted construction worker?”

It may be concluded that Article 12 Draft Enforcement Directive must be interpreted as the possibility for the posted construction worker to hold only the (sub) contractor liable of which the employer is a direct subcontractor. This results in the inability to hold any other contractor

liable, even if the contractor which has been held liable fails to pay the minimum wage of the host state.

Regarding the question whether or not Article 12 of the Draft Enforcement Directive provides for effective enforcement, the following conclusion may be drawn: the direct liability as laid down in Article 12 of the Draft Enforcement Directive needs to be amended as a whole. This is concluded because the text leaves room for different interpretations which results in a lack of clarity for the posted construction worker. Moreover, the direct liability is easily circumvented by adding other (sub) contractors to the subcontracting chain. This leads to the impossibility for the posted construction worker to obtain his or her wage.

More specifically to the content of the direct liability, the due diligence paragraph needs to be deleted. The absence of a European definition of due diligence will lead to many different interpretations at the national level. Because Member States have a certain margin of appreciation in this regard, the due diligence criteria might be easily met which influences the effectiveness of the liability when the due diligence also becomes a ground for exoneration of the liability. Due diligence may not cause exemption of the liability.

With regard to the disadvantages for SMEs, the argument of disproportionate administrative obligations has been mentioned. These administrative obligations might however be mitigated by either the time there is to adapt to the measure or because undertakings already live up to similar administrative obligations. In addition, (chain) liability arrangements are also mentioned as beneficial for SMEs for the reason that foreign companies not complying with national labor rules will no longer undercut SMEs in tendering processes.

In comparison to Article 8 of Directive 2009/52, Article 12 of the Draft Enforcement Directive lacks flanking measures which strengthen the effect of the liability.

In sum, the direct liability of Article 12 Draft Enforcement Directive is deemed not to be an effective tool to enforce the payment of the minimum wage of the host state to the posted construction worker. There is a lack of clarity for posted construction workers, the direct liability is easily circumvented, the due diligence paragraph needs to be deleted as it may cause exemption of the liability and the Draft Enforcement Directive lacks flanking measures which strengthen the effect of the liability. On the other hand, the disadvantages for SMEs are deemed to be mitigated.

3. “To what extent does a chain liability effectively enforce the payment of the minimum wage of the host state to the posted construction worker?”

The German *Generalunternehmerhaftung* of §14 AEntG must be interpreted as the possibility for the posted construction worker to hold all guarantors liable, including the main contractor. This results in the option for the posted construction worker to always hold a guarantor liable when the employer does not pay the German minimum wage.

Regarding the question whether or not §14 AEntG provides for effective enforcement, the following conclusion may be drawn: the chain liability as laid down in §14 AEntG is deemed to provide for effective enforcement of the payment of the minimum wage of the host state to the posted construction worker.

The latter conclusion is based on the fact that all guarantors may be held liable, which increases the chance for the posted construction worker to receive his or her wage. Moreover, together with other flanking measures, being the sanction for contractors doing business with *malafide* companies and the notification requirement for the employer which is established abroad, the chain liability has a preventive effect while it provides an incentive for undertakings to only work with (sub) contractors which pay the German minimum wage. Only contractors qualified as entrepreneurs who do not appoint other subcontractors are excluded.

The liability concerns a no-fault liability, which means that there is no due diligence option, not even for the main contractor. On the other hand, there are certain self-regulatory instruments by which guarantors can diminish the chance of being held liable. However, these self-regulatory instruments do not exclude a guarantor from the liability.

In addition to this, the type of liability, being a chain liability, brings about many advantages, also for SMEs, e.g. they are no longer undercut by foreign companies but they are rather seen as a reputable contractor which reduces the risk on a claim.

In sum, it may be stated that the chain liability is deemed to effectively enforce the payment of the German minimum wage to the posted construction worker because of the foregoing arguments.

5.2 Comparison

The comparison between Article 12 Draft Enforcement Directive and §14 AEntG is based on several elements which affect the effective enforcement of both liability provisions.

The elements on which the comparison is based are the type of liability, the (absence of a) due diligence and the consequences for SMEs.

