

# SUBCONTRACTING: EXPLOITATION BY DESIGN

TACKLING THE BUSINESS MODEL FOR SOCIAL DUMPING



B-1047 Brussels, Belgium  
+32 (0)2 283 23 01  
left-communications@europarl.europa.eu  
www.left.eu



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# EXECUTIVE SUMMARY

Following numerous scandals, subcontracting has become a topic of interest for academics and journalists alike, and its negative impact on employment and working conditions has been widely condemned.

This report sets out the various ways that subcontracting undermines labour laws in the EU. Using case studies we seek to demonstrate that subcontracting is not a temporary solution to deal with specific market situations or a necessary solution to performing tasks that do not belong to the company's core business, but is instead **the business model**, normalising exploitation and social dumping so that **companies can increase their profits**.

Subcontracting allows companies to **separate power and profits, on one side, from risks and responsibilities, on the other side**. In fact, the lead company and the main contractor(s) often decide the conditions that must be respected in the service provision or in the good production; instead, the risks and the responsibilities are displaced on subcontractors that, in order to comply with the conditions imposed by the lead company or the main contractor, are often forced to breach labour regulation.

Subcontracting also **affects the stability of work contracts** where workers employed by the subcontractor can be lawfully dismissed if the main contract or the subcontract end.

Due to different employers, collective agreements and applicable labour laws, it increases **unequal treatment between workers and fragments labour communities by hampering worker organisation**. Fragmentation of the production process among several companies hinders the achievement of the thresholds needed to create a worker representative.

Subcontracting makes controls by **labour inspectors** more difficult as the relationships between companies are often unclear and the relevant labour laws and working conditions are obfuscated.

Subcontracting is therefore often involved in both **legal and illegal forms of workers' exploitation** (i.e. practices aimed at progressively deteriorating working conditions) and **social dumping** (i.e. practices aimed at exploiting poor labour conditions with the aim of gaining a competitive advantage).

Despite the widespread presence of abuse in subcontracting chains, this report focuses mainly on the **legal forms of workers' exploitation and social dumping**. In this report, we argue that the exploitation of workers and social dumping result from not only legal breaches, but that these phenomena are actually supported by lawmakers. In other words, **lawmakers deliberately decide to facilitate subcontracting, despite its negative impact on labour**.

As a result, we are calling for intervention at EU level to ensure decent living and working conditions for workers involved in subcontracting chains.

This should be achieved by: limiting the length and level of subcontracting chains; promoting full joint and several liability; strengthening work stability; assuring workers' equal treatment; supporting trade unions and worker representatives along the entire subcontracting chain.

To do this our recommendations are two-fold:

1. A new **European Regulation on decent work in the subcontracting chain** that:

- **Limits the possibility to contract out and shortens the length of the subcontracting chain** by:
  - Prohibiting subcontracting or the possibility to further contract out when necessary to pursue a legitimate interest, such as the protection of workers' rights;
  - Giving powers to member states to oblige the main contractor to perform certain essential tasks;
  - Creating interconnected national databases to exchange information and white/black lists of reliable/unreliable business partners; and
  - Introducing a general duty of transparency on the entire subcontracting chain.
- **Promotes joint and several liability:** The EU legislation shall clarify that whoever exploits workers' activities must bear the duties linked to the contract of employment. Moreover, full joint and several liability for all companies involved in the subcontracting chain shall be introduced.
- **Strengthens work stability** by using social clauses currently present in public procurement legislation to protect workers when a new subcontractor takes over the work or service.
- Guarantees **equal treatment of workers**, applying the same terms and conditions of employment across the subcontracting chain.
- Supports **trade unions and worker representatives along the entire subcontracting chain and guarantees the right to strike.** To monitor the subcontracting chain and to participate in the entire due diligence processes, worker representatives shall be present and their role, including the role of the European Work Council, shall be strengthened.

2. Modification of the existing legal framework, in particular:

Amending the **Corporate Sustainability Due Diligence proposal** in order to:

- Ensure transparency of the entire supply chain, obliging companies to disclose information on all the suppliers involved;
- Introduce a rule on joint and several liability for human right violations committed by suppliers;
- Limit the use of contract termination clauses and contractual insurance to avoid any risk of burden-shifting by the lead company onto its suppliers and to guarantee work stability in the supply chain;
- Strengthen the equality clause by:
  - Enlarging and making illustrative and non-exhaustive the lists of human rights and Treaties in Annex of the Directive on Corporate Sustainability Due Diligence (CSDD) proposal;
  - Obliging companies to monitor the respect of legislation that implement these Treaties (where it exists); and
  - Including collective agreements (including transnational collective agreements) in the human rights framework that companies have to respect.
- Ensuring the full involvement of trade unions and workers' representatives throughout the whole due diligence process, including the development and implementation process.

Amending the **legislation on public procurement** in order to:

- Introduce the possibility, for the contracting authority, to limit the length and level of subcontracting chains and the share of subcontracted contract, when needed to pursue legitimate interests;
- Strengthen the rule on joint and several liability, introducing a full liability along the entire subcontracting chain;
- State that social clauses aimed at strengthening work stability are consistent with EU law;
- Increase workers' equal treatment by obliging subcontractors to guarantee their workers at least the same treatment received by the main contractor's workers;
- to award companies that respect and promote trade unions rights along their entire subcontracting chain.

**Supporting the creation of worker representatives along the entire subcontracting chains**, as well as in sites and groups by:

- Amending **Directive 2002/14** to strengthen right of information and consultation as an integral part of company decision-making at all levels and throughout the entire subcontracting chain;
- Introducing a **new framework directive on workers' information, consultation and participation** for the various kinds of European companies and for companies that use EU company mobility instruments, in order to establish minimum standards on issues such as anticipating change;
- Amending the **European Works Council (EWC) Directive** so as to ensure: that the EWC's opinion is taken into account in company decisions and is delivered before consultation is completed at the respective level and before the governing bodies come to a decision. The amended Directive would also ensure efficient coordination of information, consultation and participation at local, national and EU levels; and effective sanctions when information and consultation rights are violated.



# INTRODUCTION

Several cases in the media<sup>1</sup> and academic articles<sup>2</sup> demonstrate that subcontracting often entails workers' exploitation and social dumping. These cases also prove that subcontracting is not a temporary solution to deal with specific market situations or a means of performing tasks outside of the company's core business, but has become the normal strategy adopted by many companies to increase profits.

Sometimes, abuses are so widespread that workers consider them as part of the normal working conditions. This leads to the normalisation of labour abuse, which partially explains the absence of workers' complaints.

In this report, we decided to focus mainly on the **legal forms of workers' exploitation and social dumping**. We seek to demonstrate that workers' exploitation and social dumping happens not only as a result of legal breaches, but is intentionally supported by states competing to attract companies, and by the European Union that encourages this competition by promoting economic freedom, one of its founding principles.

As we will explain in Part I of the report, on many occasions, **legislators have deliberately decided to facilitate any types of subcontracting, despite their negative impact on labour**. In other words, legislators have chosen to defend and boost profits generated by cost-cutting subcontracting strategies, instead of guaranteeing decent living and working conditions to workers involved in these chains.

Legislators exploit vulnerable people who are willing to work for low wages and in poor conditions, by allowing several forms of precarious and ultra-precarious jobs and by forcing non-nationals into a precarious (sometimes even clandestine) status.

Consequently, we believe that the EU can and should improve the working conditions of people involved in subcontracting chains through regulation. Our main request is therefore to adopt a **European regulation on decent work in subcontracting chains** based on five main objectives: limiting length and level of subcontracting chains; promoting full joint and several liability; strengthening work stability; assuring workers' equal treatment; supporting trade unions and worker representatives along the entire subcontracting chain.

