

## LIABILITY REGULATIONS IN EUROPEAN SUBCONTRACTING: WILL JOINT LIABILITY BE THE 21<sup>ST</sup> CENTURY EUROPEAN APPROACH?

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The proliferation of Multinational Enterprises (“MNE”) in the European marketplace has been a mixed blessing. On the one hand, the decentralization and transnationalisation of European business enterprises has ushered in an impressive era of economic growth and stability in the European Union (“E.U.”).<sup>1</sup> MNEs can deliver substantial benefits to European Union Member States (“Member States”) by efficiently allocating labour, capital, and technology<sup>2</sup> and fostering intense competition between enterprises previously protected by national boundaries. The actual result of this brave new world of economic activity has been an “unprecedented rate of economic activity over the last quarter of a century [that] has placed a major role in raising employment levels across most economies of the European Union.”<sup>3</sup> On the other hand, the decentralization and transnationalisation of European business enterprises has generated new regulatory, economic, and social challenges. Today’s European MNEs lack the traditional vertical integration of yesteryear, and instead take a more horizontal organizational approach, creating complex production and labor networks.<sup>4</sup> Particularly, the practice of subcontracting has experienced a boom in the European Union over the past few decades.<sup>5</sup> Many MNEs do not just

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<sup>1</sup> Motion for a European Parliament Resolution on the Social Responsibility of Subcontracting Undertakings in Production Chains, at 4, EUR. PARL. RES. 2008/2249(INI)(2008), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARTL&mode=XML&language=EN&reference=PE415.234> [hereinafter *Motion*].

<sup>2</sup> INT’L LABOUR ORG. [ILO], TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 2 (3d ed. 2001), *available at* <http://www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/documents/normativeinstrument/kd00121.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 9.

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utilize complex subcontracting chains primarily in the construction sector, “but also in other economic sectors such as the cleaning industry, transport, tourism and the shipyard industry, to name only a few.”<sup>6</sup> The widespread use of subcontracting chains has raised important legal questions regarding the “legal implications of subcontracting for employers and workers, its impact on employee rights, the increased potential for social dumping and a potential avoidance of fiscal and social security responsibilities.”<sup>7</sup> This note examines the recent proposal by the European Parliament’s Committee on Employment and Social Affairs (“Committee”) for new regulations imposing enterprise liability for European MNEs. The note is divided into four sections. The First Section will examine the Committee’s *Motion for a European Parliament Resolution on the Social Responsibility of Subcontracting Undertakings in Production Chains* (“Motion”) by examining its broad concepts, defining key concepts, and exploring the Motion’s recitals individually. The Second Section will examine enterprise liability laws already in place in eight Member States. The Second Section will examine each Member States’ laws and evaluate their effect and effectiveness. The Third Section will examine reactions of European social and business actors to the principal of joint liability. The Fourth Section is dedicated to conclusions.

**I. THE MOTION, KEY CONCEPTS DEFINED, AND THE MOTION’S RECITALS**

**A. The Motion’s broad principles.**

The Committee’s Motion is an eleven-page document with sweeping possibilities for the European business community. Though it mostly reiterates social and labour policies of previous E.U. resolutions and mandates, including those calling for penalties against companies that illegally employ third-country nationals<sup>8</sup> and those calling for increased labour rights awareness among posted workers,<sup>9</sup> the truly ground breaking recommendation is for the “[European] Commission to establish a clear-cut Community legal instrument introducing joint and several liability at the European level.” The Motion’s authors call their proposed liability regime, “[a] European ‘joint liability’ or ‘client liability’

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<sup>6</sup> *Id.*

<sup>7</sup> *Motion, supra* note 1, at 9.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 5.

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system” that is a European solution to European problems.<sup>10</sup> At a minimum, the Motion calls for enterprise liability for European companies, with regards to “wages, social security contributions, taxes, and damages in relation to work-related accidents.”<sup>11</sup> The Motion lacks a scienter requirement, that is, “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.”<sup>12</sup> Consequently, the proposed liability would not require any degree of complicity or knowledge on the part of the superior contracting party. The superior contracting party could be held jointly liable simply through association with the malfeasant subcontracting party.

According to the Motion’s authors, such a liability scheme would be a great benefit to posted workers across the European Community, would ensure that all workers, foreign or domestic, receive the agreed industry minimum, and would provide a further ‘debtor’ for aggrieved workers and governments alike that is likely more solvent.<sup>13</sup> The joint liability proposal seeks to “ensure that the main contractors give greater consideration to whether the [subcontractor] is reliable and whether it intends to act in compliance with” the host nation’s wages, social security, tax, and tort laws.<sup>14</sup> The theory underpinning the Committee’s call for joint and several liability laws is that if the upper tier company (principal contractor) can be held liable for the malfeasance of its subcontractors at any tier, the upper tier companies will have a great incentive to personally “guarantee that all subcontractors assume their corporate responsibility in respect of employee’s rights.”<sup>15</sup>

The Motion seeks to regulate the increasingly complex business links between parent companies and their web of suppliers and contractors.<sup>16</sup> The following scenario is what the Motion might seek to address: Parent Company is a construction firm that is incorporated in and has its principal place of business in Germany. It receives a lucrative contract to construct an apartment complex in the Netherlands. Parent Company manages the project but subcontracts the work to three principal subcontractors: Finnish Electrical Subcontractor, Dutch Masonry Subcontractor, and Italian Architectural Subcontractor. The Finnish Electrical Subcontractor in turn subcontracts work to a Portuguese second tier subcontractor to install fiber optic cable. The

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<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> BLACK’S LAW DICTIONARY 1373 (8th ed. 2004).

<sup>13</sup> *Motion, supra* note 1, at 9.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.* at 4.

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Portuguese second tier subcontractor then hires a British company, incorporated in Seychelles, to supply laborers from Poland, Lithuania and Russia. If the British company fails to pay either the agreed minimum wage to its Lithuanian workers or the appropriate tax payments, and there was a system of enterprise liability as per the Motion's recommendation, then the Dutch government and the Lithuanian employee could hold each and every party in this subcontracting chain liable for the unpaid taxes and wages, respectively.

**B. Defining Key Concepts**

A contractor is generally any company that “contracts to do work or provide supplies for another [company].”<sup>17</sup> A general, prime or principal contractor is “[o]ne who contracts for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all the work.”<sup>18</sup> A subcontractor is, generally: “[o]ne who is awarded a portion of an existing contract by a contractor.”<sup>19</sup> The practice of subcontracting is sometimes referred to as outsourcing. The process creates a triangular employment relationship with three principal partners: 1. The client who orders the work; 2. The principal contractor who in part performs some work and in part outsources part or all of the work from the client; and 3. The subcontractor who receives the work from the contractor, and then either performs that work or in part outsources it to another lower tier of subcontractor.

Triangular employment relationships are becoming increasingly vital to today's economy. Outsourcing is now widely recognized for the competitive advantages it provides, as reflected in the rapidly growing rates of outsourcing around the world. Many business functions are outsourced for various reasons: to streamline processes, remove burdens, cut costs, etc. There are numerous identifiable forms of outsourcing, such as sub-contracting, employee leasing, and the use of temp agencies and service agencies, as well as various integrated corporate networks and franchising agreements.<sup>20</sup>

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<sup>17</sup> BLACKS LAW DICTIONARY 350 (8th ed. 2004).

<sup>18</sup> *Id.* at 351.

<sup>19</sup> *Id.* at 1464.

<sup>20</sup> Yuval Feldman, *Ex-Ante vs. Ex-Post: Optimizing State Intervention in Exploitive Triangular*

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According to empirical studies, outsourcing can be divided into two types:

The first type tends to build up a network of contractual arrangements, namely service contracts, that concern specific phases or pieces of production to be done outside the firm's premises; by contract the second type of outsourcing involves enterprise contracts with an intermediary agency for the supply of a certain number of workers to work within that undertaking.<sup>21</sup>

Joint and several liability is:

liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.<sup>22</sup>

Joint and several liability is a concept often used interchangeably with *enterprise liability* and *chain liability*, albeit incorrectly. Joint and several liability generally references liability between immediately contracting parties in one segment of the contracting chain. Whereas chain liability "applies not only in relation to the contracting party, but also to the *whole chain*. In this case, the Inland Revenue may address all parties in the chain for the *entire debt* of a subcontractor (emphasis added)."<sup>23</sup>

It is helpful to think of subcontracting as links in a chain. The client resides at the top of the chain. The client, either an individual or a business entity, is the ultimate recipient and beneficiary of a contracted-for work. Typically, the client contracts with a principal contractor, the next link in the subcontracting chain, for work to be done. Any further links are merely sub or

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*Employment Relationships*, 30 COMP. LAB. L. & POL'Y J. 751, 752 (2009).

<sup>21</sup> Luca Ratti, *Agency Work and the Idea of Dual Employership: A Comparative Perspective*, 30 COMP. LAB. L. & POL'Y J. 839 (2009).

<sup>22</sup> BLACKS LAW DICTIONARY 933 (8th ed. 2004).

<sup>23</sup> MIJKE HOUWERZIJL & SASKIA PETERS, LIABILITY IN SUBCONTRACTING PROCESSES IN THE EUROPEAN CONSTRUCTION SECTOR, EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 2 (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/94/en/1/EF0894EN.pdf> [hereinafter *Eurofound*].

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intermediary contractors or temporary work agencies. The various “links” are bound together in a subcontracting chain. When liability is joint and several, it is generally limited to two immediately bound links. Where liability is chain, the aggrieved party can seek redress from any link in the entire chain. This note will generally use the term *joint liability* to refer to laws that hold the superior contracting party at least partially liable for the malfeasance of another party in the contracting chain, unless the cited legislation specifically calls for chain or joint and several liability.

### C. Examination of the Motion’s Recitals

Prior to an in-depth discussion of joint and several liability, a thorough analysis of the Motion’s recitals is in order. The recitals begin with citations to eighteen articles, resolutions, motions, and court cases that purportedly justify the call for a motion on the social responsibility of subcontracting undertakings in production chains. The eighteen citations appear immediately prior to fifteen paragraphs that provide concise justifications for the twenty seven-point motion. The following paragraphs analyze those recitals that address the issue of joint liability in subcontracting chains.