The type of liability

The type of liability differs greatly. Article 12 Draft Enforcement Directive needs to be qualified as a direct liability and §14 AEntG as a chain liability.

Whereas a direct liability ensures that the posted construction worker is able to hold only the subcontractor of which the employer is a direct subcontractor liable, a chain liability ensures that the posted worker may hold every guarantor in the subcontracting chain liable. As a result, a direct liability is easily circumvented, by adding another *malafide* company to the subcontracting chain – which will disappear as easily as the employer of the posted construction worker. The result is that no payment will take place at all. This problem cannot be circumvented with a chain liability, because then there will always be the main contractor which will have to pay the posted construction worker.

Another important influence of a chain liability is its preventive effect. As every single company in the subcontracting chain may be held liable, this creates a deterrent effect. Because being held liable will often entail many expenses, (main) contactors will become careful in their choice of whom they do business with and with whom their subcontractors do business with. This will result in a higher chance for posted construction workers to receive the wage they are entitled to.

With a direct liability, this effect is reduced to the extent that there is only a deterrent effect for the contractor of which the employer is a direct subcontractor. As mentioned above, because the liability is easily circumvented, the deterrent effect of a direct liability is very much reduced. It would thus still be possible for *malafide* companies to offer lower tariffs and no liability to (main) contractors, it is likely that a (main) contractor will accept, thus continuing the exploitation and non-payment of the minimum wage of the host state to the posted construction worker.

(Absence of a) due diligence

Article 12 Draft Enforcement Directive contains a voluntary due diligence and §14 AEntG does not. If a liability provision does not contain a due diligence for either one or more subcontractors, this enhances effective enforcement. This is explained by the fact that a due diligence option creates the possibility for guarantors to escape their liability, thereby reducing the effectiveness of the enforcement of the payment of the minimum wage of the host state. If a guarantor is able to successfully invoke the due diligence as an exoneration to

the liability, the consequence for the posted construction worker is that he will not receive the minimum wage of the host state. Therefore, due diligence obligations should be eliminated entirely. Self-regulatory measures as in place in the Germany could replace due diligence – as long as it is not possible to limit the liability with these measures. Examples of these self-regulatory measures are the obligation for a subcontractor to show evidence that the wage is paid or the construction in which the main contractor pays the employees instead of the employer.

The consequences for SMEs

The consequences for SMEs are rather similar when it concerns a direct and a chain liability. For both liabilities, it is said that a liability provision creates administrative obligations and extra costs, which could result in losing out on their business. On the other hand, it has also been argued that these disadvantages may be mitigated by the considerable time it will take before this legislation will come into force. This will give SMEs the time to adapt and prepare for the new measure. Moreover, with regard to a chain liability, even advantages have been mentioned for SMEs which already comply with the payment of the national minimum wage. They will no longer be undercut by foreign *malafide* companies but they will be favored as they will be seen as a reputable contractor which reduces the risk on a claim.

5.3 The research question answered

The research question posed in the introduction reads as follows:

Does a chain liability ensure a more effective enforcement than a direct liability for the payment of the minimum wage of the host state to the posted construction worker within the EU and to what extent is either one or the other liability more favorable for a Member State to implement?

In order to answer the research question, it is of importance to reiterate that ‘a more effective enforcement’ is defined in this thesis as a higher chance of compliance with the payment of wages in the host state to the posted construction worker.

It follows from the comparison of Article 12 Draft Enforcement Directive and §14 AEntG that a chain liability indeed is deemed to provide a more effective enforcement than a direct liability for the payment of the minimum wage of the host state to the posted construction worker within the EU.

This is concluded on the basis of an examination of three elements of a liability provision: the type of liability, the (absence of a) due diligence and the (dis)advantages for SMEs. During the writing, it has come to the fore that the preventive effect of the liability and additional flanking (enforcement) measures are also important aspects which need to be taken into account when comparing these liabilities.