<sup>1</sup> See, for example:

<sup>2</sup> <https://www.work-watch.de/>, <https://www.lighthousereports.nl/investigation/invisible-workers/> and <https://www.theguardian.com/uk-news/series/the-new-world-of-work>  
For the construction sector: Berntsen, Lillie, 2014, 1 ss.; Eldring, Fitzgerald, Arnholtz, 2012, 21 ss.; Kahmann, 2006, 183 ss.; Lillie, Sippola, 2011, 292 ss.; Meardi, Martin, Riera, 2012, 5 ss.; Thörnqvist, Woolfson, 2013, 525 ss.; Wagner, 2015; Wagner, Lillie, 2014, 403 ss.; Wagner, Berntsen, 2016, 193 ss.. For the transport sector: Haidinger, 2017; Proseccchi, 2020, 543 ss.; Pastori, Brambilla, 2013; VNB-ITF-IUF, 2020. For the agri-food sector: EFFAT, 2011; Campanella, Dazzi, 2020; Palumbo, Corrado, 2020. For the garment industry: Clean Clothes Campaign, the International Trade Union Confederation, the European Trade Union Confederation, IndustriALL Global Union and UNI Global Union, 2017; Smallbone, Do, Blackburn, Isusi, Corral, Durán López, Patrini, 2018; Theuws., ten Kate, 2016. See, as well, the Reports prepared for the European Trade Unions: Borelli S., Proseccchi G., Guaman Hernandez A., Loffredo A., Orlandini G., Riesco Sanz A. 2021; Houwerzijl, Traversa 2019; Borelli, Houwerzijl, Traversa 2020; Sydex 2021.



# SUBCONTRACTING AS THE BUSINESS MODEL.

## 1. THE IMPACT OF SUBCONTRACTING ON WORKERS' RIGHTS

Subcontracting has been identified, in several cases concerning several sectors<sup>3</sup>, as a factor negatively impacting workers' rights and employment conditions. These cases demonstrate that subcontracting has become **THE** business model, i.e. for many companies, subcontracting is the usual **strategy adopted to increase profits** participating in highly competitive markets. Indeed, subcontracting permits the client and the contractor(s) to **cut labour costs** and reduce the price of the goods produced and the services provided. This outcome is much more evident in global supply chains and when subcontracting concerns transnational cases. In the latter, outsourcing boosts competition among states that struggle to offer attractive conditions to foreign investors<sup>4</sup>.

Therefore, both **workers' exploitation** (i.e. practices aimed at progressively deteriorating working conditions) and **social dumping** (i.e. practices aimed at exploiting low labour conditions with the aim of gaining competitive advantage)<sup>5</sup> feature subcontracting. This can be explained considering the five main effects of subcontracting on labour:

1. Subcontracting allows companies to **separate power and profits from risks and responsibilities**<sup>6</sup>. In fact, the client and the main contractor(s) keep a certain control on their subcontracting chain, deciding the conditions that must be respected in service provision or goods production (e.g. the price, the timing, the technical requirements, the volume of production)<sup>7</sup>. The degree of control on subcontractors is even higher when they belong to the same group of companies. The risks and the responsibilities linked to goods production or service provision lie with the subcontractors, meaning in order to comply with the conditions imposed by the client or the main contractor, they are often forced to infringe labour regulation<sup>8</sup>.
2. Subcontracting **affects the stability of employment contracts**: if the main contract and the subcontract(s) end, the workers employed by the subcontractor(s) could be lawfully dismissed. Therefore, subcontracting allows *à la carte work*<sup>9</sup> thanks to which companies have at their disposal, at their will and with total flexibility, a large number of workers. As demonstrated during the pandemic, facing market constraints, the client and the main contractor(s) can simply adapt their subcontracting chain to reduce the goods or services demanded, leaving many workers without a salary or a job<sup>10</sup>.

<sup>3</sup> See the references in footnote n. 3.

<sup>4</sup> Supiot 2019.

<sup>5</sup> Kiss 2017; Bernaciak 2015.

<sup>6</sup> Supiot 2018.

<sup>7</sup> Cremers and Houwerzijl (2019, p. 7) refer to «unequal bargaining power in the chain» that «can lead to questionable commercial contracts that define the market transactions between the different levels, with abnormally low-priced outsourcing and tendering».

<sup>8</sup> The unfeasibility of the price established in the subcontract is often the main evidence that the client and the contractor are aware of the worker rights' violations (see Anner 2015; Anner, Bair, Blasi 2013). For this reason, public procurement Directives oblige contracting authorities to «require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services» (Articles 69 of the Directive 2014/24).

<sup>9</sup> This term has been used by Riesco Sanz 2021, p. 62.

<sup>10</sup> Vogt, Saage-Maaß, Vanpeperstraete, Hensler, 2020; Lowell Jackson, Judd, Viegelahn, 2020; Kyritsis, LeBaron, Nova, 2020; Anner 2022.

3. Subcontracting **increases unequal treatment among workers**. Since different national and company collective agreements, as well as different labour legislation usually apply to workers involved in a subcontracting chain, they have different salaries, working conditions, trade union rights, social security protection, etc. In the EU, freedom to provide services exacerbates this unequal treatment by the payment of social contributions in the home country, the impossibility to apply company collective agreements and the limited scope of the equality clause in the Posting of Workers Directive<sup>11</sup>. Finally, in global supply chains, companies fully enjoy the possibility to select the country that offers the most advantageous (i.e. least expensive) working conditions.
4. Subcontracting **fragments labour communities and hampers worker organisation**, as workers involved in the subcontracting chain have different employers, different collective agreements and, sometimes, different national legislation. Consequently, the collective rights that workers benefit from are often divergent and especially in transnational cases. In the latter, as well as in chains that involve migrant workers, interactions among workers are also prevented by linguistic barriers and racist stereotypes sometimes promoted by the company management<sup>12</sup>. Fragmentation of the production process among several companies can hinder the achievement of the necessary thresholds to create worker representatives in the company or in the establishment.
5. Subcontracting makes controls by **labour inspectors** more difficult. The complexity of the subcontracting chain makes it difficult to detect the companies involved and their relationship to one another. Labour inspectors struggle to determine the employers in the chain, which working conditions are applied, or whether labour regulations are respected. Consequently, at a time when the number of labour inspectors is decreasing in many states due to the public budget constraints<sup>13</sup>, their work has become more complex and time intensive. Sometimes, inspections require the intervention of different national authorities or the transnational cooperation among member states. In global supply chains, effective inspections are often impossible, due to the weak presence of labour inspectors in the certain countries outside the EU.

Due to these five main effects of subcontracting on labour, companies that contract out achieve significant competitive advantages and consequently, many competitors end up emulating the outsourcing model. Moreover, the first tier of subcontractors often decide to further contract out all or part of the activity, in order to benefit from the same cutting cost strategy<sup>14</sup>; therefore, the workers employed by the last tier of subcontractors are usually the ones that suffer the worst working conditions.

Many studies demonstrate that subcontracting is not a temporary solution to deal with specific market situations or to perform tasks that do not belong to the company's core business<sup>15</sup>. Subcontracting can concern almost **the entire production process** and it is often a **never-ending story**: even when labour inspectors or trade unions intervene to denounce worker rights' violations or other severe infringements, subcontracting does not end there but is simply adapted in order to be control-resilient<sup>16</sup>.

<sup>11</sup> Article 3.1 of the Directive 96/71 (as modified by the Directive 2018/957) enumerates the matters for which the Host State (i.e. the State where the work is carried out) can impose to the service provider to respect its legislation.

<sup>12</sup> See recently TUC, *Still Rigged. Racism in the UK Labour Market 2022*, <https://www.tuc.org.uk/sites/default/files/2022-08/RacismIntheUKLabourMarket.pdf>

<sup>13</sup> <https://www.etuc.org/en/pressrelease/huge-fall-labour-inspections-raises-covid-risk>

<sup>14</sup> See, for example, the Rive Gauche case, further described in Borelli, Frosecchi, Guaman, Loffredo, Orlandini, Riesco Sanz 2021.

<sup>15</sup> See the Itaipizza case, further described in Borelli, Frosecchi, Guaman, Loffredo, Orlandini, Riesco Sanz 2021.

<sup>16</sup> See, for example, what has happened in Spain after the controls on bogus cooperatives in the meat production sector: Borelli, Dueñas 2022.