The Motion’s recitals cite both the International Labour Office’s *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (“Tripartite Declaration”) and the Organization for Economic Cooperation and Development’s (“OECD”) *Guidelines for Multinational Enterprises* (“Guidelines”).<sup>24</sup> Together, these two documents constitute what the European Parliament labeled, “the two most authoritative internationally agreed sets of standards for corporate conduct.”<sup>25</sup> Both the Tripartite Declaration and the OECD’s Guidelines address concerns posed by the flourishing of MNEs, and through logical extension, the practice of subcontracting. Both documents stress that MNEs play an important role in modern business. “Through international direct investment and other means . . . [MNEs] can bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology, and labour.”<sup>26</sup> The Guidelines note however “[t]oday’s competitive forces are intense and multinational enterprises face a variety of legal, social, and regulatory settings. In this context, some enterprises may be tempted to gain an

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<sup>24</sup> *Motion*, *supra* note 1, at 3.

<sup>25</sup> European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership, 2007 O.J. (C 301E) 45, 46, *available at* <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:301E:SOM:EN:HTML> [hereinafter *C301E*].

<sup>26</sup> *ILO*, *supra* note 2, at 2.

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unfair competitive advantage.”<sup>27</sup> The Tripartite Agreement states that the challenges posed by MNEs to workers’ rights and host governments are best addressed through laws and policies adopted through cooperation between governments.<sup>28</sup> The Guidelines similarly call for international cooperation.<sup>29</sup> Though neither document proposes joint liability regulations for MNEs, the principles espoused in the documents emphasize the need for international cooperation and regulation of MNEs to better balance the needs of governments, the rights of workers, and the dynamic nature of MNEs.

Similarly, the Motion’s recitals recall Article 39 of the European Community Treaty, which concerns the movement of workers across the European Community.<sup>30</sup> It prohibits discrimination against workers based on nationality, and secures their right to seek and accept employment offers in the various E.C. states.<sup>31</sup> The immediately preceding recital references Article 31(1) of the Charter of Fundamental Rights of the European Union (“Charter”).<sup>32</sup> The Charter’s preamble emphasizes a balance between freedom of enterprise, the rights of individuals, and the stability of public authorities.<sup>33</sup> Article 31, *Fair and Just Working Conditions*, particularly emphasizes the right of European workers to “working conditions, which respect his or her health, safety, and dignity.”<sup>34</sup> Taken together with the Guidelines and the Tripartite Agreement, by citing Article 39 of the E.C. Treaty and Article 31(1) of the Charter, the Committee has not only emphasized the benefits offered by MNEs, particularly the free flow of labour between the E.C. states, but also cautioned that the rights of workers and needs of states must be balanced against those benefits.

The recital referencing the proposal for a directive of the European Parliament and the Council providing for sanctions against employers of illegally staying third-country nationals is particularly applicable to the Motion. Like the Motion, COM(2007) 249 (“COM 2007”) addresses a community-wide concern by holding principal employers responsible even where the infringing

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<sup>27</sup> ORG. FOR ECON. CO-OPERATION & DEV [OECD], OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 10 (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

<sup>28</sup> ILO, *supra* note 2, at 2.

<sup>29</sup> OECD, *supra* note 27, at 5.

<sup>30</sup> Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, 2006 O.J. (C 321) 57 [hereinafter *C321*].

<sup>31</sup> *Id.* at 57, 58.

<sup>32</sup> *Motion, supra* note 1, at 3.

<sup>33</sup> Charter of Fundamental Rights of the European Union, 364/01, 2000 O.J. (C 364) 1, 8 [hereinafter *C364*].

<sup>34</sup> *Id.* at 15.

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party is a subcontractor.<sup>35</sup> COM 2007 addresses the problem of illegal immigration by punishing business enterprises that employ and take advantage of the illegal immigrants.<sup>36</sup> This concern for illegally employed third-country nationals and the business environment in the applicable member state is as also found in the Motion: “Illegal employment . . . leads to losses in public finances, can depress wages and working conditions, may distort competition between businesses and means that undeclared workers will not benefit from health insurance and pension rights that depend on contributions.”<sup>37</sup> The proposal calls for a directive that sanctions employers, not the illegally employed workers. Furthermore, under Article 9 of the proposal: “To the extent that a financial penalty cannot be recovered from a subcontractor it should be recoverable from other contractors in the chain of subcontracting, up to and including the main contractor.”<sup>38</sup> Sanctions include fines and exclusions from public subsidies or contracts.<sup>39</sup> The proposal advances the principle of subsidiarity; that for the directive to be effective, it must be community wide and uniform.<sup>40</sup>

In 2007, the European Parliament and the Council of the European Union published its own proposal providing for sanctions against employers of illegally staying third-country nationals. The proposal’s new Article 9 concerning subcontracting goes further than the previous proposal and requires that “Member States shall ensure that the main contractor and any immediate subcontractor” be liable for sanctions and back payments to workers.<sup>41</sup> Furthermore, “[t]he main contractor and any intermediate subcontractor shall under paragraph 1 be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.”<sup>42</sup> Taken together with the Motion, it becomes clear that the European Union is increasingly considering legislation that uniformly binds the entire Community in sanctioning principal contractors for the malfeasance of their subcontractors. It is important to note that there is no scienter requirement in either L80/29 or the Motion. Consequently, the Principal could be held liable, regardless of

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<sup>35</sup> *Proposal for a Directive of the European Parliament and of the Council Providing for Sanctions Against Employers of Illegally Staying Third-Country Nationals*, at 10, COM (2007) 249 final (May 16, 2007), available at [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=195730](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=195730) [hereinafter *COM249*].

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 10.

<sup>39</sup> Council Directive 2002/14, 2002 O.J. (L 80) 6 (EC) [hereinafter *Directive 2002*].

<sup>40</sup> *Id.* at 6.

<sup>41</sup> *Id.* at 18.

<sup>42</sup> *Id.* at 18.



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whether the corporate veil is pierced or whether the principal contractor is at fault.

The Motion also cites the European Parliament's resolution of 13 March 2007 on corporate social responsibility ("2006/2133"),<sup>43</sup> which states that "increasing social responsibility by business, linked to the principle of corporate accountability, represents an essential element of the European social model, Europe's strategy for sustainable development, and for the purposes of meeting the social challenges of economic globalization."<sup>44</sup> Furthermore, 2006/2133 provides that "companies should not be considered a substitute for public authorities when these fail to exercise control over compliance with social . . . standards."<sup>45</sup> The motion goes on to state that in the transnational context, European companies should be held responsible for the activities of their subcontractors.<sup>46</sup>

In addition, the Motion cites the European Community's Green Paper, *Modernising labor law to meet the challenges of the 21<sup>st</sup> century* ("Green Paper"), which purports to launch a debate concerning how E.U. labour law can balance modern business trends and organization with the Lisbon Strategy's objective of achieving sustainable growth.<sup>47</sup> According to the Green Paper, European labour markets are challenged to combine "greater flexibility with the need to maximize [job] security for all. The drive for flexibility in the labour market has given rise to increasingly diverse contractual forms of employment, which can differ significantly from the standard contractual model in terms of the degree of employment."<sup>48</sup> Like the OECD's Guidelines, the Green Paper attributes technological progress, globalization and a changing economy as factors driving the changes to the traditional employment model.<sup>49</sup> These factors push European businesses to develop a wide variety of employment contracts.<sup>50</sup> "Non-standard as well as flexible standard contractual arrangements have enabled businesses to respond swiftly to changing consumer trends, evolving technologies and new opportunities for attracting and retaining a more diverse workforce through better job matching between supply and demand."<sup>51</sup> However, the Green Paper notes that the new contractual

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<sup>43</sup> *Motion, supra* note 1, at 3.

<sup>44</sup> *C301E, supra* note 25, at 48.

<sup>45</sup> *Id.* at 48.

<sup>46</sup> *Id.* at 51.

<sup>47</sup> *Commission Green Paper on Modernising Labour Law to Meet the Challenges of the 21<sup>st</sup> Century*, at 3, COM (2006) final 708 (Nov. 11, 2006) [hereinafter *Green Paper*].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 7.

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arrangements also push European businesses to avoid employment protection rules, social security contributions, industry specific wage minimums, etc.<sup>52</sup> This is particularly true in extended chains of subcontracting.<sup>53</sup> In response, “[s]everal Member States have sought to address such problems by making principal contractors responsible for the obligations of their subcontractors under a system of joint and several liability. Such a system encourages principal contractors to monitor compliance with employment legislation on the part of their commercial partners.”<sup>54</sup> In response to Question 9 concerning three-way employment relationships and the question of joint and several liability, the Communication *Outcome of the public consultation on the Commission’s Green Paper “Modernising labour law to meet the challenges of the 21<sup>st</sup> century,”* the European Parliament

highlighted the need to regulate joint and several liability for principal undertakings to deal with abuses in subcontracting and outsourcing in the interests of ensuring a level playing field for companies in a transparent and competitive market.<sup>55</sup>

The response notes that Member States were split on the question of subsidiary liability; some supporting new liability rules and other expressing satisfaction with existing laws.<sup>56</sup>

Finally, the Motion cites the case of *Wolff & Muller GmbH & Co. KG v. Jose Filipe Pereira Felix*, referred by the German courts to the European Court of Justice (“ECJ”), which decided the case in October 2004.<sup>57</sup> The Court held, in part, that national laws providing that a subcontractor is a guarantor for the minimum remuneration of their subcontractors’ employees is not, *per se*, violative of Directive 96/71 (concerning the posting of workers in the framework of the provision of services).<sup>58</sup> According to the Court:

Article 5 of Directive 96/71 ‘does not preclude a national system whereby, when subcontracting the conduct of building work to an undertaking established in another Member State, a building contractor in another Member State concerned

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 13.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 8.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> Case C-60/03, *Wolff & Muller GmbH v. Felix*, 2004 E.C.R. I-9553 [hereinafter *Wolff*].