The type of liability and the preventive effect of the liability are the determining factors in the answer to the question to which extent a chain liability provides a more effective enforcement than a direct liability. The answer to this question is that a chain liability in all ways provides a more effective enforcement. This is the case with regard to the amount of guarantors which may be held liable – this amount is considerably higher with a chain liability (cf. all instead of one). As a result, chances to obtain the minimum wage to which a posted construction worker is entitled are much higher. Moreover, the deterrent effect of a chain liability is much more influential than that of a direct liability. The reason for this is similar; while much more guarantors may be held liable, all guarantors become much more careful with whom they do business with. A subsequent result is that *malafide* companies will be contracted less as guarantors want to avoid the risk to be held liable.

To what extent would it be more favorable for a Member State to choose for either a direct or a chain liability?

Assuming that a Member State wishes to provide effective enforcement to protect the payment of the national minimum wage to the posted construction worker, it would be more favorable to choose for a chain liability as mentioned above.

However, because the latest version of the Second Draft only mentions the posted construction worker as the person who is able to hold a guarantor liable, this might hamper the effective enforcement of the liability. This is the case because the abused foreign workers fear to lose their job and they are often ill-informed about their rights because there is a lack of reliable (legal) information, not available in their own language. Therefore, I would like to advise to not only allow the posted worker to commence judicial proceedings but also other stakeholders, for example trade unions.

It is also important that the chain liability does not contain any due diligence obligations. These obligations will create the possibility to escape the liability, thereby reducing the effectiveness of the enforcement of the payment of the minimum wage of the host state. This is very detrimental for the effectiveness of the liability, not only because the guarantor no

longer have to pay but also because it takes down the preventive effect as the deterrent effect disappears.

However, the implementation of a chain liability is not the only action which needs to be taken to reach effective wage protection for the posted construction worker. Other supporting enforcement measures are of importance in this regard as well. These flanking measures can be divided into two groups: flanking measures which effectively enhance the enforcement of the liability by addressing the alternative strategies such as bogus self-employment (mentioned in chapter two) and flanking measures which increase the preventive effect of a chain liability (mentioned in chapter four). Both categories of flanking measures are of importance to create an effective chain liability.

The first category consists of provisions such as article 3 (factual elements of posting) and article 9 of the Draft Enforcement Directive (administrative requirements and control measures), the second category could consist of a notification requirement for the employer established abroad (§18 AEntG) and financial sanctions (Article 5 Directive 2009/52) e.g. for doing business with *malafide* companies.

In addition to the measures mentioned above, and in order to respond to the disadvantages mentioned for the SMEs, it seems essential to ensure that SMEs have a transitional period to prepare for the implementation of the liability.

Concluding, if a Member State aims to protect the payment of the minimum wage of the host state to the posted construction worker, it is more favorable for a Member State to implement a chain liability in which not only the posted construction worker is able to hold a contractor liable, which does not contain due diligence obligations and which also refers to flanking measures to counteract alternative strategies which circumvent the liability and flanking measures which enhance the preventive effect of the chain liability. In addition, it seems essential to ensure that SMEs have a transitional period to prepare for the implementation of the liability.

Recommendations for Member States

1. In order to provide effective enforcement to protect the payment of the national minimum wage to the posted construction worker, it would be more favorable to implement a chain liability.

2. In order to strengthen the chain liability, it is of importance to exclude any due diligence obligations which might exempt guarantors from their liability. Self-regulatory measures which cannot exempt guarantors from their liability might be an alternative to due diligence obligations.

3. Flanking (enforcement) measures which effectively enhance the enforcement of the liability by addressing the alternative strategies such as bogus self-employment are necessary to ensure that the liability will not be easily circumvented, which would render the liability useless.

4. Other flanking (enforcement) measures such as a notification requirement for the employer established abroad or financial sanctions for doing business with *malafide* companies are necessary to the extent that they increase the preventive effect of a chain liability.

5. It is recommended to provide SMEs with a transitional period to prepare for the implementation of the liability. Information about the new legislation needs to be spread in time.