## 2. THE ILLEGAL FORM OF WORKERS' EXPLOITATION AND SOCIAL DUMPING IN SUBCONTRACTING

Workers' exploitation and social dumping in subcontracting chains can occur in a range of forms, some of which are illegal. Due to their lack of responsibility, clients and contractors rarely monitor workers' rights violations, in some cases resulting in serious crime, that take place in their subcontracting chains<sup>17</sup>. When these violations become commonplace, a **normalisation of labour abuse can ensue**<sup>18</sup>. In these circumstances, workers no longer perceive the existence of abuse because this is embedded in the sector and considered as part of the normal working conditions<sup>19</sup>. Consequently, workers do not fight for their rights.

The **absence of workers' complaints** has been detected in several studies on subcontracting<sup>20</sup>. This affects, in particular, **third-country nationals** that are often afraid of complaining about workplace violations in case they lose their employment contract and, consequently, their work permit. The situation of the third country nationals without work permits is even more precarious as they also risk sanctions under immigration rules, including forced return to their home country, if they raise concerns about workers' rights violations.

### Human Trafficking at Borealis in Antwerp

In July 2022, at a large construction site of Borealis, the chemical company, in Antwerp, Belgian labour inspectors found 55 men of Filipino and Bangladeshi origin who were paid a monthly wage of barely €650 for working six days a week. These workers were housed in atrocious conditions and were in Belgium illegally as their work permits had expired.

Borealis stated that the men were not their employees, but employees of a contractor. Borealis went on to state that it demands absolute transparency from contractors and subcontractors. However, inspectors discovered that Borealis was for some time well aware of the abuse.

During the investigation, roughly 40 Turkish and Romanian welders and pipe fitters replaced the 55 Bangladeshi and Filipino workers. The new employees lived in the same poor accommodation and worked for the same contractor. During the investigation, 138 workers were recognised victims of human trafficking but only 55 of them received a residence permit<sup>21</sup>.

The Borealis case is one of the several cases of serious workers' exploitation recently detected in Belgium<sup>22</sup>. Indeed, according to the last Global Slavery Index, in 2018, the number of victims of modern slavery in Belgium was estimated at 23,000. In 2016, that index for Belgium still stood at 2,000 people.

Many workers are deterred from suing their employer (and the lead company or the contractor) due to **the cost and duration of legal proceedings**; this is particularly the case in transnational subcontracting chains. Consequently, workers may become resigned to accepting a certain degree of rights violations in order to keep their job and not to lose their salary, which, in the case of posting of workers or third-country nationals, is usually higher than in their country of origin.

17 Davies, Ollus 2019, p. 87.

18 See United Nations 2019.

19 Some scholars have talked about "everyday abuse": «Workers experiencing everyday abuses rarely regard themselves as victims in need of rescue, but their capacity to defend their interests tends to be heavily constrained» (Quirk, Robinson, Thibos 2020, p. 7).

20 See the Italpizza case, further described in ETUC, *Securing workers' rights in subcontracting chains. Case studies*, [https://www.etuc.org/sites/default/files/2021-10/Securing%20workers%20rights\\_EN\\_LR.pdf](https://www.etuc.org/sites/default/files/2021-10/Securing%20workers%20rights_EN_LR.pdf)

21 <https://www.pzc.nl/antwerpen/vakbonden-oplossing-nodig-voor-humanitaire-noodsituatie-slachtoffers-borealis-site~a7d3be2d/?referrer=https%3A%2F%2Fwww.google.com%2F>

22 Other examples are the Rive Gauche case (further described in Borelli, Frosechi, Guaman, Loffredo, Orlandini, Riesco Sanz 2021) and Antwerp case, further described in EFBWW, *Enough is enough. Safe and healthy workplaces for all workers*, <https://www.efbww.eu/stream/f30dd363-0233-45c8-a6f0-438623e9cfc7>.

Where exploitation is so serious, there have been notable protests organised to highlight rights violations<sup>23</sup>. Labour inspectors, trade unions and other public authorities usually intervene to control the situation. Sometimes, in order to avoid bad publicity, the lead company or the main contractor are available to satisfy workers' requests but, in the end, subcontracting goes on as a never-ending story.

### The Rive Gauche case

In April 2016, at a construction site in Charleroi, seven Egyptian workers climbed to the top of a crane, threatening to jump if their salaries were not paid. Alerted by the trade unions and by media, the labour inspectors arrived immediately to block the construction site. These workers were employed by an Italian subcontractor that set up a constellation of companies in order to provide labour to the main contractor, Valens-Duchene. In order to avoid bad publicity, Valens-Duchene intervened and, on the same day, paid the seven Egyptians on the crane and their two colleagues that organised the protest.

The Egyptians' success encouraged other workers to protest. The following day, many others addressed the Belgian labour inspectorate, highlighting that they had not been paid for several months. In a few weeks, €423,787 was transferred to workers.

Immediately after the protest, Valens-Duchene decided to terminate the contract with the Italian subcontractor in order to avoid any joint liability for the payment of remunerations, and subcontracted the construction work to another French company that then further subcontracted to Portuguese and Romanian companies.

## 3. THE LEGAL FORMS OF WORKERS' EXPLOITATION AND SOCIAL DUMPING IN SUBCONTRACTING

In this report we focus mainly on the **legal forms of workers' exploitation and social dumping, to demonstrate that often they occur through design rather than accident**. On many occasions, **legislators deliberately facilitate forms of subcontracting, despite of its negative impact on labour**.

To provide some examples from European legislation:

- The obligation for member states to register a company, without further controls than the ones allowed by the Directive 2019/1151 on the use of digital tools and processes in company law, and the possibility for member states to opt for the incorporation theory. Consequently, entrepreneurs can easily create (real or bogus) companies in the state that offers the most convenient fiscal, economic and social conditions, and then decide to locate their production or to provide their good and services abroad;
- The liberalisation of several market sectors, such as air and road sectors, that strongly increased competition among companies. The negative consequences of the liberalisation on working conditions have been proven by many trade union actions against the Ryanair business model, some of which ended before the Court of Justice of the European Union (Court of Justice of the European Union (CJEU), 14.9.2017, C-168/16, *Nogueira*). We should also underline that, on several occasions, the CJEU supported competition as an EU fundamental principle ruling many forms of market regulation as inconsistent with EU law. For example, it ruled that a national regulation "pursuant to which the price of haulage services for hire and reward may not be lower than minimum operating costs, which are fixed by a body composed mainly of representatives of the economic operators concerned" was incompatible with EU law (CJEU, 4.9.2014, Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API*);

<sup>23</sup> See the Rive Gauche and the Italpizza cases, further described in Borelli, Froscechi, Guaman, Loffredo, Orlandini, Riesco Sanz 2021.

- The overestimation of economic freedoms and the consequent strict application of the proportionality principle to justify any limits to these freedoms. As far as it concerns public procurement, for example, the CJEU considered a national law that limits the share of the contract which the tenderer is permitted to subcontract to third parties to 30%, as incompatible with Directive 2014/24 (CJEU, 26.9.2019, C-63/18, *Vitali*). According to the CJEU, such a national law “prohibits, in general and abstract terms, use of subcontracting which exceeds a fixed percentage of the public contract concerned, so that that prohibition applies whatever the economic sector concerned by the contract at issue, the nature of the works or the identity of the subcontractors. Furthermore, such a general prohibition does not allow for any assessment on a case-by-case basis by the contracting entity” (§ 40).

In all these circumstances, the European co-legislators and the CJEU chose to defend and increase profits generated by subcontracting and its cost-cutting strategies instead of guaranteeing decent living and working conditions to workers involved in these chains<sup>24</sup>.

On the other side, policies aimed at allowing several forms of precarious and ultra-precarious work have increased the number of vulnerable people needing to work for any wages and in any circumstances. Moreover, in many cases migration policies link the work permit to the contract of employment or create cumbersome procedures that make obtaining a work permit unrealistic, forcing migrant workers into exploitative practices, including modern slavery.<sup>25</sup>

In globalised markets, legal forms of workers’ exploitation stem also from competition policy between states. Eager to provide the best conditions to attract businesses, certain countries squeeze workers’ rights and social protection, sometimes deliberately weakening the national industrial relations system<sup>26</sup> or lowering the social security contributions<sup>27</sup>. In the Eurozone, this effect is exacerbated by the impossibility to adapt the exchange rate and by the rigid constraints imposed on public budget.