<sup>58</sup> *Id.*

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becomes liable, in the same way as a guarantor who has waived the defence of prior recourse, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker employed by the latter or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), even if the safeguarding of workers' pay is not the primary objective of the national legislation concerned or is merely a subsidiary objective.<sup>59</sup>

Mr. Pereira Felix was a citizen of Portugal who worked for a Portuguese subcontractor as a bricklayer at a building site in Berlin, Germany.<sup>60</sup> The Portuguese subcontractor worked for Wolff & Muller GmbH ("Wolff & Muller"), a German company.<sup>61</sup> Mr. Felix brought suit against both his Portuguese employer and Wolff & Muller to recover disputed wages from them jointly and severally.<sup>62</sup> Mr. Felix claimed that Wolff & Muller was jointly and severally liable for the DEM 4,019.23 in unpaid remuneration because Wolff & Muller was a guarantor of his wages under Paragraph 1(a) of the *Arbeitnehmer-Entsendegesetz* (law on the posting of workers or "AEntG"). Under the AEntG:

[a]n undertaking which appoints another undertaking to provide building services within the meaning of Paragraph 211(1) of the third book of the *Sozialgesetzbuch* ["SGB III"] is liable, in the same way as a guarantor who has waived the defense of prior recourse, for the obligations of that undertaking, of any subcontractor. . . concerning payment of the minimum wage.<sup>63</sup>

Wolff & Muller countered that it was not liable under the AEntG in part because Paragraph 1(a) violates Article 49 of the E.C. Treaty on the freedom of movement of services.<sup>64</sup> The ECJ agreed with the petitions filed by the German, Austrian, and French governments and the European Commission that

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

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“liability as a guarantor certainly provides workers with a genuine benefit that contributes to their protection. Workers are given another party, in addition to their employer, against whom they can pursue their claims for net wages under national legislation.”<sup>65</sup>

The legal underpinning of the decision is as follows: Under Article 5 of Directive 96/71, the E.U. required that Germany adopt national legislation ensuring that there were adequate protections for posted workers to seek redress, as in the case of unremunerated pay.<sup>66</sup> Article 5 grants Germany a wide berth in fashioning its own national legislation for an aggrieved posted worker to seek redress.<sup>67</sup> Paragraph 1(a) AEntG does not fall outside that wide scope.<sup>68</sup>

Noticeably absent from the *Wolff & Muller* decision on the chain liability of national legislation in the E.U. Member States is a scienter requirement. That is, neither the courts nor the legislatures place a high importance on the concept of complicity on the part of the client or principal contractor as an element of the offense. Thus, the principal contractors are held to a strict liability. They are responsible to the some degree for the malfeasant acts of the subcontractors regardless of whether the corporate veil was pierced. The situation is reminiscent of the holding in *Union Carbide v. Union of India*,<sup>69</sup> often referred to as the Bhopal Case. In the Bhopal Case, the government of India, representing thousands of Indian national plaintiffs, brought suit against Union Carbide Corporation (“UCC”), an American corporation, in Bhopal District Court in India under a theory of multinational enterprise liability.<sup>70</sup> The Indian courts found against UCC, despite a dearth of evidence that either UCC exercised any considerable control over the pesticide factory at dispute or that UCC had pierced the corporate veil.<sup>71</sup> Despite evidence to the contrary, the courts found that UCC had in fact kept itself at arms length from its subsidiary Union Carbide India, Ltd. However, that did not protect UCC from liability.<sup>72</sup> The Bhopal Case is worth consideration in the context of the Motion, because in the Bhopal Case, liability was assigned without a strong scienter requirement. In both situations, liability for the malfeasance of one company is imposed on an otherwise distinct legal entity,

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Union Carbide Corp. v. Union of India*, A.I.R. 1990 S.C. 273 [hereinafter *Union Carbide*].

<sup>70</sup> DETLEV F. VOGTS ET AL., *TRANSNATIONAL BUSINESS PROBLEMS* 194-95 (Foundation Press 4th ed. 2008).

<sup>71</sup> *Id.* at 196.

<sup>72</sup> *Id.*

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through no fault of its own.

In the Motion's recitals, the Committee makes a strong argument for joint liability regulations as a European response to abuses in subcontracting. Taken together, the recitals demonstrate that precedent exists for joint liability regulations and that some E.U. Member States already have such regulations, a lack of uniformity across the E.U. impedes their ability to function succinctly. It now becomes appropriate to isolate the studies conducted by the European Foundation for the Improvement of Living and Working Conditions, cited prominently in the Motion's recitals.

## II. JOINT LIABILITY LAWS IN EIGHT MEMBER STATES

### A. The Eurofound Report

The Motion prominently cites a series of reports by the European Foundation for the Improvement of Living and Working Conditions ("Eurofound").<sup>73</sup> Eurofound's main report, *Liability in subcontracting processes in the European construction sector* addresses the legal implications of subcontracting in Europe, and surveys various Member States' liability laws.<sup>74</sup> Specifically, Eurofound focuses on eight Member States' laws: Austria, Belgium, Finland, France, Germany, Italy, the Netherlands and Spain.<sup>75</sup> The Eurofound reports offer the most comprehensive and recent survey of E.U. Member State liability laws, and its findings will constitute the bulk of section two of this note.

According to the Eurofound report, there has been a boom in subcontracting practices in Europe over the past twenty-five years.<sup>76</sup> Though the report cites three different subcontracting trends, at the core of each is a principal organization utilizing smaller businesses to perform the actual contracted for work.<sup>77</sup> Over time, the chains linking subcontractors and other workers to their principal employers have become increasingly long and complicated.<sup>78</sup> "The growing use of subcontracting for labour intensive segments of the execution of construction projects does not necessarily lead to a deterioration of the working conditions, *but it certainly has created a decrease*

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<sup>73</sup> *Motion, supra* note 1, at 4.

<sup>74</sup> *EUROFOUND, supra* note 23, at 1.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

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*of the direct social responsibility of the principal contractor* (emphasis added).<sup>79</sup> Abuses naturally sprung from this decreased direct responsibility. The Eurofound report cites an example from the Union of Construction, Allied Trades and Technicians (“UCATT”) in the United Kingdom (“UK”), where a principal contractor paid a dozen Lithuanian subcontractors below minimum wages, failed to pay overtime and charged the workers for their rent, tools and utilities.<sup>80</sup> “The steadily evolving integration of the Member States’ economies in the internal market of capital, goods, services, and persons – together with the recent EU enlargements – have also led to the greater movement of workers across countries.”<sup>81</sup> The lower end of subcontracting chains tends to be filled with foreign companies posting foreign workers who may be particularly vulnerable to abuse.<sup>82</sup> The Eurofound report cites for example, the case of ZRE Katowicz Ireland Construction Ltd., which had been contracted by a German:

enterprise to carry out scaffolding work on a large contract, which the German company had with the Irish power plant operator, the Electricity Supply Board . . . for the €380 million refurbishment of its plant. When the German company discovered that ZRE had not been complying with the Irish employment law, it terminated its contract, forcing ZRE to dismiss 200 of it[s] Polish employees.<sup>83</sup>

It is in this context that the European Union and particularly the European Parliament took up the question of joint and several liability for principal contractors, as an effective compliance tool to protect Member State and Community law.<sup>84</sup>

Joint liability laws in subcontracting chains date back to the 1960s and 1970s for Italy, the Netherlands, Belgium, Finland and France.<sup>85</sup> Spain, Austria and Germany followed suit in the 1980s and 1990s.<sup>86</sup> “The regulations were introduced in order to prevent the abuse of employee’s rights and the evasion of rules, as well as to combat undeclared work and illegal unfair business competition.”<sup>87</sup> Some Member States (Austria, France and Italy) developed

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 5.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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legislation to prevent cross-border dumping in the construction sector, while the other Member States developed laws to protect at least two of the following: social security contributions, taxes on wages, and minimum wages.<sup>88</sup> “Sanctions for parties who do not abide the liability rules fall under three main categories across the eight Member States: back-payment obligations, fines, and/or alternative additional penalties.”<sup>89</sup> Additionally, Eurofound cites various preventative measures that are in place in all Member States except Belgium. These measures include requirements for the principal company to check the reliability of subcontractors and various measures to “guarantee the payment of wages, social security contributions, and wage tax.”<sup>90</sup> The following sections will examine the existing laws in eight E.U. Member States, including the laws’ historical context, their breadth and scope, and their effectiveness.