Bibliography

Table of Cases

- 5 AZR 617/01 (A) Bundesarbeitsgericht, *Beschluss vom 6. 11. 2002* Neue Zeitschrift für Arbeitsrecht 2003 490

- C-60/03 *Wolff and Müller v Pereira* [2004] ECR I-9553

- C-268/06 *Impact* [2008] ECR I-02483

Table of Legislation

- Arbeitnehmer-Entsendegesetz (AEntG) [2009]

- Council Directive (EC) 96/71 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1

- Council Directive (EC) 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24

- European Commission '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

- European Commission, 'Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals' COM (2007) 249 final

- European Council, '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' (2012/0061 COD) 17611/13

Secondary Sources

- A van Dongen and C Rosman, 'Poolse trukendoos op de bouwplaats' *Eindhovens Dagblad* (Eindhoven, 31 Augustus 2013)

- B Ségol, 'Letter to EPSCO Ministers' <http://www.sindikat-zsss.si/attachments/article/1108/Pismo_EKS_MinistromZaDelo_EU_DirektivaNapoteniDelavci_06122013.pdf> accessed 27 February 2014

- Business Europe
  -- 'Business Europe Position Paper – Enforcement of the Posting of Workers Directive' (25 May 2012) <http://www.businesseurope.eu/DocShareNoFrame/docs/5/ANOHIIFDNJFCECMOHBBOIICIPDWY9DBNT39LTE4Q/UNICE/docs/DLS/2012-00677-E.pdf> accessed 27 February 2014

  -- 'Difficulties with the enforcement of the Directive on the Posting of Workers – EP Conference' (22 March 2012) < http://www.businesseurope.eu/DocShareNoFrame/docs/1/CJPKKBDDDJCMPHJOMEIDPMAJPDWY9DBKWD9LTE4Q/UNICE/docs/DLS/2012-00410-E.pdf>

- Chalmers and others, *European Union Law* (2nd edn, Cambridge University 2010)

- Conclusions of the panel discussion during a conference organized by the Institute of the Research on the Market Economy, 21 May 2011, Poland

- ETUC
  -- 'ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive' (26 April 2012) <http://www.etuc.org/a/9917> accessed 27 February 2014

  -- 'EU governments must end social dumping – ETUC calls on ministers to enforce posted workers' rights' (2013) <http://www.etuc.org/a/11805> accessed 27 February 2014

  -- 'Position on the Enforcement Directive of the Posting of Workers Directive –

Adopted at the Executive Committee on 5-6 June 2012' (12 June 2012) <http://www.etuc.org/a/10037> accessed 27 February 2014

- EFBWW
  -- 'A new case of social dumping and exploitation by Atlanco Rimec' (2013) <http://www.efbww.org/default.asp?index=889&Language=EN> accessed 27 February 2014

  -- 'EPSCO agreement on the Enforcement Directive' (2013) <http://www.efbww.org/default.asp?Index=899&Language=EN> accessed 27 February 2014

  -- 'National manifestations by several EFBWW affiliates on 15 May on the worrying development regarding the Enforcement Directive' (2012) <http://www.efbww.org/default.asp?Index=876&Language=EN> accessed 27 February 2014

- European Commission,
  -- 'Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty' COM (2006) 48 final

  -- 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) 603

  European Parliament
  -- 'Committee meeting EMPL 21.02.2013' (2013) < http://www.europarl.europa.eu/ep-live/en/committees/video?event=20130221-0900-COMMITTEE-EMPL> accessed 27 February 2014

  -- 'Resolution on the social responsibility of subcontracting undertakings in production chains' 2008/2249(INI)

- FNV Bondgenoten, 'Europa Nieuws' (2012) <http://www.fnv.nl/site/media/pdf/272013/21juni> accessed 27 February 2014

- G Asshoff, *Liability in subcontracting processes in the European construction sector: Germany* (European Foundation for the Improvement of Living and Working Conditions, 2008) <http://www.eurofound.europa.eu/pubdocs/2008/875/en/1/ef08875en.pdf> accessed 27 February 2014;

- IG BAU
  -- 'IG BAU warnt vor dorhender Prozessflut bei Arbeitsgerichten' (2013) <http://www.igbau.de/IG_BAU_warnt_vor_drohender_Prozessflut_bei_Arbeitsgerichten.html> accessed on 27 February 2014