Consequently, enforcement measures aimed at strengthening the number and the efficiency of inspections, promoting cooperation among different public authorities at national and European level, facilitating access to justice and setting up effective remedies and sanctions<sup>28</sup>, are certainly necessary but cannot be the only solution to improve the indecent living and working conditions currently generated by subcontracting.

<sup>24</sup> On this point see also Bellavista 2022, p. 4.

<sup>25</sup> According to Hyman (2021, p. 176), «modern slavery is not an aberration but is rather integral to contemporary business models». Moreover, «forced labour is not merely the outcome of (illicit) private activities; States must be viewed as actors who play a casual role in shaping the conditions that give rise to it».

<sup>26</sup> Collective bargaining systems have been deeply affected by the austerity measures imposed during the 2008 financial crisis (Pecinovsky 2022). Not being able to devalue their currency, some member states have been obliged to decentralise their collective bargaining system to lower the cost of services provided and good produced on their territory.

<sup>27</sup> The most worrying case is Romania where workers have to entirely pay their social contributions (<https://www.wtwco.com/en-NZ/Insights/2017/11/romania-social-security-funding-shifts-to-employees>).

<sup>28</sup> See European Parliament, resolution of 25 November 2021 on the introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility (2021/2620(RSP), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021IP0473&from=IT>



# EUROPEAN POLICIES TO CREATE DECENT WORKING CONDITIONS IN SUBCONTRACTING CHAINS

## 1. MEASURES TO FIGHT AGAINST LEGAL FORMS OF WORKERS' EXPLOITATION AND SOCIAL DUMPING.

Measures to ensure decent living and working conditions of workers involved in subcontracting chains shall include: limiting length and level of subcontracting chains; promoting full joint and several liability; strengthening work stability; assuring workers' equal treatment; supporting trade unions and worker representatives along the entire subcontracting chain.

Before starting our analysis, we should point out that currently a dedicated European law on living and working conditions in subcontracting chains is missing. The few rules are spread out across different European directives and have been insufficient in the fight against the widespread legal and illegal forms of workers' exploitation and social dumping in subcontracting chains. Therefore, it is of paramount importance to adopt a **European regulation on decent work in subcontracting chains**. This regulation should be built on solutions implemented at national, European and international level, very often following emergencies and scandals<sup>29</sup>. In no cases should a European regulation affect and decrease these standards.

In the following paragraphs, we will indicate that the five main objectives to create decent living and working conditions for workers involved in subcontracting chains can be partially achieved also by improving the existing European legal framework.

## 2. LIMITING LENGTH AND LEVEL OF SUBCONTRACTING CHAINS

One of the main effects of subcontracting on labour is the lack of responsibility of the companies at the top of the chain. Consequently, measures aimed at **reconstructing the link between power and profits, on one side, and risks and responsibilities, on the other side** are needed. Among these, the most effective are those that limit the possibility to contract out or shorten the length of the subcontracting chain<sup>30</sup>. Shortening supply chains was demanded by the Conference on the Future of Europe, in particular for the agri-food sector<sup>31</sup>. Examples of these measures are present both in European and in national law.

First of all, we should recall Article 5.1 of the Directive 91/383/EEC on the safety and health at work for workers with a fixed-duration employment relationship or a temporary employment relationship. According to this Article, member states can prohibit temporary agency workers "from being used for certain work as defined in national legislation, which would be particularly dangerous to their safety or health, and in particular for certain work which requires special medical surveillance, as defined in national legislation."

<sup>29</sup> As reported by Thomas and Anner (2022), only after the tragedy of Rana Plaza, the International Labour Conference of the International Labour Organisation recognised that ILO «guidance, programmes, measures, initiatives or standards are needed to promote decent work and/or facilitate reducing decent work deficits in global supply chains» (ILO, *Report of the Committee on decent work in global supply chains. Resolution and conclusions submitted for the adoption by the Conference*, 2016).

<sup>30</sup> Council Conclusions on Improving the working and living conditions of seasonal and other mobile workers (9 October 2020) suggest to introduce «limits to subcontracting chains as well as joint and several liabilities».

<sup>31</sup> Conference on the Future of Europe, *REPORT ON THE FINAL OUTCOME*, 2022, pp. 47, 144 and 253.

Taking advantage of this possibility, Spain has forbidden temporary agency work in case of high-risk activities<sup>32</sup>. In the Spanish construction sector, subcontracting is limited to three levels (except in special cases) and is banned for the self-employed or companies which mainly supply workers (i.e. such companies are not entitled to further subcontract work that has been contracted to them)<sup>33</sup>.

In Germany, after severe COVID-19 outbreaks in slaughterhouses, the 2020 Occupational Safety and Health Inspection Act was enacted. According to this legislation, subcontracting, as well as temporary agency work, is forbidden for German companies with more than 50 employees, for slaughtering, cutting and deboning work<sup>34</sup>. It is worth mentioning that both the Spanish and the German law stemmed from trade union<sup>35</sup> and left-wing parties' mobilisation<sup>36</sup> following severe violations of workers' rights, in the construction and meat sectors respectively.

It should also be recalled that public procurement Directives allow other limitations of subcontracting, such as: the prohibition to subcontract the entire public procurement's execution (as in France and in Italy); the obligation for the contract holder to perform certain essential tasks (as in France, Germany and Italy); the possibility to subcontract only the services identified by the contracting authorities (as in Italy); and the prohibition for a subcontractor to further subcontract (as in Italy)<sup>37</sup>.

From the CJEU's case law on public procurement, we can infer that subcontracting can be forbidden or limited as far as the principle of proportionality is respected, meaning that limitation must not go beyond what is necessary to achieve a legitimate interest (European Court of Justice, 30 January 2020, C-395/18, *Tim s.p.a.* § 45). Such legitimate interests include the promotion of lawfulness and transparency, combatting corruption and criminal organisations, the respect of environmental, social and labour law (as required by Article 18 of the Directive 2014/24) and the fulfilment of decent living and working conditions.

As already mentioned (Part I, § 3), the CJEU tends to overestimate the importance of the economic freedoms and to strictly apply the principle of proportionality, without taking into due consideration that, in certain circumstances (as in subcontracting chains), *ex post* controls are very cumbersome and only *ex ante* limits can effectively guarantee the respect of the abovementioned legitimate interests.

In its Guide *Buying Social - a guide to taking account of social considerations in public procurement*, the European Commission provided some indications on the way to apply the principle of proportionality in order to achieve the general principles of procurement enshrined in Article 18 of the Directive 2014/24. However, further explanations that take into consideration the specific context in which the national measures were adopted are needed to leave the final decision on their proportionality to the discretion of national judges.

Other instruments that can help limit subcontracting are **white lists or black lists** of reliable/unreliable business partners. For example, Spanish legislation obliges companies operating as contractors or subcontractors in the construction sector to be inserted in the Register of Accredited Companies. Compulsory requirements for registration are: the fact that the construction company has a genuine productive organisation to perform its economic activity and directly exercises the powers of organisation and direction over the work carried out by its workers; the employment of at least 30% of employees with a permanent contract; and the fulfilment of all health and safety obligations<sup>38</sup>.

Rules on grounds for exclusion are present also in the public procurement Directives (art. 57 of the Directive 2014/24). On this point, French legislation is very interesting because it allows contracting authorities to exclude tenderers who have not respected the obligation to negotiate with trade unions provided for in the Labour Code. Whereas Italian legislation lists among exclusion grounds, the serious infringement to health and safety law and applies these exclusions to subcontractors<sup>39</sup>.

<sup>32</sup> Article 8 of the Law n. 14/1994.

<sup>33</sup> Article 5.2 Law 32/2006.

<sup>34</sup> Erol, Schulten 2021.

<sup>35</sup> For the German case see <https://www.righttofoodandnutrition.org/worker-unions-campaign-leads-passage-law-vs-subcontracting-germanys-pandemic-hit-meat-industry>

<sup>36</sup> In Spain see the Borelli, Dueñas 2022 and Riesco Sanz 2021.

<sup>37</sup> Borelli, Castelli, Gualandi, Recchia, Schulten 2021.