### B. AUSTRIA

Generally, under Austrian law, “the principal contractor to a job maintains an element of responsibility for the wages of employees in a subcontracting chain.”<sup>91</sup> Austria first introduced legislation concerning the liability of principal contractors for the malfeasance of subcontractors in the 1990s.<sup>92</sup> The Austrian parliament considered the legislation in light of problems suffered by their northern neighbor, Germany.<sup>93</sup> In post-unification Germany, “social dumping in the construction sector was becoming a major problem with regard to foreign companies and workers.”<sup>94</sup> Like Germany, Austria is a high wage country surrounded by low wage countries like the Czech Republic, Hungary, Slovenia and Slovakia.<sup>95</sup> Consequently, “it is very attractive for [non Austrian] companies to operate in Austria using their own workers who receive wages at the level of their country of origin.”<sup>96</sup> The Austrian government and various Austrian labor groups argued that this would depress wages and

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<sup>88</sup> *Id.* at 2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Walter Gagawczuk, *Liability in Subcontracting Processes in the European Construction Sector: Austria*, in EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 1 (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/871/en/1/ef08871en.pdf> [hereinafter *Eurofound Austria*].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

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generally disrupt the labor market in Austria.<sup>97</sup> Prior to the introduction of legislation in 1995, various Austrian ministries and their various labor and business social partners discussed two key issues:

1. Whether Austrian Associations (*Verbandsklage*) could seek judicial remedies in collective suits; and
2. Whether any legislation should sanction employers that pay less than the industry minimum wage.<sup>98</sup>

In 1995, the Austrian parliament introduced the *Antimissbrauchgesetz* (“Anti-Abuse Act”), which contained §7(2)(2) – *Arbeitsvertragsrecht-Anpassungsgesetz* (Employment Contract Law Amendment Act or “AVRAG”).<sup>99</sup> The provision was later amended with §§7a(2) and 7c, and came into force in 1999.<sup>100</sup> According to Eurofound, “[t]he main objective of the liability provisions – the old Article 7 AVRAG and the new articles 7a(2) and 7c AVRAG is to combat non-payment and abuse of employees in the context of cross-border subcontracting practices and thus avoiding potential cases of social dumping and illegal business competition.”<sup>101</sup> Section 7a(2) applies exclusively to cross-border posted workers where the principal contractor’s corporate seat is outside the European Union.<sup>102</sup> Section 7c AVRAG applies to principal contractors whose principal corporate seats are located within the E.U.<sup>103</sup> Thus every business is within the AVRAG’s reach. Section 7c(2) is similarly applicable in public procurement contracts where the principal contractor subcontracts at least part of the work to a subcontractor.<sup>104</sup> Under the *Bundesvergabegesetz* (Federal Public Procurement law or “BVergG”), the principal contractor can subcontract the work where the subcontractors are capable, competent and have a: “certain reliability.”<sup>105</sup> Thus, the principal contractor is responsible for ascertaining the subcontractor’s credentials, which can be readily accomplished by referencing a register of subcontractors called

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1.

<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2.

<sup>104</sup> *Id.* at 6.

<sup>105</sup> *Id.*



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the *Auftragnehmerkataster Oesterreich* (“ANKO”).<sup>106</sup>

Overall, most interested parties consider Austria’s liability legislation for subcontractors to be ineffective.<sup>107</sup> The Eurofound report cites three principal reasons for this opinion:

Enforcement of the few known rules is left solely to the employee and their legal representative;

The provisions do not apply in the case of bankruptcy of the subcontractor;

As liability is restricted to the highest level of the chain, the employee has to prove that the principal contractor was aware of an unreliable subcontractor some levels further down the chain, which is almost an impossible task. At best, the rules have a rather modest preventive impact on the behavior of the principal contractor when choosing subcontractor(s).<sup>108</sup>

First, the provisions are private law, so no public ministries like the *Arbeitsinspektorat* (“Labour Inspectorate”) are charged with enforcing the legislation.<sup>109</sup> Consequently, private parties, such as an aggrieved employee or posted worker (and perhaps his advocate from a group like the *Oesterreichischer Gewerkschaftsbund* “Austrian Trade Union Federation”), the employer(s), (sometimes through their representatives like the *Wirtschaftskammer Oesterreich* “Austrian Federal Economic Chamber”), and the courts are involved.<sup>110</sup>

Furthermore, the AVRAG contains several loopholes through which principal contractors can avoid liability. “[§7c AVRAG] states in its fifth paragraph that the liability is not applicable if the subcontractor is insolvent . . . Furthermore, according to the dominant interpretation, the liability arrangement is restricted to the highest level of the [subcontracting] chain.”<sup>111</sup> Lastly, even where an employee can legitimately bring suit for lost wages, overtime, etc., he would not seek it from the subcontracting chain, but rather from the Austrian

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<sup>106</sup> *Id.* at 7.

<sup>107</sup> *Id.* at 14.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 8.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 9.

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*Insolvenzausfallgeldfonds* – a fund for the protection of employees should their employer go bankrupt.<sup>112</sup> Arguably, the most effective Austrian legislation is §7a(2) AVRAG, which commands joint and several liability without reservation.<sup>113</sup> However, §7a(2) AVRAG applies only to principal contractors having a principal place of business outside of the E.U.<sup>114</sup> Despite the strict joint and several liability restrictions, there are many practical barriers for a foreign worker to actually bring suit against the subcontracting chain, including the lack of legal representation, language barriers, and a general fear of losing future employment.

## C. BELGIUM

“Belgium does not have a framework on liability in subcontracting processes. Liability is established mainly in the constructor sector. . . pursuant to Article I of the Royal Decree of 27 December 2007. . . The liability covers taxes on wages, social security contributions and social fund payments.”<sup>115</sup> Belgium’s liability laws on subcontracting practices date back to the 1970s. They were largely in reaction to the public alarm over the so-called gangmasters, and the aberrant contractors who employed, sometimes, thousands of workers but failed to pay social security contributions or taxes on wages.<sup>116</sup> The legislation, then as now, principally targeted the construction sector, where most of the infractions took place.<sup>117</sup> In response to these labor abuses, the *Federale Overheidsdienst Financien* (“Federal Public Service Finance”) proposed banning the practice of subcontracting entirely.<sup>118</sup>

The liability on foreign and domestic contractors and subcontractors alike was joint and several.<sup>119</sup> Furthermore, Belgian law required the principal contractor to notify the relevant ministries that it was using subcontractors.<sup>120</sup> All contractors were strongly urged to register with the appropriate provincial

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Jan Buelens, *Liability in Subcontracting Processes in the European Construction Sector: Belgium*, in EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 1 (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/872/en/1/ef08872en.pdf>.

<sup>116</sup> *Id.* at 1-2.

<sup>117</sup> *Id.* at 1.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 12.

<sup>120</sup> *Id.* at 3.

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registration concern.<sup>121</sup> Under the Royal Decree of 27 December 2007, contractors could register if they met defined registration requirements, such as a lack of bankruptcies, a demonstration of a strong financial situation, and the absence of previous violations of social, tax and wage obligations.<sup>122</sup> Contractors that successfully registered enjoyed certain tax and subsidy benefits. Furthermore,

the client and principal contractor were jointly liable for the debts of the contracting part. . . if the contracting party was not registered. In case of non-registration, the contracting party had to make certain deductions and pay them into the social and tax administration. After these deductions had been made, the client and principal contractor remained liable only for the outstanding sum of money.<sup>123</sup>

The European Court of Justice ushered in the current liability laws when it rendered its decision on November 9, 2006 in the matter of *Commission v. Belgium*.<sup>124</sup> “The ECJ ruled that the Belgian system regarding tax on wages violated the freedom to provide cross-border services within the European Union . . . as stipulated in articles 49 and 50 of the EC Treaty, because the obligatory nature of the registration system could have a deterrent effect on foreign companies.”<sup>125</sup> Consequently, Belgium passed new legislation (“Article 30bis Law 27 June 1969, as amended by the Law of 27 April 2007; Article 400 and those that followed of the Direct Income Code”)<sup>126</sup> that went into effect in 2008, that severed the link between registration and liability. Furthermore, the liability is no longer chain, but rather contractual.<sup>127</sup> “If a contracting party fails to meet their [social security, tax, and social fund] obligations, the administration first has to invoke the liability on the other party. The administration can address the next level in the chain only if this party also fails to meet its obligations.”<sup>128</sup> The principal contractor must only withhold a percentage of payments to the subcontractors if the latter has outstanding social or tax debts.<sup>129</sup> Principal contractors may be subject to a small fine if they fail

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 3; *Commission v. Belgium*, 2006 O.J. (C 433) 4.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 3.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 12.

<sup>129</sup> *Id.*

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to make these withholdings where appropriate, and may also be liable to a surcharge equal to the withholding amount.<sup>130</sup>

According to Eurofound, Belgians are conflicted on the effectiveness of their pre and post 2006 EJC ruling liability legislation.<sup>131</sup> The social actors interviewed in the report generally agreed that the pre-EJC ruling legislation effectively reduced fraud by giving all contracting parties a strong incentive to register, and thus met good business practice standards.<sup>132</sup> However, the social actors also expressed frustration with the complicated nature of the old (and new) regulations.<sup>133</sup> Eurofound states that though the new liability regulations are too recent to adequately evaluate, many social actors have expressed doubts on feasible enforcement because there is no longer an incentivizing link between registration and liability. Furthermore, “the ministry has experienced problems acting against foreign companies, which are often used as buffers between the Belgian client or principal contractor and the Belgian subcontractor.”<sup>134</sup> Though time will tell the effectiveness of the new liability rules, the early results indicate that Belgium considered its older liability regime to be more effective.

#### D. FINLAND

Finnish liability laws are primarily applicable to its construction industry.<sup>135</sup> The rules are found in both Finland’s Penal Code and Collective Labour Agreements (“CLA”).<sup>136</sup> The rules cover wage tax and social security contributions, “but are essentially informative and meant to promote a sound economy but do not include a real monetary liability of the principal contractor for the obligations of the subcontractors.”<sup>137</sup> Finnish liability laws are relatively recent. The latest and most applicable legislation came into force in 2007 (Law 2006/1233 or “Liability Act”).

The Liability Act principally applies to building services across the

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<sup>130</sup> *Id.* at 6.

<sup>131</sup> *Id.* at 8.

<sup>132</sup> *Id.* at 8-9.

<sup>133</sup> *Id.* at 9.