  -- 'Verschlechterung der EU-Durchsetzungsrichtlinie: IG BAU warnt vor Raubbau an Arbeiterrechten in der EU' (12 December 2013) <http://www.igbau.de/Verschlechterung_der_EU-Durchsetzungsrichtlinie_IG_BAU_warnt_vor_Raubbau_an_Arbeiterrechten_in_de...html> accessed 27 February 2014

- ISMERI EUROPA, 'Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services' (2012) < http://ec.europa.eu/social/main.jsp?catId=471> accessed 27 February 2014

- J Malmberg and C Johansson, 'The Commissions Posting Package' [Swedish Institute for European Policy Studies] (2012) 2012 European Policy Analysis <http://www.sieps.se/sites/default/files/2012_8epa.pdf> accessed 27 February 2014

- K Tillmanns,'Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäβig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen (Arbeitnehmer-Entsendegesetz – AEntG)' in Henssler (ed) *Arbeitsrecht Kommentar* (Dr. Otto Schmidt, 2010)

- L Asscher, 'Verslag van de Raad Werkgelegenheid en Sociaal Beleid d.d. 9 december 2013' (2013) < http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/12/19/verslag-van-de-raad-werkgelegenheid-en-sociaal-beleid-d-d-9-december-2013.html> accessed 27 February 2014

- M Govaert and A van Beers, ‘Handhaving detacheringsrichtlijn; hoe te ontkomen aan ketenaansprakelijkheid?’ (2013) 68 Tijdschrift voor Recht en Arbeid

- M Schlachter,
  -- ‘Arbeitnehmer-Entsendegesetz’ in Müller-Glöge and others *Erfurter Kommentar zum Arbeitsrecht* (Verlag C.H. Beck München, 2011)

  -- ‘Erfurter Kommentar zum Arbeitsrecht’ (2013) <http://beck-online.beck.de/default.aspx?vpath=bibdata/komm/ErfKoArbR_13/AEntG/cont/ErfKoArbR.AEntG.p14%2Ehtm> accessed 27 February 2014

- MS Houwerzijl
  -- *De Detacheringsrichtlijn – over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (Europese Monografieën, Kluwer, Deventer 2004)

  -- and S Peters, *Liabilitiy in subcontracting processes in the European construction sector* (European Foundation for the improvement of Living and Working Conditions, 2008) <http://www.eurofound.europa.eu/pubdocs/2008/94/en/1/EF0894EN.pdf> accessed 27 February 2014

  -- and A van Hoek, ‘Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union’ (2011)

  -- and T Wilkinson, ‘The Effects of EU law on the Social and Economic Goals of Europe 2020: A Decision Theoretic Approach to Wage Liability Regimes in Modern Europe’ (2013) 14 German Law Journal

- Nederlandse Omroep Stichting, ‘Ook Duitsland krijgt minimumloon’ <http://nos.nl/artikel/576581-ook-duitsland-krijgt-minimumloon.html> accessed 27 February 2014

-

- Plenarprotokoll 14/14 des Deutschen Bundestag vom 10. Dezember 1998, 868 D

- PW Strick, ‘Das neue Arbeitnehmer-Entsendegesetz (AEntG), Anwendbarkeit der Entscheidung OLG Düsseldorf’ (1999) Baurecht 713

- S Deckers, ‘Der Mindestentgeltbegriff in § 1a AEntG (2008) <http://beck-online.beck.de/default.aspx?typ=reference&y=300&z=NZA&b=2008&s=321> accessed 27 February 2014

- T Harbrecht, ‘Die Auswirkungen der Einführung des § 1a Arbeitnehmer-Entsendegesetz (AEntG)’ (1999) Baurecht 1376

- UEAPME, ‘Position on the 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’ (12 July 2012) <http://www.ueapme.com/IMG/pdf/UEAPME_pp_posting_enforcement_directive_final_120712.pdf> accessed 27 February 2014

- W Koberski and others, *Arbeitnehmer-Entsendegesetz – Mindestarbeitsbedingungengesetz* (C.H. Beck München, 2011)