<sup>38</sup> Article 4 Law 32/2006. For additional information, see Romero-Barruso, Villena-Escribano, de las Nieves González-García, Segarra-Cañameres 2019. On the selection criteria in the construction sector see also ILO, *Code of practice on safety and health in construction*, Part I, point 2.5, Geneva 2022.

<sup>39</sup> Borelli, Castelli, Gualandi, Recchia, Schulten 2021.

The main problem of white/black lists is that they require detailed information on companies operating in the EU (e.g. on disciplinary or administrative actions, criminal sanctions, decisions on fraudulent practices, insolvency, bankruptcy) and a well-functioning data exchange system, both requirements that are currently missing and that should be strongly promoted by the European Labour Authority.

In some cases, ex ante certification could hamper labour inspections and can prevent workers' access to justice. For example, Article 4.7 of the proposal for a regulation on prohibiting products made with forced labour on the Union market (COM(2022)453) prevents investigation when due diligence obligations in relation to forced labour are applied. Connections between ex ante certifications and labour inspections or access to justice should be avoided because a company can anyway commit abuse after having been certified.

Other useful rules are those that increase the **transparency** of the subcontracting chain. European legislation has increasingly exploited these measures, as proven by the possibility, for the member states, to impose a preliminary declaration in case of posting (Article 9 of the Directive 2014/67/EU).

The new Article 19a of the Directive 2013/34 amended by the corporate sustainability reporting Directive, obliges companies entering in its scope, to publish a sustainability report that contains "information about the undertaking's own operations, and about its value chain, including products and services, its business relationships and its supply chain" (see also Recital 27 and 29 and Article 29a on the consolidated sustainability report)<sup>40</sup>.

The disclosure of companies belonging to a supply chain is a fundamental requirement of any due diligence process. Therefore, in the European Commission's Corporate Sustainability Due Diligence (CSDD) proposal it should be clarified that, as part of its due diligence obligation the main company has to provide the full list of suppliers and will be sanctioned if it does not respect this duty.

The employer's duties when it comes to cooperating and coordinating the actions of undertakings sharing a work place in matters of the protection and prevention of occupational risks (Article 6.4 Directive 89/391) must be respected, regardless of the employer's awareness of the companies present in the workplace. Consequently, the fact that an employer is not aware of the presence of a certain company in the workplace constitutes, in itself, a violation of the duty to cooperate and coordinate established by Article 6.4. of the Directive 89/391.

For enforcing health and safety regulation, Spanish law obliges contractors and subcontractors in the construction sector to keep a register where all the subcontracting agreements must be recorded<sup>41</sup>.

In public procurement legislation, Article 71.5 of the Directive 2014/24 obliges the contracting authority to "require the main contractor to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors". Moreover, during the course of the contract, the contracting authority shall require the main contractor to notify any changes to this information. When implementing this rule, the French legislator has specified that the contract holder is allowed to subcontract only if it has obtained the contracting authority's acceptance of the list of subcontractors<sup>42</sup>.

As already mentioned, rules on transparency are fundamental to fully understand the structure of a subcontracting chain, condition on which the effectiveness of any workers' right depends. Consequently, the infringement of transparency rules should be severely punished: otherwise, companies can prefer to remain "opaque", hampering the exercise of trade union and workers' rights.

40 A weaker rule was established by Recital 6 of the Directive 2014/95/EU on non-financial reporting; see, analogously, *Commission's Guidelines on non-financial reporting (methodology for reporting non-financial information)* (2017/C 215/01), p. 11 and p. 12).

41 Article 8 Law n. 32/2006.

42 Borelli, Castelli, Gualandi, Recchia, Schulten 2021.

### 3. PROMOTING FULL JOINT AND SEVERAL LIABILITY

In some cases of subcontracting, companies fully exercise the functions of employers without assuming any of the obligations and responsibilities that said statute implies.

#### The Italpizza case

Italpizza is a company based in Emilia Romagna (Italy) that produces frozen pizzas. The company's entire production cycle was outsourced as well as the packaging, the logistics and the cleaning. Nevertheless, the main company exercised considerable power over its subcontractors who were often pushed to infringe labour regulations on working time, occupational health and safety, wages, etc. in order to be able to meet with the conditions imposed by Italpizza.

In July 2019, after several months of protest, trade unions succeeded in signing an agreement obliging the company to internalise the majority of the workers by the 1st of January 2022. While this internalisation process was ongoing, several trade unionists were accused in a criminal trial for pickets organised during the strikes and could be forced to compensate damages suffered by Italpizza during the protests<sup>43</sup>.

Labour supply is forbidden by many states, as well as by some European regulations that provide a **substantial definition of employer**<sup>44</sup>, defining it as the person that exerts the power to direct and control the workers and to organise the production process; consequently, whoever exploits workers' activities must be responsible for duties linked to the contract of employment.

The prohibition of labour supply does not prevent the creation of **letterbox companies** (i.e. companies that do not perform any economic activity, but are created in order to set up cost-saving strategies) that often are present in subcontracting chains<sup>45</sup>. However, it stops these bogus companies being qualified as employers.

The substantial definition of employer helps reconstruct the link between power and profit, on one side, and risks and responsibilities, on the other side, since it charges the person exercising the power to direct and control workers and to organise the production process with the employer's duties. A very similar result is reached through rules on **joint and several liability**<sup>46</sup>.

These rules have been recently introduced at national and European level, to address some of the most negative effects of the fragmentation of the production cycle. Each rule can guarantee different rights, have a different scope, invoke chain liability or limit liability to the main company, and may require the proof of the company's negligence.

Rules on joint and several liability fulfil three important objectives:

- Firstly, they prevent companies from outsourcing to unreliable business partners and incentivise them to constantly monitor the subcontracting chain (*preventive function*). When joint liability applies to all the companies involved in the subcontracting chain i.e. full chain liability, the effect is magnified, as all companies have an incentive to monitor the respect of workers' rights by all service providers.
- Secondly, these rules make the person(s) that profits from activities performed by workers involved in the subcontracting chain liable for any violations occurred (*deterrent function*)<sup>47</sup>;
- Thirdly, they enable workers to address lead company and the contractor(s), in case their employer does not fulfil its obligation (*guaranteeing function*). The objective is particularly important in cases of bankruptcy or company closure that happen very often in subcontracting chains.

<sup>43</sup> <https://www.modenatoday.it/cronaca/rinvio-giudizio-processo-sciopero-italpizza-3-ottobre-2022.html>

<sup>44</sup> The substantial definition of employer is also linked to the principle of primacy of fact according to which «the determination of the existence of an employment relationship should be guided by the fact relating to the actual performance of the work and not by the parties' description of the relationship» (recital n. 21 Directive on adequate minimum wage in the EU).

<sup>45</sup> See Birkmose, Neville, Engsig Sørensen 2019.

<sup>46</sup> See European Parliament, *Report on a strong social Europe for Just Transitions* (2020/2084(INI)), 24 November 2020, § 56. See also Howerzijl, van Hoek, 2011.

<sup>47</sup> On the responsibility of the company profiting from the activities of another company see the Catala project elaborated in France in 2005: [http://www.justice.gouv.fr/art\\_pix/RAPPORTCATALASEPTEMBRE2005.pdf](http://www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf)

### The AFMB case

AFMB is a Cypriot company that signed several agreements with transport undertakings established in the Netherlands whereby AFMB took charge of the management of the heavy goods vehicles operated by those undertakings as part of their businesses, on behalf of and at the risk of those undertakings. AFMB also entered into employment contracts with international long-distance lorry drivers residing in the Netherlands. According to the terms of those contracts, AFMB was named as the employer of those workers and Cypriot employment law was declared as applicable. Before the conclusion of those employment contracts, the international long-distance lorry drivers concerned had never lived nor worked in Cyprus. When those contracts were performed, they continued to live in the Netherlands and worked, on behalf of the Dutch transport undertakings. Further, some of those drivers had previously been employees of those undertakings.