<sup>134</sup> *Id.*

<sup>135</sup> Jari Hellsten, *Liability in Subcontracting Processes in the European Construction Sector: Finland*, in EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 1 (2008), available at

<http://www.eurofound.europa.eu/pubdocs/2008/873/en/1/ef08873en.pdf>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

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contractual chain, from builders to repairmen to developers.<sup>138</sup> However, liability is not chain. Instead, the Liability Act imposes “liability throughout the chain but only in relation to the contracting partner.”<sup>139</sup> Thus, a contractor would only be liable for the most immediate subcontractor’s party. In Finland:

A building project is legally seen as simply a pyramid of independent commercial service contractors, in which each contracting party has its own responsibilities. It is not considered an interrelated chain in which all parties have a share in the same project and which therefore justifies more responsibilities such as chain liability for the client and/or principal contractor.<sup>140</sup>

This liability is nationwide and applicable to foreign subcontractors.<sup>141</sup> The principal requirement of the Liability Act is that the main contractor investigates and assesses the reliability of their subcontractor.<sup>142</sup> Furthermore, the Liability Act imposes a negligence fee on the principal contractor when it fails to perform the necessary background checks on the subcontractor pursuant to Section 5 of the Liability Act.<sup>143</sup> The Liability Act does not impose back-payment obligations on the principal contractor.<sup>144</sup>

The CLEs date back to the 1970s, much further than the Liability Act.<sup>145</sup> The CLEs are private agreements between contracting parties. They are essentially moral obligations that the principal contractor will be a guarantor of the subcontractor’s employees’ wages.<sup>146</sup> Consequently, the obligation is not sanctioned, and depends entirely on internal discipline and self-regulation.<sup>147</sup> “The liability is not applicable to non-organised principal contractors . . . [and] actions against non-organised principal contractors seldom occur.”<sup>148</sup>

Finally, a provision in the Finnish Penal Code can be interpreted as imposing chain liability in subcontracting operations. Under Chapter 10 §2(1) of the Penal Code, “anyone benefitting from a criminal offense, such as work

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<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 7.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 12.

<sup>145</sup> *Id.* at 7.

<sup>146</sup> *Id.* at 8.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 3.

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discrimination or discrimination on the grounds of national origin for profiteering purposes, both due to illegally low wages, may become subject to forfeiture.”<sup>149</sup> A general amendment was added to the penal code in 2001, “making it now possible to direct the confiscation against a principal contractor or client benefitting from the payment of illegally low wages.”<sup>150</sup>

Eurofound concluded that the liability provisions currently in place in Finland are generally accepted by the relevant social actors and play a limited preventative role in combating fraud in subcontracting.<sup>151</sup> Though various labour and trade union organizations would prefer more stringent chain liability provisions,<sup>152</sup> Eurofound notes that profound opposition to such measures from the Finnish business community is likely to prevent its implementation in the near future.<sup>153</sup> Furthermore, since the Liability Act is very recent, a full evaluation of its effectiveness is not currently possible.<sup>154</sup> Thus, the Finnish position is likely to be a wait and see one with regards to E.U. legislation.

**E. FRANCE**

French liability in subcontracting chain laws date back to the 1970s and are some of the most stringent in Europe.<sup>155</sup> In France, several kinds of liability arrangements exist for principal contractors and clients in the subcontracting chain for wages, social security contributions and taxes on wages.<sup>156</sup> The first French law regarding joint liability is still in force today, through amended.<sup>157</sup> Law No. 75-1334 of 31 December 1975 (“1975 Law”) on joint liability primarily protects subcontractors from defaulting general contractors.<sup>158</sup> Law No. 90-613 of 12 July 1990, JORF No. 16 of 14 July 1990 (“1990 Law”) - “on joint liability between an entrepreneur and their subcontractor for the payment of salaries, holidays, and social security contributions for the benefit of the subcontractors” - workers must be seen in the

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 4.

<sup>151</sup> *Id.* at 12.

<sup>152</sup> *Id.* at 10-11.

<sup>153</sup> *Id.* at 12.

<sup>154</sup> *Id.*

<sup>155</sup> Barbara Palli, *Liability in Subcontracting Processes in the European Construction Sector: France*, in EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 1 (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/874/en/1/ef08874en.pdf>.

<sup>156</sup> *Id.* at 3.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

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context of bogus subcontracting.”<sup>159</sup> Law No. 91-1383 of 31 December 1991, JO No. 1 of 1 January 1992 (“1992 Law”) mandates joint liability where the business fails to make payments to workers or social security bodies.<sup>160</sup> The rationale of these joint liability provisions is that the ultimate beneficiary of an illegal work/service should bear the financial consequences of the illegality.”<sup>161</sup> The 1992 law is supposed to encourage clients and contractors to choose law-abiding subcontractors, and then act as guarantors to the state and other parties in the subcontracting chain if the subcontractors are, in fact, illegal.<sup>162</sup> Finally, Law No. 2005-882 of 2 August 2005 incorporated in Article L 1262-4 and Article 1262-5 of the Labour Code is implementing legislation for E.U. Directive 96/71, previously discussed in this Note’s Belgium section.<sup>163</sup> Together, these are the principal provisions that delegate chain liability on subcontracting.

The 1975 Law provides “national and/or foreign subcontractors with a direct action against the order provider for the payment of work and services provided where the main contractor proves to be insolvent.”<sup>164</sup> Under the 1975 Law, subcontractors are protected by either of two means: first, through a private agreement where the principal contractor secures an arrangement with the subcontractors for guaranteeing payment, which can take several forms under the French Civil Code<sup>165</sup> Second, under Article 12 of the 1975 Law, the subcontractor can initiate a direct action against the client where the client accepted the subcontractor’s contract to work, the client accepted the private contractual arrangement between the principal and the subcontractor, and the principal contractor failed to honor that arrangement.<sup>166</sup> Clients then have a direct incentive to have direct knowledge of the subcontractors on the project and the agreements arranged between the contracting parties. Likewise, the principal contractors “must secure acceptance of each subcontractor by the client – either when the subcontracting agreement is signed or later on during the whole duration of the contract. The principal contractor must also secure an agreement regarding the conditions of payment. At the same time, principal contractors are legally bound to pass on to the client all subcontracting

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 4.

<sup>164</sup> *Id.* at 5.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

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agreements whenever they are so required.”<sup>167</sup> Under French law, the aggrieved subcontractor can bring suit to recover the unpaid cost of services.<sup>168</sup> The principal contractor must inform and obtain the same consent from the client in public procurement as well.<sup>169</sup> Non-compliance could cost the contractor a two-year prison sentence or an €18,000 fine.<sup>170</sup> Thus, under the 1975 Law, both the client and the principal contractor are jointly liable when either fails to meet their obligations to the subcontractor. The client and the principal contractor both act as guarantors of compliance.

The 1990 Act similarly applies to every French principal contractor that utilizes foreign or domestic subcontractors.<sup>171</sup> The 1990 Act purports to protect the subcontractor’s employees in the event that the employing subcontractor fails to remunerate the worker or otherwise violates legal or collective agreement provisions.<sup>172</sup> The theory behind the 1990 Act is that the contractor, being the beneficiary of the subcontractor’s efforts, must then subsequently act as guarantor of the defunct subcontractor’s social security and worker’s salaries obligations.<sup>173</sup> The 1990 Law lacks a specific scienter requirement, and is so applicable regardless of any fault or contractual obligations to the contrary.<sup>174</sup> Violations by the subcontractor are subject to a fine of €30,000 and/or two years’ imprisonment, and the principal contractor may also be subjected to a €12,000 fine or a one-year prison sentence.<sup>175</sup> Furthermore, where the subcontractor defaults on any of its obligations to its workers, regardless of whether any party in the contracting chain is at fault, the aggrieved workers, either individually or collectively through a representative trade union, can bring a direct legal action against the principal contractor.<sup>176</sup>

France’s liability laws extend further than just the traditional client-contractor-subcontractor model to include the utilization of temporary work agencies. Under the French Labour Code, the user company, whether it is the client, contractor, or subcontractor, is ultimately responsible for the agency worker’s salaries and social security contributions.<sup>177</sup> Though the user company may demand a certificate of good standing from the temporary work agency,

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 6.

<sup>169</sup> *Id.* at 5.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 7.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*



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“the law does not provide for a specific sanction should the agency fail to comply with the requirement.”<sup>178</sup>

In addition, in 1992, joint liability in the context of illegal or undeclared work was introduced in French law by an Act of Parliament entitled ‘*Legislation for the reinforcement of the battle against undeclared work.*’ This Act was adopted on the basis of a report highlighting the inadequacy of previous provisions in combating undeclared work in the context of subcontracting chains.<sup>179</sup>

In the context of illegal work, the client can be held jointly and severally liable with either the principal contractor or the subcontractor for failure to fully remunerate workers or pay the appropriate taxes or social security obligations.<sup>180</sup> Thus, the client or the principal contractor acts as a guarantor of the malfeasant contractor’s wage and social obligations.

Article L.8222-1 of the Labour Code . . . now provides that every client . . . is under a legal obligation to: verify that the other party has accomplished all declaration formalities required in order to provide services as an independent contractor or to employ others on the conclusion of a contract for services or a subcontracting agreement worth a minimum of €3,000 and then periodically, every six months, until the end of the contract.<sup>181</sup>

Furthermore, under Article 8.222-2, clients and principal contractors found guilty of benefitting from illegal work face penalties of three years imprisonment, a fine of €45,000, bans of public procurement, public humiliation, etc.<sup>182</sup>

The Eurofound study concluded that there were too few adjudicated cases in French jurisprudence to adequately examine the effectiveness of France’s liability laws.<sup>183</sup> Eurofound cites widespread social acceptance of black market economic activity as a strong reason why relatively few aggrieved

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<sup>178</sup> *Id.* at 8.

<sup>179</sup> *Id.* at 2.

<sup>180</sup> *Id.* at 9.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 11.

<sup>183</sup> *Id.* at 17.

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parties took advantage of the strong provisions.<sup>184</sup> Furthermore, as in all the other national studies, practical considerations such as the language barrier and their limited stay prevent abused foreign workers from exercising their rights under French law.<sup>185</sup> Some business groups decry the regulations as overly burdensome for employers while ignoring the real offenders.<sup>186</sup> Trade union groups have typically come out in favor of the rules, and have even advocated for outright bans on subcontracting.<sup>187</sup> The overall legislative trend in France is towards more liability regulations and strict reporting requirements from posted workers.<sup>188</sup> Consequently, it seems likely that France will be supportive of an E.U. initiative for making joint and several liability in subcontracting.