- Y Jorens, S Peters and MS Houwerzijl, ‘Study on the protection of workers’ rights in subcontracting processes in the European Union (2012)’ <http://ec.europa.eu/social/main.jsp?catId=471> accessed 27 February 2014

ZDB
-- ‘Positionspapier zur Zukunftssicherung der Deutschen Bauwirftschaft’ (2003) <http://www.zdb.de/zdb.nsf/C226A117BA2753FBC1256D1800459B2A/$File/2003-04-01_Positionspapier_ZukunftssichgBauwirtschaft.pdf> accessed 27 February 2014

-- ‘Geschäftsbericht 2001’ (2001) <http://www.zdb.de/zdb.nsf/A22D353B069E256FC1256D2400465C08/$File/ZDB%20Geschaeftsbericht%202001.pdf> accessed 27 February 2014

Annex I: Definitions of key terminology used

Client

The subcontracting chain starts with the client, who is defined as: 'any natural or legal person, public or private, who orders and/or pays for the works that are the object of a contract'.

The contractor

The client hires one or more 'contractors'. A contractor may be defined as 'any participant who agrees to carry out the physical execution of the works that are the object of a contract'.

The principal / main contractor

If the client only engages the services of one contractor to carry out all the work, then obviously no chain of subcontracting exists. However, the client may also employ the services of a single contractor who is responsible for the entire building project, but who, in turn, outsources part of the work to other contractors. In this case, the first contractor is referred to as the 'principal contractor'.

The subcontractors

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

Temporary work agencies (labor-only subcontracting)

Apart from outsourcing work to specialized subcontractors – who may carry out the work themselves as self-employed operators or through their own employees – contractors may also engage external labor to perform some of the work under their supervision. In some sectors and/or countries, the practice of hiring workers from temporary work agencies is less accepted than in others. In this study, the parties that only offer the services of their workers to a contractor are referred to as 'temporary work agencies' (the more general term 'supplier' may also be used, but is avoided in this study).

Agency worker

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

The subcontracting chain

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

A subcontracting chain constitutes a logistical chain, as well as a value chain of an economic and productive nature – 'from conception to completion'. Single specialties or tasks are often 'externalized' to small companies or self-employed workers. Subcontracting chains may sometimes

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

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

Liability

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

Guarantor

A 'guarantor' is someone who is made liable for paying the debts of the subcontractor if the latter party defaults; in practice, this is usually the principal contractor and/or client.

Debtor

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

Creditor

If the debtor does not fulfill the said obligations in respect of the 'creditor', he will therefore be indebted to this party – for instance to the employee, the social fund, the Inland Revenue, social security authorities.

Thus, the creditor can be a person, company or institution to whom or which the money is owed.

Annex II: Legislative texts

Article 12 Draft Enforcement Directive – First Draft

1. With respect to the construction activities referred to in the Annex to Directive 96/71/EC, for all posting situations covered by Article 1(3) of Directive 96/71/EC, the Member States shall ensure on a non–discriminatory basis with regard to the protection of the equivalent rights of employees of direct subcontractors established in its territory, that the contractor of which the employer (service provider or temporary employment undertaking or placement agency) is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker and/or common funds or institutions of social partners for non-payment of the following:

(a) any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 (1) of Directive 96/71/EC;

(b) any back-payments or refund of taxes or social security contributions unduly withheld from his/her salary.

The liability referred to in the present paragraph shall be limited to worker's rights acquired under the contractual relationship between the contractor and his subcontractor.

2. Member States shall provide that a contractor who has undertaken due diligence shall not be liable in accordance with paragraph 1. Such systems shall be applied in a transparent, nondiscriminatory and proportionate way. They may imply preventive measures taken by the contractor concerning proof provided by the subcontractor of the main working conditions applied to the posted workers as referred to in Article 3 (1) of Directive 96/71/EC, including pay slips and payment of wages, the respect of social security and/or taxation obligations in the Member State of establishment and compliance with the applicable rules on posting of workers.