Due to the disagreement between the Cypriot and Dutch social security institutions on the applicable law, the case was addressed to the European Court

of Justice. The Court found that in order to identify the employer, social security institutions must have regard “not only to the information formally contained in the employment contract but also to how the obligations under the contract incumbent on both the worker and the undertaking in question are performed in practice. Accordingly, whatever the wording of the contractual documents, it is necessary to identify the entity which actually exercises authority over the worker, which bears, in reality, the relevant wage costs, and which has the actual power to dismiss that worker” (§ 61). If an interpretation of the concepts employed “were not to take into account the objective situation of the employed person but were to be based solely on formal considerations, such as the conclusion of an employment contract”, employers would “be able to resort to purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules. In particular, such exploitation of that legislation would be likely to have a ‘race to the bottom’ effect on the social security systems of the member states and perhaps, ultimately, reduce the level of protection offered by those systems” (§ 66 and 69).

In order to be effective, joint and several liability should concern the full subcontracting chain. A recent study for the European Parliament has, for example, proven that where the direct joint and several liability established by Article 12 of the Directive 2014/67, is limited liability to one link in the chain only, it is relatively easy to circumvent this liability by inserting a letter box company<sup>48</sup>.

Rules on joint and several liability are often watered-down by escape clauses<sup>49</sup>. In several cases, the fulfilment of due diligence obligations exonerates the client and the contractor(s) from the liability for the risks generated by their economic activities<sup>50</sup>. This link between due diligence obligations and joint liability should be avoided; joint liability should not be linked to the company’s negligence. In fact, rules on joint and several liability aim at making the company that profits from the services provided by contractors and subcontractors accountable and at better guaranteeing workers’ rights and social security obligations. Both these functions are completely

independent from whether the company has fulfilled its due diligence obligations on the subcontracting chain or not.

In Germany, for example, the contractor is liable for any failure to pay wages and social funds, irrespective of any fault or responsibility (Art. 8 of the *Arbeitnehmerentendegesetz*). No escape clauses are accepted; consequently, liability applies irrespective of any preventive measures and even the most thorough due diligence will not prevent liability<sup>51</sup>.

Strict joint liability was applied as well by the CJEU when interpreting EU competition law. According to EU competition law, when the parent company and its subsidiary form a single economic unit, i.e. when the latter “does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company”, the conduct of a subsidiary may be imputed to the parent company. Consequently,

48 Heinen, Müller, Kessler 2017.

49 Cremers, Houwerzijl 2019, p. 5.

50 On the use of due diligence obligation to rule out joint liability see Article 12 of the Directive 2014/67, Article 17 of the Directive 2014/36 and Article 8 of the Directive 2009/52.

51 Cremers, Houwerzijl 2019, p. 21.

“the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringement of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it” (10 September 2009, C-97/08, *Akzo Nobel and others v. Commission*, § 58 and 77).

Contract termination and contractual arrangements can also provide a way to escape joint and several liability, as is the case in Belgium and France<sup>52</sup>. These clauses strengthen the position of the main companies since they shift the burden of risks down in the subcontracting chain. Moreover, considering how easy it is to create a company (see Part I, § 3), in the event of contract termination a subcontractor can be easily replaced, making subcontracting practices a never-ending story. For these reasons, both termination clauses and contractual assurances currently present in the CSDD proposal to dismiss liability (Article 22) should be eliminated or strictly limited.

In public procurement legislation, joint liability between subcontractors and the main contractor functions to guarantee compliance with applicable obligations in the fields of environmental, social and labour law established by international, EU and national law or collective agreements (art. 71.6 of the Directive 2014/24). The EU Directives also allow member states to provide for more stringent liability rules (Article 71.7 of the Directive 2014/24).

As we have seen in the case of group of undertakings, joint liability can also stem from the remedial theory on co-employer, i.e. the theory that imputes the unlawful conduct of the employer to another subject who controls or directs the former<sup>53</sup>. This theory can also be exploited “to embrace the complexity of multinationals’ decision-making models”, so as to ascribe the duty of information and consultation to the decision-making body at the multinational level that takes the economic and financial decision (Schömann 2012, p. IV-21).

## 4. STRENGTHENING WORK STABILITY

As outlined above, subcontracting can lead to employers taking an *à la carte* approach to their responsibilities for workers. Labour instability is exacerbated by clauses such as termination of contract and contractual assurances that allow the lead company and the contractor(s) to escape any liability by substituting their subcontractors.

To avoid this consequence, **measures to guarantee the continuity of the work contract**, such as social clauses in public procurement and workers’ protection in the case of transfer of undertaking, should be applied.

Social clauses aimed at promoting job stability have been widely debated in Italian and Spanish legislation on public procurement<sup>54</sup>. In Italy, the bidders are obliged to attach a “re-employment plan” to their offer (Article 50 of the Legislative Decree n. 50/2016). In Spain, an obligation to re-employ workers in case a new contractor takes over the public work or service exists only if expressly established by law or by a mandatory collective agreement. In these cases, the new contractor is liable for unpaid salaries and social security contributions owed to affected workers.

In global supply chains, to mitigate poor behaviour by retailers, the Clean Clothes Campaign called on brands to sign up to a wage guarantee. This is a public commitment to ensure that the workers in their supply chains are paid what they are owed and able to enter into negotiations to establish a fund so that, in the case of cut-backs, workers will receive the severance pay that they are legally entitled to. Another work stability measure worth highlighting is the joint statement adopted on the 15 March 2021 by H&M and Industrial Global Union. This statement supports the recovery of the global garment industry through the Covid-19 crisis, whereby H&M commits to fulfil all its payment terms and to strengthen the predictability of orders by reducing monthly fluctuations in order placement.

<sup>52</sup> In Belgium, once informed of the worker rights’ violations, the client and the contractor(s) have 14 days to end the contract and avoid any joint liability. Similarly, the French legislation allows the client and the contractor(s) to terminate the subcontract(s), avoiding any joint liability, in case the subcontractor refuses to stop an infringement.

<sup>53</sup> On the contrary, the *ex-ante* theory on co-employer can boost the indiscriminate use of the workforce without ascribing the employer’s obligations to all of the companies involved.

<sup>54</sup> Borelli, Castelli, Gualandi, Recchia, Schulten 2021.

## 5. GUARANTEEING WORKERS' EQUAL TREATMENT

As mentioned in Part I, workers involved in subcontracting chain risk being treated differently<sup>55</sup>. All equal treatment clauses set a common minimum standard for workers having different employers. We can categorise equal treatment clauses into four groups:

- *Strict equal treatment clauses* aimed at guaranteeing worker A (at least) the same conditions as worker B. The strict equal treatment clauses prescribe to not discriminate against worker A (employed by ALFA) in relation to worker B (employed by BETA); in other terms, the fact of having a different employer should not be a ground to discriminate. The scope of the strict equal treatment clauses varies since it can concern wages, working conditions, social protections, etc. Article 5.1 of the Directive 2008/104, for examples, obliges to guarantee to temporary agency workers, for the duration of their assignment, at least basic working and employment conditions that would apply if they had been recruited directly by that undertaking to occupy the same job. In Italy, lawmakers recently amended public procurement law to oblige subcontractors to grant their workers the wages and treatment equal to that which would have been guaranteed by the main contractor (Article 105.14 of the Legislative Decree n. 50/2016);
- *Equal treatment clauses linked to collective agreement*. These clauses require subcontractors to respect the collective agreement applied by the client or the contractor. Also in this case, the scope of the clauses can differ since it can concern national collective agreement, company collective agreement, the entire agreement or part of it, etc. Recently, Spanish lawmakers imposed the respect of the national collective agreement applied by the lead company to contractors and subcontractors<sup>56</sup>;

### The case of the Spanish Meat Industry

Spain is the EU's largest pig producer, a sector that has been constantly on rise in the last decade. Subcontracting practices are widespread in the sector. The companies that act as subcontractors in the meat industry are characterised by having different forms and legal status, many of which are bogus worker cooperatives where workers are considered to be self-employed. Consequently, collective agreements, as well as labour law, usually do not apply to them. Furthermore, workers in these cooperatives have a lower level of social protection, since they are included in a cheaper social security regime in which the cooperatives do not have to pay the employer's contribution.

Between 2018 and 2020, the Inspectorate identified almost 50,000 bogus self-employed people, representing nearly 300 million euros of national revenue, as a consequence of illegal fraud committed by bogus cooperatives in different sectors of the Spanish economy. Thanks to union action, in the same period more than 23,000 bogus self-employed workers were regularised and companies were fined more than €200 million.