**F. GERMANY**

Germany's liability laws date back to the early 2000s, and principally apply to the German construction sector.<sup>189</sup>

Articles 48 et seq. [*Einkommensteuergesetz*, Income Tax Act or "EtsG"] were introduced in 2001 against the background of illegal activity in the construction industry. Due to removal of the internal frontiers of the European Union . . . and the increasing permeability of its external frontiers, the opportunity for illegal activity had grown.<sup>190</sup>

Article 48 EStG established joint liability for building services recipients for taxes owed to the Inland Revenue office.<sup>191</sup> These taxes include workers' wages, income tax and corporation income tax.<sup>192</sup> The liability is not true chain liability. Rather, it is narrower, and binds only two vertically tied parties to each other.<sup>193</sup> Furthermore, the higher-ranking contracting party

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 18

<sup>187</sup> *Id.* at 19.

<sup>188</sup> *Id.*

<sup>189</sup> Gregor Asshoff, *Liability in Subcontracting processes in the European Construction Sector: Germany*, in EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 2 (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/875/en/1/ef08875en.pdf>.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

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indemnifies itself through obtaining exemption certificates stating that the company is in compliance with the law.<sup>194</sup> The withholding amount is relatively small, at just 15% of the total monetary consideration between the contracting parties.<sup>195</sup> “If an exemption certificate has been submitted, the principal contractor is only liable if it could not trust in the legitimacy of the exemption certificate . . . If the principal contractor withholds tax and transfers it to the Inland Revenue office, preventative measures are not necessary.”<sup>196</sup>

Germany adopted Article 28 of the *Viertes Buch des Sozialgesetzbuches* (Fourth Book of the Social Security Code or “Article 28”) in 2002 “to combat illegal employment and illicit work. By establishing a liability of the principal contractor for the obligations of subcontractors concerning the payment of contributions, [Article 28] ensures that the principal contractor takes care that subcontractors fulfil their obligations regarding payments.”<sup>197</sup> Article 28 applies to the provision of building services worth €500,000 or more.<sup>198</sup> Either the principal contractor or another company along the subcontracting chain that hired out another company acts like a directly enforceable guarantor under Article 28.<sup>199</sup> That is, the relevant government body health insurer acts like a creditor with the right to collect from any party in the subcontracting chain, including the principal contractor, the client or any intermediary subcontractors.<sup>200</sup> However, before the liability can be invoked, the collecting government agency must first remind the party that its payment is due. The warning period must first expire before further action can be taken.<sup>201</sup> Even then, the principal contractor has a chance to exonerate itself.<sup>202</sup>

Article 1a of the *Arbeitnehmer-Entsendegesetz* (Posted Workers Act or “AentG”) “establishes a liability of the principal contractor of works and services for the obligations of the client, intermediary contractor and temporary work agency (hirer) concerning payment of minimum wages to workers and leave fund contributions to the Leave and Wage Equalisation Fund of the Building Industry (*Urlaubs- und Lohnausgleichskasse der Bauwirtschaft*, ULAK).”<sup>203</sup> Germany introduced Article 1a in 1999, and has substantially

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 6.

<sup>196</sup> *Id.* at 7.

<sup>197</sup> *Id.* at 4.

<sup>198</sup> *Id.* at 8.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 2.

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amended it over the past 10 years. The article was introduced in response to the pervading corruption existing in the German construction sector in the aftermath of German reunification and E.U. integration.<sup>204</sup> Germany correctly concluded, “principal contractors might have a tendency to opt for subcontractors who keep their costs down by not paying minimum wages and leave fund contributions under the AentG.”<sup>205</sup> Earlier forms of the AentG merely imposed a fine, which the German government found inadequate to enforce the law in light of numerous complaints from foreign governments and their embassies that had to repatriate posted workers in Germany, who were presumably abandoned in Germany by their malfasant subcontracting employer.<sup>206</sup> Under Article 1a, the principal contractor or the intermediate subcontractor that hired the services of another contracting company is liable as a guarantor for the unpaid wages of the subcontracting company’s employees.<sup>207</sup> The employing company may also be liable for unpaid contributions to the ULAK.<sup>208</sup> Article 1a gives unremunerated employees the right to seek redress in Germany labour courts from the principal contractor or any other contracting party above its employer in the vertical contracting chain.<sup>209</sup> Article 1a is the subject of the controversial *Wolff & Mueller* case discussed above. The law was substantially amended in 2007, and its scope was expanded to cover ‘work and services’ instead of building services exclusively.<sup>210</sup> From the legislative record, it appears that the Germany *Bundestag* will consider expansions to postal services and other economic sectors in the years to come.<sup>211</sup>

According to the Eurofound report on Germany, German business, social and governmental actors have mixed views on the existing liability laws.<sup>212</sup> The report cites widespread criticism of Article 28, which was both overly bureaucratic and expensive and questionably effective.<sup>213</sup> Between 2002 and 2004, the German government imposed only eight fines under the law; one of which was enforced, totaling €2,000.<sup>214</sup> At the same time, it is estimated that Article 28 costs Germany construction companies more than €1 million a year in compliance costs. Likewise, Article 48’s withholding tax procedure has an

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<sup>204</sup> *Id.* at 3.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 12.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 3.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 16-19.

<sup>213</sup> *Id.* at 17.

<sup>214</sup> *Id.* at 15.

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uncertain claim to success. About 95% of construction business endeavors apply for an exemption to the 15% consideration withholding for the Inland Revenue Office.<sup>215</sup> However, Article 1a AentG is considered an effective law in Germany, which many credit to its simple liability rules and lack of scienter requirement.<sup>216</sup>

If an element of negligence or fault was included in Article 1a AentG, the mostly justifiable claims of workers and of the joint institution of the social partners could not succeed. Since the liability of the principal contractor regardless of fault has been implemented, large companies and their organizations are much more interested in information regarding the provisions of the AentG and the possibilities of urging their subcontractors to observe this law.<sup>217</sup>

### G. ITALY

The breadth and depth of liability laws in Italy is considerable. Italian laws impose chain liability on the client, principal contractor and intermediary subcontractors for wage tax, social security contributions, social fund payments, wage and holiday payments, and even health and safety obligations.<sup>218</sup> The Italian justification for these extensive liability regulations is the same as in the other eight Member States: to hold the most solvent parties as guarantors of workers' rights and pay,<sup>219</sup> to protect revenue streams to the relevant government authorities<sup>220</sup> and to ensure a high level of transparency in Italian markets.<sup>221</sup> The most sweeping and relevant Italian legislation is also recent, having been implemented in the past ten years.<sup>222</sup>

In 2003, the Italian parliament passed Section 29 Subsection 2 of Legislative Decree No. 276/2003 ("LD 276"), concerning the passive joint and

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 17.

<sup>217</sup> *Id.*

<sup>218</sup> Rosario Salonia & Mario Emanuele, *Liability in Subcontracting Processes in the European Construction Sector: Italy*, in EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 1 (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/876/en/1/ef08876en.pdf>.

<sup>219</sup> *Id.* at 14.

<sup>220</sup> *Id.* at 15.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 1.

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several liability of both the client and the principal contractor.<sup>223</sup> Section 29 contains this sweeping legislation:

[I]n the case of the contracting of works or services, the client or employer is jointly and severally obliged, together with the (principal) contractor and with each and every subcontractor, to pay the wages and social security contributions of the workers within two years of the date of termination of the contract.<sup>224</sup>

LD 276 also incorporates other workers' rights, like paid holidays, have an international element to it.

In case of cross-border contracting, foreign inland revenue and social security authorities will be able to demand payment by an Italian client or contractor, bound by the constraint of joint and several liability, of contributions and taxes owed in relation to work or services supplied pursuant to contracting . . . arrangements in Italy.<sup>225</sup>

The second primary piece of legislation imposing joint liability on Italian contracting chains is Law No. 248/2006 ("Law 248").<sup>226</sup> Law 248 extended Law 276's joint and several liability to the fulfillment of withholding tax obligations.<sup>227</sup>

Finally, Law No. 296/2006 ("Law 296") imposed liability on contracting chains unique in Europe. "[T]he client or contractor is also considered jointly and severally liable for injuries to the employees of a contractor or any subcontractor(s) not compensated by the National Insurance Institute for Industrial Accidents."<sup>228</sup>

The efficacy of Italy's liability laws is about the same as in France. The Italian business community views these laws as unduly burdensome.<sup>229</sup> Furthermore, the business community balks at the almost unlimited liability that the laws place upon clients and principal contractors.<sup>230</sup> On the other hand,

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 5.

<sup>226</sup> *Id.* at 2.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 14.

<sup>230</sup> *Id.*

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trade unions strongly approve of the regulations, but also note that the laws fail to address the core problems in Italy's markets.<sup>231</sup> The regulations impose such liability on Italian clients and principal contractors that almost all pay and social security contribution disputes are settled out of court.<sup>232</sup> Furthermore, the most vulnerable workers are self-employed workers, which constitute 47% of Italy's construction labour force.<sup>233</sup> Unfortunately, Italy's strict regulations are of little avail to this work force. Overall, according to the trade unions, "no significant improvement has been made over the last few years in the protection of workers involved in contracting and subcontracting chains."<sup>234</sup>

### H. THE NETHERLANDS

Joint liability laws in the Netherlands date back to the 1960s, and were a response to numerous instances of principal contractors in the construction sector that were deliberately avoiding their social security obligations.<sup>235</sup> The *Coördinatiewet Sociale Verzekeringen* (Social Security Coordination Act or "CSV") made user companies of temporary laborers jointly and severally liable for unpaid social security taxes.<sup>236</sup> However, since the CSV proved easy to evade, the Dutch parliament passed the *Wet Ketenaansprakelijkheid* (Liability of Subcontractors Act or "WKA") as part of the Wages and Salaries Tax and Social Contributions Act of 1982.<sup>237</sup> The WKA applies joint and several liability for social security contributions and wage taxes to user companies or principal contractors.<sup>238</sup> "[S]pecifically, the liability relates to wage tax, national insurance contributions, the income-related contribution towards the healthcare insurance scheme and employee insurance contributions from the wages of the employees concerned."<sup>239</sup> The liability is joint and several, and applicable to the whole chain of subcontractors or temporary work agencies, at the same project or building site, for the social security and wages taxes due.<sup>240</sup>

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<sup>231</sup> *Id.* at 16.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 17.