3. Member States may, in conformity with Union law, provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis in regard to the scope and range of subcontractor liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those contained in the Annex to Directive

96/71/EC. Member States may in these cases provide that a contractor that has undertaken due diligence as defined by national law shall not be liable.

4. Within three years after the date referred to in Article 20, the Commission shall, in consultation with the Member States and social partners at EU level, review the application of this Article with a view to proposing, where appropriate, any necessary amendments or modifications.

Article 12 Draft Enforcement Directive – Second Draft

1. In order to tackle fraud and abuse, Member States may, after consultation of the relevant social partners, in accordance with national law and/or practice, take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer/service provider covered by Article 1 (3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC.

2. As regards the activities mentioned in the Annex to Directive 96/71/EC, Member States shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer, for the respect of the posted workers' rights referred to in paragraph 1 of this Article.

2a. The liability referred to in paragraphs 1 and 2 shall be limited to worker's rights acquired under the contractual relationship between the contractor and his subcontractor.

3. Member States may, in conformity with Union law, equally provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis in regard to the scope and range of subcontracting liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those contained in the Annex to Directive 96/71/EC.

Member States may in the cases referred to in paragraphs 1, 2 and 3 provide that a contractor that has taken due diligence obligations as defined by national law shall not be liable.

3a. Instead of liability rules referred to in paragraph 2 of this Article, Member States may take other appropriate enforcement measures, in accordance with EU 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.

3b. Member States shall inform the Commission about measures taken under this Article and shall make the information generally available in the most relevant language(s), the choice being left to Member States. In the case of paragraph 2 of this Article, the information to the Commission shall include elements setting out liability in subcontracting chains. In the case of paragraph 3a of this Article, the information to the Commission shall include elements setting out the effectiveness of the alternative national measures with regard to the liability rules referred to in paragraph 2 of this Article.

The Commission shall make this information available to the other Member States.

3c. The Commission shall closely monitor the application of this Article.

4. Within three years after the date referred to in Article 20, the Commission shall, in consultation with the Member States and social partners at Union level, review the application of this Article with a view to proposing, where appropriate, any necessary amendments or modifications.

§ 14 AEntG

Ein Unternehmer, der einen anderen Unternehmer mit der Erbringung von Werk- oder Dienstleistungen beauftragt, haftet für die Verpflichtungen dieses Unternehmers, eines Nachunternehmers oder eines von dem Unternehmer oder einem Nachunternehmer beauftragten Verleihers zur Zahlung des Mindestentgelts an Arbeitnehmer oder Arbeitnehmerinnen oder zur Zahlung von Beiträgen an eine gemeinsame Einrichtung der Tarifvertragsparteien nach § 8 wie ein Bürge, der auf die Einrede der Vorausklage verzichtet hat. Das Mindestentgelt im Sinne des Satzes 1 umfasst nur den Betrag, der nach Abzug der Steuern und der Beiträge zur Sozialversicherung und zur Arbeitsförderung oder entsprechender Aufwendungen zur sozialen Sicherung an Arbeitnehmer oder Arbeitnehmerinnen auszuzahlen ist (Nettoentgelt).

Article 8 Directive 2009/52/EC

1. Where the employer is a subcontractor and without prejudice to the provisions of national law concerning the rights of contribution or recourse or to the provisions of national law in the field of social security, Member States shall ensure that the contractor of which the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay:
(a) any financial sanction imposed under Article 5; and
(b) any back payments due under Article 6(1)(a) and (c) and Article 6(2) and(3).

2. Where the employer is a subcontractor, Member States shall ensure that the main contractor and any intermediate subcontractor, where they knew that the employing subcontractor employed illegally staying third-country nationals, may be liable to make the payments referred to in paragraph 1 in addition to or in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor. 3. A contractor that has undertaken due diligence obligations as defined by national law shall not be liable under paragraphs 1 and 2. 4. Member States may provide for more stringent liability rules under national law.

3. A contractor that has undertaken due diligence obligations as defined by national law shall not be liable under paragraphs 1 and 2.