As the crackdown on bogus self-employed status has grown, meat producers increasingly contract out to multiservice companies, which are often created ad hoc to avoid applying the national collective agreement compulsory for the client and the main contractor. To fight against unfair competition generated by multiservice companies, the labour reform approved by Royal Decree-Law 32/2021 establishes that contractors and subcontractors shall apply the national sectoral collective agreement to their workers for the activity they carry out. Consequently, if a company contracts out all or part of its main activity, the working conditions of people employed by contractors and subcontractors are regulated by the same sectoral collective agreement

<sup>55</sup> Equal treatment in subcontracting is widely supported by European Trade Unions (see EFFAT (2020). Hungry for fairness: raising standards in the meat sector. EFFAT's 10 demands for action at EU level, <https://effat.org/wp-content/uploads/2020/09/Hungry-for-fairness-raising-standards-in-the-meat-sector-10-demands-EN.pdf> EFBWW (2021). Emergency motion. Enough is enough – Safe and healthy workplaces for all workers! <https://www.efbww.eu/news/efbww-emergency-motion-enough-is-enough-safe-and-healthy-workpla/2529-a>

<sup>56</sup> Baylos Grau A. (2021). La reforma laboral del año 2021, <https://www.net21.org/la-reforma-laboral-del-ano-2021/>

- *Equal treatment clauses linked to national and European regulation.* These clauses oblige subcontractors to respect certain regulations applied to the client or the contractor. The scope of the clauses may concern one or more regulations. The Posting of Workers Directive, for example, obliges member states to ensure that the posting undertaking guarantees, “on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment” covering certain matters regulated by law, regulation, administrative provision, or by universally applicable collective agreements or collective agreements which apply in accordance with Article 3.8 of the Directive (Article 3.1 of the Directive 96/71 as amended by the Directive 2018/957)<sup>57</sup>. As far as it concerns public procurement or concession contracts, Article 9 of the Directive on adequate minimum wages requires economic operators and their subcontractors to “comply with the applicable obligations regarding wages, the right to organise and collective bargaining on wage-setting, in the field of social and labour law established by Union law, national law, collective agreements or international social and labour law provisions”<sup>58</sup>; and
- *Equal treatment clauses that require subcontractors to respect certain standards.* These clauses require subcontractors to respect certain European and/or international labour standards. These standards can be binding or non-binding, and are usually formulated in general terms. The degree of equality among workers depends on which standards shall be respected. This explains why it is of paramount importance to widen the list of Treaties listed in Annex I of the CSDD Proposal, making this list illustrative and non-exhaustive. In order to strengthen equal treatment, it would be also important to impose the respect of the national law that implement the Treaties listed in the Annex of the CSDD proposal (where they exist), as well as the obligations established in the

collective agreements signed by the company or by its employers’ association.

The degree of equality among workers depends on the type of equality clause enforced. Obviously, it is a matter of political will to decide which degree of equality to promote (if any)<sup>59</sup>. Rationale behind the equality clause enforced varies: the European Parliament recently called for “equal conditions for work of equal value done in the same place”<sup>60</sup>. The temporary agency work Directive requires equal treatment between people that directly or indirectly work for the same company. In public procurement directives, equality clauses derive from the fact that these directives shall support “social policies and accelerates the transition to more sustainable supply-chains and business models”<sup>61</sup>.

## 6. SUPPORTING TRADE UNIONS AND WORKER REPRESENTATIVES ALONG THE ENTIRE SUBCONTRACTING CHAIN

Workers’ organisation is severely affected by subcontracting. Both different working conditions and work instability make it difficult to set up worker representatives in subcontracting chains. Moreover, trade unionism develops usually in a sector or at company level; subcontracting goes beyond both of them since it concerns several companies and often several sectors.

Workers’ organisation is also prevented by the temporary duration of some subcontracting chains and the high turnover of workers generated not only by the wide use of precarious contracts, but also by the poor working conditions. Moreover, in many subcontracting chains, the trade unionisation of the workforce is hindered by the difficulties in detecting and organising workers that are extremely mobile (as in the transport sector), have different working arrangements and residence status or scattered around several workplaces, sometimes in several countries.

<sup>57</sup> On equal treatment in case of posting, see Rocca 2020.

<sup>58</sup> Recital 31 specifies that collective agreements should be the ones «for the relevant sector and geographical area». Moreover, Recital 32 requires compliance with collective agreements provisions for obtaining financial support from Union funds and programmes.

<sup>59</sup> In 2016, for example, the Commission rejected «the introduction of the principle of equal pay for equal work at company level by requiring that posted workers are guaranteed the terms and conditions of employment covering remuneration that would be applicable if the posted workers were employed by a reference undertaking or, in its absence, a similar undertaking established in the host member state». In the case of a subcontracting chain, this proposal would have implied that the posted workers should have received «the same remuneration treatment as the employees of the contractor established in the host member state of which the service provider is a direct or an indirect subcontractor» (the “reference undertaking”). Despite of recognising that this option was the «most effective to attain the objective of providing equal treatment to posted workers since it would ensure full equal treatment for posted workers compared with workers of the undertaking of reference», the Commission discarded it because «it risks failing the test of proportionality and compatibility with the Internal Market, as it would create more obligation on companies posting workers from other member states than on local companies in the host member state» (COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT, Accompanying the document. Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016)52, point 4.5.2).

<sup>60</sup> European Parliament, resolution of 25 November 2021 on the introduction of a European social security pass for improving the digital enforcement of social security rights and fair mobility (2021/2620(RSP)), § 5 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021IP0473&from=IT>

<sup>61</sup> European Commission, *Commission’s Communication: Making Public Procurement work in and for Europe*, COM(2017)732, p. 13.

In global supply chains, worker representatives are often absent at company level and intervention of national trade unions and worker representatives at the lead company or contractor level does not make up for this shortcoming. Many trade unions in foreign countries are very weak or controlled by the company management, while the worker representatives at the lead company or contractor level are too distant from the country where the supplier is based and do not have the means to perform trade union activities along the entire supply chain.

The lack of worker representatives and trade union intervention in the subcontracting chain not only weakens workers' rights, it threatens the **effectiveness of any due diligence obligations**. Absence of workers' participation throughout the entire due diligence process, means that the lead company and the contractor can water down their obligations, transforming them into mere box-ticking exercise. Subcontractors can easily fulfil their monitoring and compliance obligations through formal declarations and assessments done mainly (or only) by the leading company. This is particularly the case in countries where labour inspections are lacking.

For these reasons, "the workers' voices must be a key component of EU initiatives to ensure sustainable and democratic corporate governance and due diligence on human rights"<sup>62</sup>. Consequently, the CSDD proposal "should establish mandatory due diligence requirements covering companies' operations, activities and their business relationships, including supply and subcontracting chains, and should ensure the full involvement of trade unions and workers' representatives throughout the whole due diligence process, including the development and implementation process"<sup>63</sup>.

To address workplace fragmentation caused by subcontracting, some national legislation and collective agreements have strengthened the position of worker representatives in the lead company or the contractor(s)' organisations. In Belgium, for example, the national collective agreement for the construction sector guarantees to these worker representatives the right to be informed on the subcontractors and on the conditions applied to their workers. Similarly, Article 8 of the Temporary Agency Work Directive

obliges the user undertaking to provide information on the use of temporary agency workers to bodies representing workers. The European Parliament has also called for a right of workers' representatives to be informed about the use of posted workers in subcontracting chains<sup>64</sup>.

It should also be noted that the law already regulates some forms of coordination of trade union teams of the lead company, contractor(s) and subcontractors, as well as some forms of joint staff representation. In France, for example, trade unions can decide to elect a worker representative on behalf of all workers present in the site. The law requires the lead company to set up an inter-company health, safety and working conditions committee when more than 10,000 people per day are expected to be present on the site and the number of companies, including self-employed workers and subcontractors, exceeds 10 (Article R238-46 of the Labour Code)<sup>65</sup>.