<sup>235</sup> Mijke Houwerzijl & Saskia Peters, *Liability in Subcontracting Processes in the European Construction Sector: Netherlands*, in EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, 2, (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/94/en/1/EF0894EN.pdf>.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 1.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 4.

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In theory, the liability could apply to every contractor in the chain, but only if the subcontractor that failed to meet its obligations is insolvent.<sup>241</sup> The principal justifications for the WKA were not only to better ensure that social security contributions were paid, but also to defeat the unfair competitive advantage that non-paying companies enjoyed over the compliant companies.<sup>242</sup>

The chain liability rules may partly apply to (sub)contractors and temporary work agencies established in another Member State providing services in the Netherlands. However, the rules will only apply when Dutch tax law or social security law applies to the Dutch employees involved . . . Furthermore, the Dutch chain liability rules may be applicable when the work is carried out abroad by Dutch subcontractors.<sup>243</sup>

If they so choose, clients or principal contractors that want to indemnify themselves against liability under the WKA can establish a so-called “G-account.”<sup>244</sup> “[A G-account] is a blocked bank account in the agency’s or subcontractor’s name . . . This account may only be used for paying social security contributions and wage taxes to the Inland Revenue.”<sup>245</sup> Principal contractors deposit amounts owed by their subcontractors for applicable taxes directly into the G-account, with the remainder going to the subcontractor(s).<sup>246</sup> By utilizing G-accounts, the potentially liable principal contractor can take positive actions to ensure that their subcontractor(s) has actually withheld the appropriate sums of money to be paid to their Inland Revenue, and thus, avoid liability.

Like in the other Member States, the Netherlands has a collective *Arbeidsovereenkomst de Bouwneijverheid* (Collective Labour Agreement or “CLA”) that provides some measure of oversight by the principal contractor.<sup>247</sup> The CLA states, “[t]he employer is obliged to monitor the compliance of this collective bargaining agreement in all individual employment contracts covered by the agreement. When dealing with independent entrepreneurs, the employer should agree on this in the subcontracting arrangement.”<sup>248</sup> The CLA is generally applicable in the Netherlands, and requires principal contractors to

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 3.

<sup>243</sup> *Id.* at 6.

<sup>244</sup> *Id.* at 10.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1.

<sup>248</sup> *Id.*



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employ subcontractors or temporary work agencies on the condition that they comply with applicable Dutch wage tax and social security laws.<sup>249</sup> However, CLA enforcement mechanisms are somewhat nebulous.<sup>250</sup> Furthermore, the CLA is not applicable to every trade, even within the Dutch construction industry.<sup>251</sup> Though recent Dutch case law suggests that employees may be able to bring suit against their employers for unpaid wages under the CLA, widespread enforcement of CLA provisions remains unclear.<sup>252</sup>

Other laws on joint liability in the Netherlands are found in the *Burgerlijk Wetboek* (Civil Code or “BW”) and in the *Wet Arbeid Vreemdelingen* (Foreign Nationals Employment Act or “WAV”).<sup>253</sup> Articles 6 and 7 of the BW provide for joint liability “in the event of industrial accidents or work-related illnesses.”<sup>254</sup> The aggrieved employee might be able to bring suit directly against either his or her employer or the principal contractor, provided that he or she can prove that either company failed to meet its duty of care.<sup>255</sup> Furthermore, under the WAV, joint liability exists between clients, principal contractors and subcontractors, where the subcontractor employs a foreign national without a work permit.<sup>256</sup>

According to the Eurofound report on the Netherlands, most of the business, social and governmental actors “are satisfied with the current liability arrangement for social security contributions and wage tax at the national level.”<sup>257</sup> In particular, the Dutch government hailed the G-accounts’ success as a preventative measure and for virtually eliminating illegal sewing workshops in the Netherlands.<sup>258</sup> The liability laws, including the G-accounts, remain considerably less effective at regulating temporary work agencies.<sup>259</sup> Most business, social and governmental actors consider the CLA to be feckless and ineffective.<sup>260</sup> Consequently, the most popular and effective measures in the Netherlands are those applying joint liability, while allowing companies to avoid it through the application of basic preventative measures like G-accounts.

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<sup>249</sup> *Id.* at 2.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 6.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 17.

<sup>258</sup> *Id.* at 13.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 17.

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## I. SPAIN

Although Spain's joint liability laws in its modern democratic era date back to the 1980s, the first meaningful legislation was passed in the 1990s with Law 31/1995 *on the Prevention of Occupational Hazards* ("Law 31/1995").<sup>261</sup> Law 31/1995 aimed to improve work place health and safety by requiring the principal contractor to monitor the subcontractor's compliance with health and safety standards.<sup>262</sup> Where the subcontractor fails to comply and the work is within the principal contractor's own workplace and sphere of activities, the principal contractor will be held jointly liable.<sup>263</sup>

Spain also implemented Law 45/1996, *on posting of workers in the context of cross-border provision of services* ("Law 45/1995") in 1995.<sup>264</sup> Law 45/1995 states that Spanish labour laws regarding working hours, wages and the prevention of occupational hazards apply to domestic Spanish companies in the same way that it applies to foreign companies operating in Spain.<sup>265</sup> "Therefore, principal contractors and user companies established in Spain have the same obligations toward posted workers as they do in relation to domestic workers."<sup>266</sup>

Article 42 of the Workers' Statute ("Article 42") provides for joint liability of the principal contractor for social wages and security contributions. As in Law 31/1995, liability attaches where the subcontracted work is within the principal contractor's so-called *own activity*.<sup>267</sup> The liability extends throughout the contract life, and ends a full year after the contract expires.<sup>268</sup>

However, no legally established mechanism exists to enforce the [social security and wage] obligations. The common practice is for the principal contractor to carry out regular and effective checks to ensure compliance with legal obligations on the part of the subcontractors; for example, it may request

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<sup>261</sup> Oscar Vargas Llave, *Liability in Subcontracting Processes in the European Construction Sector: Spain*, in EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS 2 (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/878/en/1/ef08878en.pdf>.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 7.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 8.

<sup>268</sup> *Id.*

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copies of the relevant pay slips or bank transfer documents.<sup>269</sup>

Principal contractors can also request proof of met obligations directly and monthly from their subcontractors.<sup>270</sup>

In 2006, Spain passed Law 32/2006, *on subcontracting in the construction sector* (“Law 32/2006”), which as the name implies, applies exclusively to the Spanish construction sector.<sup>271</sup> “Article 4(2) of [Law 32/2006] refers to the obligation [of principal contractors] to ensure that workers are adequately trained in the prevention of occupational hazards, as well as the duty to have a preventative organization in place and to register with the Register of Accredited Companies.”<sup>272</sup> Noncompliance with these requirements results in joint liability between the malfeasant subcontractor and its principal contractor.<sup>273</sup> Interestingly, Article 5 of Law 32/2206 limits the number of vertical links in the subcontracting chain to three, absent a special showing that more subcontractors are objectively required to complete the work.<sup>274</sup> Article 5 evidences Spain’s efforts to simplify the contracting process by constricting the length of the vertical contracting chain.

In 2003, Spain passed Law 58/2003, a general tax law that holds principal contractors liable for the tax debt of their subcontractors.<sup>275</sup> This includes tax debt for “workers, professionals, or other entrepreneurs – for the part corresponding to the subcontracted works or services; [including] any amounts payable or to be withheld.”<sup>276</sup> The principal contractor can avoid this liability if it obtains from the subcontractor clearance certificates declaring that the subcontractor is compliant.<sup>277</sup>

According to the Eurofound report on Spain, the Spanish labour and business community is generally satisfied with the existing liability laws.<sup>278</sup> “In general, the existing laws provide an effective and adequate regulatory framework – although in practices disputes may arise about the interpretation of concepts such as ‘own activity’ and the ‘workplace of the entrepreneur,’ or about the scope of various obligations subsumed under joint liability.”<sup>279</sup> The

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 9.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 10.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 13.

<sup>279</sup> *Id.*

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vagueness of key terms in the various liability laws has obstructed enforcement efforts by the Spanish government.<sup>280</sup> However, nothing in the report indicates that Spain would oppose stricter liability regulations, so long as they are more clearly worded.

### III. REACTIONS OF EUROPEAN SOCIAL AND BUSINESS ACTORS TO JOINT LIABILITY PROPOSALS

The reactions to proposals for joint liability in European subcontracting fall along predictable lines among the various social actors generally favoring more stringent regulations and the business actors generally not favoring them. Social actors include labour organizations, non-governmental organizations and governments. Business actors include MNEs, national businesses, trade groups and non-governmental organizations. Unfortunately, the E.U. neither solicited nor published opinions on the Motion. Consequently, a dearth of information about this Motion exists from social and business actors since its adoption as a non-legislative resolution in March of 2009. Consequently, the most comprehensive materials available concerning European attitudes toward joint liability laws date back to the 2007, *Outcome of the Public Consultation on the Commission's Green Paper "Modernising labour law to meet the challenges of the 21<sup>st</sup> century* ("Green Paper"), mentioned above in the discussion on the Motion's recitals. Fortunately, the questions posed in the Green Paper concerning joint liability regulations are sufficiently similar to the proposals in the Motion so that an adequate comparison can be made. Question number 9 in the Green Paper asks, in part: "Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in 'three-way relationships'?"<sup>281</sup> The responsive communication from the European Commission to the Council and Parliament generally stated that Member States were split about the need for subsidiarity (joint) liability "to ensure compliance with employment rights through the EU."<sup>282</sup> Social actors like the European Trade Union Confederation ("ETUC") "considered that a Community initiative is required in the form of an instrument to regulate the 'chain responsibility' of user enterprises and intermediaries in the case of agency work and sub-

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<sup>280</sup> *Id.*

<sup>281</sup> *Green Paper, supra* note 48, at 13.