4. Member States may provide for more stringent liability rules under national law.

Article 3 Draft Enforcement Directive

1. For the purpose of implementing, applying and enforcing Directive 96/71/EC the competent authorities shall take into account all factual elements characterising the activities carried out by an undertaking in the State in which it is established in order to determine whether it genuinely performs substantial activities, other than purely internal management and/or administrative activities. Such elements may include:

(a) the place where the undertaking has its registered office and administration, uses office space, pays taxes, has a professional licence or is registered with the chambers of commerce or professional bodies,

(b) the place where posted workers are recruited,

(c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand,

(d) the place where the undertaking performs its substantial business activity and where it employs administrative staff,

(e) the number of contracts performed and/or turnover realised in the Member State of establishment,

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

(a) the work is carried out for a limited period of time in another Member State;

(b) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 and/or the Rome Convention;

(c) the posted worker returns or is expected to resume working to the Member State from which he/she is posted after completion of the work or the provision of services for which he or she was posted;

(d) travel, board and lodging/accommodation is provided or reimbursed by the employer who posts the worker, and if so, how this is done; as well as

(e) any previous periods during which the post was filled by the same or another (posted) worker.

3. All the factual elements enumerated in paragraphs 1 and 2 above are indicative factors in the overall assessment to be made in case of doubt, and may not therefore be considered in isolation. The assessment of these elements shall be adapted to each specific case and take account of the specificities of the situation.

Article 9 Draft Enforcement Directive

1. 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.
For these purposes Member States may in particular impose the following measures:

(a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, containing the relevant information necessary in order to allow factual controls at the workplace, including:
i) the identity of the service provider;
ii) the anticipated number of clearly identifiable posted workers;
iii) the persons referred to under (ca) and (d);
iv) the anticipated duration, envisaged beginning and end date of the posting;
v) the address(es) of the workplace; and
vi) the nature of the services justifying the posting;

(b) an obligation to keep or make available and/or retain copies in paper or electronic form of the employment contract (or an equivalent document within the meaning of Directive 91/533, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive), payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector, the operations base or the vehicle with which the service is provided;

(ba) an obligation to deliver the documents referred to under (b), after the period of posting, at the request of the authorities of the host Member State, within a reasonable period of time;

(c) an obligation to provide a translation of the documents referred to under (b) into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the Member State;

ca) an obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be;

(d) an obligation to designate a contact person, if necessary, with whom the relevant social partners may seek to induce the service provider to enter into collective bargaining within the host Member State, in accordance with national legislation and practice, during the period in which the services are provided. This person may be a different person than the person referred to under (ca) and does not have to be present in the host Member State;

1a. Member States may impose other administrative requirements and control measures should situations or new developments arise from which it appears existing administrative requirements and control measures are not sufficient or efficient in order to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and this Directive, provided that these are justified and proportionate.

1b. Nothing in this Article shall affect other obligations deriving from the EU legislation and/or national law regarding worker´s protection or employment of workers provided that they are equally applicable to companies established in the Member State concerned and that they are justified and proportionate.

2. Member States shall ensure that the procedures and formalities relating to the posting of workers pursuant to this Article can be completed easily by undertakings, at a distance and by electronic means as far as possible.

2a. Member States shall notify the Commission and inform service providers of any measures referred to in paragraphs 1 and 1a that they apply or that have been implemented by them. The Commission shall communicate the provisions concerned to the other Member States. The information for the service providers shall be made generally available on a single national website in the most relevant language(s), as determined by the Member State.

The Commission shall monitor the application of the measures referred to in paragraph 1 and 1a closely, evaluate their compliance with Union law and shall, where appropriate, take the necessary measures in accordance with its competences under the Treaty.
The Commission shall report regularly to the Council on measures notified by Member States and, where appropriate, on the state of play of its assessment/analysis.

3. Within three years after the date referred to in Article 20, the appropriateness and adequacy of the application of national control measures shall, in consultation with Member States, be reviewed in the light of the experiences with and effectiveness of the system for administrative cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers as well as technological developments, with a view to proposing, where appropriate, any necessary amendments or modifications.