In order to make information and consultation an integral part of company decision-making at all levels, the creation of worker representatives along the entire subcontracting chain, as well as in sites and groups should be supported. The European Parliament has called on the Commission to "strengthen and consolidate all the relevant EU laws to ensure that informing and consulting employees is an integral part of company decision-making and that it takes place at the relevant level within companies"<sup>66</sup>. It also suggests introducing "a new framework directive on workers' information, consultation and participation for the various kinds of European companies, and for companies that use EU company mobility instruments, in order to establish minimum standards on issues such as anticipating change, including with regard to measures concerning climate change, digital transformation and restructuring"<sup>67</sup>.

62 European Parliament, Report on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005(INI)), § 3.

63 European Parliament, Report on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005(INI)), § 13.

64 Report on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005(INI)), § 8.

65 The Combrexelle report of 2015 has also called for inter-branch collective agreements covering all employees involved in a subcontracting chain (proposal 40).

66 European Parliament, Report on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005(INI)), § 17.

67 Report on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005(INI)), § 27.

The EU should also promote the role of the European Work Council (EWC), as well as the European and international trade unions in monitoring and enforcing the respect of labour rights in transnational and global supply chains<sup>68</sup>. Firstly, these bodies should be informed of the company's business partners and of its supply chain policy. The European Parliament has also demanded the Commission and EU member states strengthen "information and consultation rights to ensure that the EWC's opinion is taken into account in company decisions and is delivered before consultation is completed at the respective level and before the governing bodies come to a decision", and "to ensure the efficient coordination of information, consultation and participation at local, national and EU levels"<sup>69</sup>.

Another problem in subcontracting chains is the **lack of collective actions**. As already mentioned, many workers prefer not to protest in order not to lose their job; this is particularly true in the case of third-country nationals whose presence in the European Union depends often on a work permit linked to their

contract of employment. The lack of strike action is also due to the instability of work contracts, as well as difficulties in organising workers in the subcontracting chain.

We should also mention that in several countries strike action is not duly protected (e.g. strikes in support of workers employed in the subcontracting chain is considered illegal in some states) and workers that participate in protests can lose their jobs or be exposed to other forms of retaliation. Due to the heavily exploitative working conditions, some protests end up in spectacular demonstrations (such as roadblocks) that risk criminal prosecution<sup>70</sup>. Moreover, there is no international treaty or European legislation that recognises the right to strike for all workers against a transnational enterprise, including workers in subcontracting chains<sup>71</sup>. Therefore, the asymmetry of power and means of actions between transnational management and trade unions and workers' representatives remains (Schömann 2012, p. IV-15).

68 REPORT on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive, [https://www.europarl.europa.eu/doceo/document/A-9-2021-0331\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2021-0331_EN.html)

69 Report on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive (2021/2005(INI)), § 30. In case of infringements of the information and consultation requirements, the Parliament has claimed for effective and dissuasive sanctions, including the temporary suspension of company decisions and the exclusion from procurement and entitlement to public benefits, aids or subsidies (DRAFT REPORT with recommendations to the Commission on Revision of European Works Councils Directive (2019/2183(INL)).

70 See the Itaipizza case.

71 See Ewing, Countouris, 2019, 450.

# POLICY RECOMMENDATIONS

A **European regulation on decent work in subcontracting chains** based on the following elements:

- It shall **limit the possibility to contract out and shorten the length of the subcontracting chain**. Subcontracting shall be forbidden for services which would be particularly dangerous to workers' health or safety. Moreover, levels of subcontracting shall be limited when such a limitation is necessary, adequate and proportionate to protect the environment and fundamental rights. Member states shall also be allowed to require the contract holder to perform certain essential tasks. In order to develop white/black lists of reliable/unreliable business partners, national databases shall be interconnected and exchange of information among national authorities shall be promoted. A general duty of transparency on the entire subcontracting chain shall be introduced for all companies operating in the European Union.
- It shall **promote joint and several liability**. First, the EU legislation shall clarify that whoever exploits workers' activities must bear the duties linked to the contract of employment. Moreover, full joint and several liability for all companies involved in the subcontracting chain shall be introduced. Escape clauses shall be avoided and liability shall be unconditional.
- It shall **strengthen work stability**. Social clauses currently present in public procurement legislation shall be exploited, as far as possible, in cases of subcontracting when a new contractor takes over the work or service.
- It shall **guarantee workers' equal treatment**. Workers in subcontracting chains shall be guaranteed, as far as possible, the terms and conditions of employment that would be applicable if they were employed by the lead company or the main contractor. In global supply chains,

international and European labour standards, as well as national legislation implementing these standards and collective agreements shall be respected.

- It shall **support trade unions and worker representatives along the entire subcontracting chain**. First, the role of worker representatives, including the European Work Council shall be strengthened, including rights to monitor on the subcontracting chain and to participate in the entire due diligence processes. Second, the creation of worker representatives along the entire subcontracting chains, as well as in sites and groups shall be supported. Worker representatives shall also be informed of all business partners involved in the subcontracting chain, the working conditions of their workers and the services and work contracted out. Moreover, the right to strike shall be always guaranteed, also including for workers employed in the subcontracting chain.

The objectives we intend to pursue, i.e. limiting length and level of subcontracting chains; promoting full joint and several liability; strengthening work stability; assuring workers' equal treatment; supporting trade unions and worker representatives along the entire subcontracting chain, can be also achieved by improving some already existing proposals and directives:

1. The **Corporate Sustainability Due Diligence proposal** should be amended in order to:
  - Assure the transparency of the entire supply chain, obliging companies to disclose information on all suppliers involved with severe sanctions for infringement of transparency duties;

- Introduce a rule on joint and several liability of the company, at a minimum when human right violations have been committed by subsidiaries;
  - Limit the use of contract termination clauses and contractual assurances so as to avoid any risk of burden-shifting by the lead company onto its suppliers and of affecting work stability in the supply chain;
  - Strengthen the equality clause by: enlarging and making illustrative and non-exhaustive the lists of human rights and Treaties in the Annex of the CSDD proposal; obliging companies to monitor the respect of legislation that implement these Treaties (where it exists); inserting collective agreements (including transnational collective agreements) to the human rights framework that the companies have to respect; and
  - Ensure the full involvement of trade unions and workers' representatives throughout the whole due diligence process, including the development and implementation process, as requested by the European Parliament.
2. The **legislation on public procurement** should be amended so as to support "social policies and accelerate the transition to more sustainable supply-chains and business models" (Commission's Communication: Making Public Procurement work in and for Europe, COM (2017)732, p. 13). In particular:
- It should introduce the possibility, for the contracting authority, to limit the length and level of subcontracting chains and the share of the subcontracted contract, when needed to pursue legitimate interests;
  - The rule on joint and several liability should be strengthened, introducing full liability throughout the entire subcontracting chain;
  - It should clearly state that social clauses aimed at strengthening work stability are consistent with EU law;
  - It should increase workers' equal treatment by obliging subcontractors to guarantee their workers at least the same treatment as the main contractor's workers; and
- It should reward companies that respect and promote trade unions rights along their entire subcontracting chain.
3. The creation of worker representatives along the entire subcontracting chains, as well as in sites and groups should be supported by:
- Amending **Directive 2002/14** establishing a general framework for informing and consulting employees, so as to strengthen right of information and consultation as an integral part of company decision-making at all levels and throughout the entire subcontracting chain;
  - Introducing a **new framework directive on workers' information, consultation and participation** for the various kinds of European companies and for companies that use EU company mobility instruments, "in order to establish minimum standards on issues such as anticipating change, including with regard to measures concerning climate change, digital transformation and restructuring", as requested by the European Parliament; and
  - Amending the **EWC Directive** so as "to ensure that the EWC's opinion is taken into account in company decisions and is delivered before consultation is completed at the respective level and before the governing bodies come to a decision" and "to ensure the efficient coordination of information, consultation and participation at local, national and EU levels", and to strengthen the effectiveness of sanctions when information and consultation rights are violated, as already highlighted by the European Parliament.

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**The Left in the European Parliament**  
Rue Wiertz 43 B-1047 Brussels  
[www.left.eu](http://www.left.eu)



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# SUBCONTRACTING: EXPLOITATION BY DESIGN

TACKLING THE BUSINESS MODEL FOR SOCIAL DUMPING