<sup>282</sup> *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Outcome of the Public Consultation on the Commission's Green Paper "Modernising Labour Law to Meet the Challenges of the 21st Century,"* at 8, COM (2007) 627 final (Oct. 24, 2007) [hereinafter *Com 2007*].

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contracting.”<sup>283</sup> Business actors generally argued that joint liability laws were ineffective, and that subcontractors were already sufficiently regulated by national legislation.<sup>284</sup>

Social actors, like the ETUC, argued very strongly for a Community-wide instrument adopting joint liability as a European response to subcontracting abuses.

[I]n recent times we have argued in favour of a European instrument regulating joint and several liability (or ‘chain-responsibility’) of user enterprise and intermediary in case of agency work and subcontracting, not only for the payment of taxes and social security contributions, but also for wages. . . The European Commission should encourage Member States that have not yet done so to take initiatives to introduce so called systems of ‘client liability,’ ‘chain responsibility’ or ‘joint and several liability,’ bring together the various practices in member States, and consider the proposal of a Community initiative on this matter.<sup>285</sup>

Other social actors like the European Federation of Building and Woodworkers (“EFBWW”) argued that principal contractors have superior financial resources and bargaining power, which they often use to negotiate less-than-fair deals with questionable subcontracting companies.<sup>286</sup> Furthermore, a lack of clear and consistent rules exists across the European Community, holding subcontracting chains responsible for failure to pay taxes and wages.<sup>287</sup> Consequently:

The EFBWW considers that the adoption of a European directive on ultimate liability of general contractors and/clients is indispensable with a view to ensuring compliance with and application of provisions governing pay and working conditions, social security and tax liabilities in a

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> EUROPEAN TRADE UNION CONFEDERATION [ETUC] , ETUC POSITION AS ADOPTED BY THE ETUC EXECUTIVE COMMITTEE OF 20-21 MARCH 2007 IN ROME 28 (2007), *available at* [http://ec.europa.edu/employment\\_social/labour\\_law/green\\_paper\\_responses\\_en.htm](http://ec.europa.edu/employment_social/labour_law/green_paper_responses_en.htm).

<sup>286</sup> WERNER BUELEN, RESPONSE FOR EUROPEAN FEDERATION OF BUILDING AND WOODWORKERS 8 (2007), *available at* [http://ec.europa.edu/employment\\_social/labour\\_law/green\\_paper\\_responses\\_en.htm](http://ec.europa.edu/employment_social/labour_law/green_paper_responses_en.htm).

<sup>287</sup> *Id.*

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subcontracting chain. Such a directive would close the legal loophole whereby subcontracting is used to get around tax, social, statutory and contractual obligations, thereby distorting the market and removing protection for workers.<sup>288</sup>

Alternately, European business actors generally argued that European-wide joint liability regulations would prove ineffective, or that national legislation was already regulating subcontracting sufficiently.<sup>289</sup> EuroCommerce noted in its position paper that principal contractors or companies that utilize temporary work agencies cannot effectively monitor their subcontractors' or temporary workers' hours, and that such legislation should be left to the Member States.<sup>290</sup> Likewise, the Confederation of British Industry noted: "UK employers are clear that the agency worker's primary relationship is with the agency. User companies do not get involved in the details of an agency worker's terms and conditions and it would not be acceptable for employment responsibilities to be passed to the user company."<sup>291</sup> Furthermore, "[c]ompanies using sub-contractors should be able to rely on the fact that those sub-contractors have to fulfill their labour law responsibilities – ensuring their subcontractors comply with the law *is not their responsibility* (emphasis added)."<sup>292</sup> The Council of European Employers of the Metal, Engineering and Technology-Based Industries bluntly stated:

It is simply not realistic to make main contractors responsible for the activities of their sub-contractors in the production chain. It would furthermore be neither efficient nor desirable to set up this subsidiary liability for sub-contractors. *It would paralyze the economy and have a negative impact because of the incalculable risks for which companies could be liable* (emphasis added).<sup>293</sup>

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<sup>288</sup> *Id.* at 8-9.

<sup>289</sup> *Com 2007, supra* note 284, at 8.

<sup>290</sup> POSITION PAPER: EUROCOMMERCE'S CONTRIBUTION TO THE GREEN PAPER, 13 (2007), available at [http://ec.europa.eu/employment\\_social/labour\\_law/green\\_paper\\_responses\\_en.htm](http://ec.europa.eu/employment_social/labour_law/green_paper_responses_en.htm).

<sup>291</sup> CBI RESPONSE TO THE EUROPEAN COMMISSION GREEN PAPER "MODERNISING LABOUR LAW TO MEET THE CHALLENGES OF THE 21<sup>ST</sup> CENTURY, CONFEDERATION OF BRITISH INDUSTRY, 4 (2007), available at [http://ec.europa.eu/employment\\_social/labour\\_law/green\\_paper\\_responses\\_en.htm](http://ec.europa.eu/employment_social/labour_law/green_paper_responses_en.htm).

<sup>292</sup> *Id.*

<sup>293</sup> COUNCIL OF EUROPEAN EMPLOYERS OF THE METAL, ENG'G AND TECH. - BASED INDUS. [CEEMET]: GREEN PAPER "MODERNISING LABOUR LAW TO MEET THE CHALLENGES OF THE 21<sup>ST</sup> CENTURY": CEEMET ANSWERS TO THE QUESTIONNAIRE, 30 Mar. 2007, at 7 (2007), available at [http://ec.europa.eu/employment\\_social/labour\\_law/answers/documents/3\\_76\\_en.pdf](http://ec.europa.eu/employment_social/labour_law/answers/documents/3_76_en.pdf).

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Even the European Commission, in its June 2009 response to the Motion, urged caution with regards to a Community-wide legal instrument for joint liability. “The Commission believes that a cautious approach is required. Account needs to be taken of the variety of legal systems in place in the Member States as well as the contrasting views among stakeholders as to the feasibility and/or desirability of a Community legal instrument.”<sup>294</sup> In its response, the Commission cited the public consultation to the Green Paper as evidence that the E.U. needs more time to analyze the principal of joint liability as an effective means of protecting workers’ rights in subcontracting chains.<sup>295</sup>

### IV. CONCLUSION

It seems unlikely that the Motion will make much headway in the European Union. That is, the principal of joint liability as a European principal is unlikely to become a binding Directive on the Member States. The Motion’s implications are too broad, and the potential opposition to the concept of joint and several liability without a scienter requirement is too strong. The principal reasons why the Motion’s principles will not likely become a Directive are:

1. The Motion is overly broad.
2. The Motion has adamant detractors.
3. Joint Liability Legislation has not proven itself effective at fighting fraud.
4. Joint liability legislation has not proven itself effective at protecting vulnerable workers.

The Motion is overly broad. Though one could interpret the legislation as being applicable solely to the European construction sector, that is not explicitly stated in the Motion. Consequently, it is unclear whether the Committee intended for joint liability to be a European rule in *all* sectors of the

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<sup>294</sup> Follow-up to the European Parliament Resolution on the Social Responsibility of Subcontracting Undertakings in Production Chains, Adopted by the Commission on 17 June 2009, EUR. PARL. DOC. A6-0065/2009, at 2 (2009).

<sup>295</sup> *Id.*

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economy or just in the constructions sectors, where the eight Member States that currently have joint liability legislation have limited its scope. Given that only eight out of the total membership of twenty-seven states have liability rules that are not uniform, and are applicable mostly to the construction sector, it seems unlikely that the European Union would readily accept a sweeping endorsement of joint liability regulations for all sectors of the economy. However, if the legislation would be tailored to the construction or building sector exclusively, the situation may be different.

Furthermore, the Motion has adamant detractors. Consistently, in each of the eight Member State reports, fierce opposition from the business community has prevented the enactment of more stringent liability regulations. The reasons for opposing this legislation are simple: the existing regulations are complicated, expensive to implement, lack a scienter requirement, and expose the client and principal contractor to potentially unlimited liability. Until these concerns are addressed through dialogue between the European Union and the European business community, with the goal of finding the best business practices that address both parties' concerns, the European business community will not likely be persuaded by the Motion's principles.

Joint liability legislation itself has not been proven effective at fighting fraud. The Eurofound reports consistently reported relatively few cases where the liability legislation actually combated fraudulent contracting practices. The reports cites various reasons for this lack of efficacy, including a general cultural acceptance of black market labour, lack of practical access to the host country's legal system, a general unwillingness on the part of worker's to bring suit to recover wages, and a lack of government involvement in the supervision and enforcement of the liability provisions. Given the relatively weak track record of even the strongest liability laws, it seems unlikely that the European Union would adopt a far-reaching liability regime.

Furthermore, joint and several liability legislation itself has not been proven effective at protecting vulnerable workers. Strong practical barriers exist between aggrieved workers and judicial redress. For example, host country's labour unions often do not represent posted workers. Posted workers often work illegally and thus have no legal remedy, posted workers often do not speak the host country's language, posted workers are often ignorant of the judicial remedies available to them, posted workers often fear losing their job or obtaining future employment, posted workers often accept lower-than-minimum wages because they are still higher than their home country's wages, posted workers are often pushed into settling out of court by their employer, and posted workers are reluctant to take advantage of the liability legislation because judicial remedies can take too long.

Moreover, in the construction industry alone, a large percentage of



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workers are self-employed and are not working for a subcontractor in the traditional sense. Though the Motion addresses some of these concerns, the Eurofound reports demonstrate that liability legislation has thus far failed to address the specific needs of these aggrieved workers.

Although it seems unlikely that the Motion will ever be adopted as a Directive as it is currently drafted, the record shows that many E.U. Member States are at least open to the imposition of joint liability restrictions on businesses as a solution to the increasingly complex web of multinational business activities. Given this openness to at least the principle, it seems likely that the E.U. could pass legislation pushing for joint liability laws in a specific industrial sector, such as construction. Thus, by focusing on a specific industrial sector and adopting the best practices that were outlined in the Motion's recitals and the Eurofound reports, the principal of joint liability may indeed become *the* European means of regulating MNEs in the 21<sup>st</sup> Century.

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